JUDGE BRETT M. KAVANAUGH

SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

APPENDIX 12(c)

TESTIMONY & OFFICIAL STATEMENTS

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Thursday, July 9, 2009

The public hearing convened in the United States Court of International Trade, One Federal Plaza, New York, New York, at 8:40 a.m., Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

RICARDO H. HINOJOSA, Acting Chair
WILLIAM B. CARR, JR., Vice Chair
RUBEN CASTILLO, Vice Chair
WILLIAM K. SESSIONS, III, Vice Chair
DABNEY L. FRIEDRICH, Commissioner
BERYL A. HOWELL, Commissioner
JONATHAN WROBLEWSKI, Commissioner

STAFF PRESENT:

JUDITH W. SHEON, Staff Director
BRENT NEWTON, Deputy Staff Director

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ACTING CHAIR HINOJOSA: Good morning. It is a special honor for me on behalf of the United States Sentencing Commission to welcome you to the third in a series of regional public hearings that we are having across the country with regards to the 25th anniversary of the passage of the Sentencing Reform Act of 1984.

We are extremely happy to be here at the Court of International Trade in New York City. We want to especially thank the chief judge of the court, Jane Restani, and all of the judges of the court as well as Tina Kimble, the Clerk of the Court, and Gail Jeby, who works with the court's office for providing this space, and all the work they have done to make this possible.

Also, a very special thank you to Chief Judge Dennis Jacobs of the Second Circuit and Circuit Executive Karen Milton for the work they have done with regard to our participation here in New York City, and certainly the chief judge of the Southern District of New York, Loretta Preska; former Chief Judge Kimba Wood; and also Elly Harold from the District Court

Clerk's Office for the great help they have given helping us organize this hearing here in New York City.

As we all know, this is the 25th anniversary of the Sentencing Reform Act of 1984. Some of us have been on the bench even before the passage of the Sentencing Reform Act, and I think it is clear to many of us that there were many who felt that the sentencing process that existed pre-passage of the Sentencing Reform Act needed some changes in a way to make it a more fair system.

As a result, we did have the passage of the Sentencing Reform Act of 1984, a bipartisan act, and you have Senators Thurmond and Senator Kennedy sponsor the same piece of legislation. I think it is fair to call that a bipartisan piece of legislation.

It took a while. It wasn't something that was passed in the first year it was introduced.

The purposes of the Sentencing Reform Act was to make the sentencing process in the federal system a more fair and transparent system.

The Commission felt that it would be appropriate to go ahead and on the 25th anniversary of the passage of the Act, to have regional public hearings, much the same way as the original Commission did when they started working on the initial set of guidelines that went into effect on November 1st of 1987, and to hear from judges, both at the appellate and district court level, and to hear from Commissioners, to hear it from practitioners and hear it from the general public with regard to their thoughts about the federal sentencing process 25 years after the passage of the Act.

As we all know, the Commission itself was created by the Sentencing Reform Act of 1984, and it is a bipartisan, seven-member commission with two ex officio members.

The statute itself indicates there have to be at least three federal judges on the Commission, three judges, and the ex officio members, of course, are composed of the representative of the Attorney General and the chair of the Parole Commission.

The initial Commission obviously had a time deadline with which they passed the

first set of guidelines that went into effect on November 1st, 1987. The guidelines have basically been in effect for about over 20 years.

There has been a constant revision as the Act itself [inaudible] would be of the guidelines themselves, and new guidelines are promulgated on a regular basis with regard to the passage of new legislation.

The Commission works under the statutory system, within the ambit of the statute that created the Commission, which is part of the Sentencing Reform Act, and the Commission is given the directive by statute to make sure that its work is in compliance with the purposes of the Sentencing Reform Act, which the commissioners through the years do and have worked hard to make sure all the guidelines have been satisfied in the Sentencing Reform Act and certainly in accordance with Section 3553(a).

There have been a lot of changes. Some of us have been on the bench since November 1st, 1987. Certainly the size of the docket has changed. The number of individuals being sentenced under the federal system that

would come under the sentencing guidelines has doubled since 1987.

The makeup of the federal docket continues to be about 80 percent of drug, firearms, fraud and immigration cases.

However, there have been some things that have changed in this period of time.

As of the statistics that we have received for 2009, fiscal year 2009, this is the first time the immigration cases have overtaken the drug cases as a high percentage of the cases.

There has been a change in the makeup of the defendants with regards to race and citizenship.

For fiscal year 2008, about 40.5 percent of the defendants sentenced were not citizens of the United States. 42 percent have become Hispanic, largely as a result of the increase in the immigration caseload.

Those numbers have even risen when you start looking at the 2009 figures.

Some things, as I said, have changed, others have not. Drug trafficking does continue to be a substantial portion of the

docket and continues to represent the highest percentage of the offenders.

Men continue to represent the majority of the defendants. The age makeup has not changed. It continues to be more than half of the federal defendants are between the ages of 21 and 35, those that are sentenced within the guidelines.

As I indicated, the Commission does its work under the directives and under the statutory responsibilities, and has striven to continue to do this for the many years during its operation.

Of course, there is no doubt that although there have been changes, both from the Supreme Court as well as by statute, the Commission has operated within those changes and has proceeded to continue its work during this period of time, and, of course the sentencing courts, the district courts, the judges.

It is also true that sentencing courts continue to use the guidelines as the starting and initial benchmark with regards to every single federal sentencing; that occurs at the rate of about 83 percent, and as far as

within the guidelines, the government-sponsored departures and variances continue to be an important part of every federal sentencing that occurs in the country.

On behalf of the Commission, I do want to indicate that we are very grateful for every single person who has agreed to come and give us your thoughts during this two-day period.

The judges certainly are very busy, and we certainly appreciate everyone's time with regards to being here and sharing your thoughts with us.

I do want to introduce the members of the Commission.

To my right is Chief Judge William Sessions, who has served as vice chair of the Commission since 1999 and has served as United States District Judge for the District of Vermont since 1995, and he is presently the chief judge of that district.

From 1978 to 1995 he was a partner with a Middlebury firm, and he has previously served in the Office of Public Defender for Addison County. He has served as a professor at

Vermont Law School, and my condolences to him, because he has been nominated as chair of the Commission and is awaiting confirmation.

My condolences I guess once you receive the confirmation.

To my left is Judge Ruben Castillo, who has also served as vice chair of the Commission since 1999. He has served as a U.S. District Judge for the Northern District of Illinois since 1994.

From 1991 to '94 he was a partner in the Chicago office of Kirkland & Ellis, and he has been a regional counsel for the Mexican American Legal Defense and Educational Fund from 1988 to 1991, and he did serve as an assistant U.S. attorney for the Northern District of Illinois before he became a judge.

Also to my right, the newest member of the Commission, Vice Chair William Carr, who has been a member of the Commission since the latter part of the year 2008. He previously served as an assistant U.S. attorney in the Eastern District of Pennsylvania from 1981 until his retirement in the year 2004, and in 1987 was actually designated as the Justice

Department contact person for the U.S. Attorney's Office.

To my left is Commissioner Howell, who has been a member of the Commission since 2004. She was the executive managing director and general counsel to the Washington D.C. office of Stroz Friedberg.

Prior to joining the firm she was the general counsel for the Senate Committee on Judiciary, and she did work for Senator Patrick Leahy when he was chairman and when he was the ranking member of the full committee.

She also has assistant United States attorney experience and was the deputy chief of the Narcotics Section of the U.S. Attorney's Office in the Eastern District of New York.

Also to my left is Commissioner Dabney Friedrich, who has been a member of the Commission since 2006. She previously served as associate counsel at the White House, counsel to Chairman Orrin Hatch of the Senate Judiciary, and she also was an assistant U.S. attorney having worked in the Southern District of California and the Eastern District of Virginia.

To my extreme right is Commissioner Jon Wroblewski, who is the designated ex officio member of the United States Sentencing Commission for the Attorney General, and representing that particular office and the Department of Justice, and he serves as the director of the Office of Policy and Legislation in the Criminal Division of the department.

I do want to thank everybody on behalf of the Commission for being present, and if there is any member of the Commission who would like to say something, it would be appropriate to do so, and I hope you will not fade out like I do.

COMMISSIONER WROBLEWSKI: Mr. Chairman, thank you very much, and I am very, very pleased to be here. This is a homecoming for me. I was born and raised in this city, and at the island just off the shore of this island, about 100 years ago, my grandparents arrived after a month's long journey from eastern Europe so it is a great pleasure to be here.

When I was growing up in this city in the 1960s and 70s, this city was a very, very

different place. Like most families who lived here for any length of time, my family was touched by crime and the criminal justice system.

I remember very vividly when my brother came home after being the victim of an armed robbery. I remember very vividly Times Square being a place infested with drug dealing, prostitution, three-card monte games, and all sorts of organized crime.

This was a very dangerous city at that time, and as late as 1992 there were 2,300 murders in this city.

Today as we meet here, this city is a very, very different place. Crime has come way down. Last year homicides in this city numbered between five and six hundred. That is five or six hundred far too many, but it represents a stunning achievement in government to go from 2,300 to 500.

The reasons for the reduction in crime are many: more police, better policing, economic development, drug treatment, drug courts and sentencing policy, including federal sentencing policy.

In the last ten years, crime has continued to come down in this city, although around the country it has not been so consistently, and imprisonment rates in this city have gone down, and in this state have gone [down].

I think that is something we ought to keep in mind and think of as a model or as a goal, to continue to bring down crime rates and do it at a lower cost and less reliance on imprisonment.

The Attorney General is in this city today. He is going to be giving a speech uptown. He will be talking about this in greater depth, but I think it is something we ought to keep in mind.

I join with Judge Hinojosa in thanking all of you for being here, and I am very much looking forward to hearing all the witnesses and questioning them.

Thank you, Judge Hinojosa.

VICE CHAIR SESSIONS: I just want to express my appreciation for whoever will come to testify, particularly Judge Newman, for all of us in the Second Circuit. We all consider

him to be -- I should not say our father, but our guiding light in many ways.

This is a very exciting proposition for all of us, especially those of us who have been on the Commission for a number of years. Twenty-five years the guidelines have been in effect, and it is at this point that it is wise for us to sit back and think about how the guidelines have worked, what can be changed, what can be adjusted, and gain a broader perspective on sentencing policy. Not just the guidelines themselves, but also policy in general, including mandatory minimum sentences, et cetera.

The purpose seems to me, and it has been true of the other two hearings we have had, is for us to listen, to question, and to get honest observations from people who are the stakeholders in the sentencing process to tell us how it is working and what they suggest for changes.

You know, from all of us, I would say, this is just a very exciting time, because we are now engaged in a really open-ended review of the process.

ACTING CHAIR HINOJOSA: With that, I will go ahead and introduce the first panel, which is a "View from the Appellate Bench," and we do have Judge Jon Newman, who is a senior judge, U.S. Court of Appeals for the Second Circuit, having served on that since 1979. From 1971 to 1979 he served as U.S. district judge for the District of Connecticut. He also was a senior law clerk prior to that for Chief Justice Earl Warren, and he served as a U.S. attorney for the District of Connecticut 1964 to 1969. Judge Newman received his bachelor's degree from Princeton and his law degree from Yale.

We have also the Honorable Brett Kavanaugh, who has been a judge on the Court of Appeals for the District of Columbia Circuit since the year 2006. Prior to that, he served as a law clerk to two circuit judges, and then to Supreme Court Justice Justice Kennedy, and Justice Kavanaugh, Judge Kavanaugh, has also engaged in the private practice of law and served as an associate counsel for the president from 2001 to 2003; senior associate counsel to the president in 2003; and an assistant to the president and his staff secretary from 2003 to

2006. He received his bachelor’s degree from Yale and his law degree from Yale.

We also have Judge Jeffrey Howard, who has been a judge on the U.S. Court of Appeals for the First Circuit since the year 2002. Prior to that, he served as an attorney in the New Hampshire Attorney General's office as the Attorney General, the Deputy Attorney General, and then as the U.S. Attorney for the District of New Hampshire from 1989 to 1993, and he also served as the State Attorney General. Judge Howard received his bachelor of arts degree from Plymouth State College and his law degree from Georgetown.

Then we have Judge Michael Fisher, who has been a judge on the U.S. Court of Appeals for the Third Circuit since 2003. Prior to that, he worked, served in the Allegheny County District Attorney's Office from 1970 to 1974, and Judge Fisher was also a member of the Pennsylvania House of Representatives, a member of the Pennsylvania Senate, and the Pennsylvania State Attorney General from 1997 to 2003, and he holds his bachelor’s degree and law degree from Georgetown.

There is no attempt to make this a Georgetown/Yale law school presentation, but it appears to have become that.

Nevertheless, we appreciate it very much.

Judge Fisher, Judge Newman, which one of you wants to go first?

Judge Newman, you will start on my right.

JUDGE NEWMAN: Thank you, Mr. Chairman, members of the Commission. I really appreciate the opportunity to appear before you.

The only other biographical point I would add to what the chairman so kindly said is that I was with the guidelines before there were guidelines. I was presumptuous enough in my statement to cite a 1977 article, urging the need for restructuring sentencing discretion. It was then totally unfounded, set by statutory maximums. I thought that was inappropriate.

I think I was one of the few judges in the country who actually spoke out in favor of the Sentencing Reform Act as it was moved through Congress. It was a lonely group

of us who thought this was a good idea; most judges did not.

So I come to this not with any hostility to the principle of guidelines. I still believe in guidelines. I still believe in structuring the sentencing discretion.

My quarrel, very frankly, is with these guidelines.

Now, some have said because of the *Booker* decision, we need not worry too much about the precise nature of the guidelines because, after all, they are advisory. I think that is an incorrect view.

The Supreme Court has made it clear that while the guidelines in a sense are advisory, they remain the starting point of all sentencing decisions. As our circuit, most circuits have ruled, the district judges are obliged to make a guideline calculation, and then decide whether it should be a guideline sentence or non-guideline sentence.

Indeed, an error in guideline calculation gets a reversal almost always from the court of appeals so the role of the guidelines remains central after *Booker*.

Various proposals have been made for some changes. I am sure you have heard some already in the hearings, you will hear some today, you will hear some in the future.

I am not here to suggest any precise amendment, although there are several things I think could be changed, but I am here to speak to a much more fundamental point.

I think the guidelines are in need of basic reform; basic reform because, in a word, they started out, remained and now are way too complicated.

The easiest way to demonstrate that is just to remind you of this book. 534 pages of detail to instruct district judges how to calculate the guidelines.

It started with a much smaller book, only 105 pages back in 1987, and now it is 534. They don't have to be so complicated. Many states have guideline systems and do it in just a few pages, and they work very well.

There is no guideline system anywhere that is as complicated and detailed as the U.S. sentencing guidelines.

I can just give you a couple of

examples that you are familiar with. You decided that losses should be precisely calibrated, the punishment should be geared towards precise amounts of loss so you have 16 categories of loss.

That means judges have to figure out not generally whether it is a small loss, a medium loss or big loss, but they have to know almost exactly.

In tax cases, for example, in a criminal tax case, the judge has to figure out the tax loss.

Ironically, in a civil tax case, he or she doesn't, because it is usually settled, but in a criminal tax case you have to know the exact amount in order to know what the appropriate guideline is.

There are other examples. I am not going to go through all of them, but I just want to mention one or two.

On injury, you have five categories of the degree of injury. You have injury as one, the third one is serious injury, fifth one is life threatening injury.

Then you have a second one that is

between injury and serious injury, and then you have a fourth one that is in between serious injury and life threatening injury.

I don't think it is a useful time for the district judge, or a sensible system of penology, to make a fine gradation between an injury that is a little bit less than serious injury but a little bit more than injured.

Judges understand that if people are injured in a crime, the sentence ought to go up, and there ought to be some arrangements within which they adjust their injuries, but they don't need to decide is this a category three where it is serious, or category two where it is a little less than serious, but more than injury?

And the same with the quantity table and the drug table, which is 36 levels.

How did the Commission get into this, the first Commission? They got into this because they followed a principle that was presented to them by the early commissioners, the first commissioners, notably one or two professors who were then on the Commission. It was a principle that I refer to as incremental

immorality, or perhaps precise incremental immorality.

The premise is this: The premise is for every small degree of wrongdoing, there must be a measurable penalty, added penalty.

In principle, there is nothing wrong with that. Everyone would agree that for murder you should get more than for theft.

Everyone would agree that to steal a million dollars, you should be punished more severely than if you steal $10,000.

So the idea of roughly calibrating punishment to severity is old hat. Every sentencing system in America follows that. Indeed, every judge in America followed that before there were guidelines.

But what we never did before guidelines is worry about whether the crime was $6,000 or $4,000, and then give a different quantitative base level adjustment depending.

As I said in other context, no crook gets up in the morning and says, "I feel like committing only $4,000 worth of wrongdoing but not 6,000."

He may decide whether to rob a

bank or convenience store, but if he goes to a convenience store, he opens the till and he takes what is there. That is his crime. It is not either a $6,000 crime or $4,000 crime. It is robbing a convenience store.

So the detail that is in this system was launched on the wrong premise, that everything had to be calibrated.

The reason the calibration stayed precise is because statisticians persuaded the early Commission that the worst thing you could do is have what the statisticians have [called] discontinuity. The progression had to be smooth. There could be no cliffs.

Well, it satisfied the statisticians but does not make sense for district judges who have to apply it every day, nor more fundamentally does it make sense from a penological standpoint.

They are too complicated. They have to be simplified and still structure discretion in a sensible way.

I want to mention one thing from the first Commission report, which you still contain in your writings now, a tiny wording

change, but the thought is exactly the same.

A couple of things you said. First as to quantity, you pointed out that robberies of a few dollars and robberies of millions would be too broad. No question about that. You shouldn't lump a few dollars with millions, but you don't need 16 levels of loss.

You also said -- I will skip that one and go to the basic point. This is what the Commission wrote back in 1984 and still says in the current. I will just read this.

"The larger the number of subcategories of offense and offender characteristics, the greater the complexity and the less workable the system. Complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple broad category system."

Finally, and perhaps most importantly -- these are your words: "Probation officers and courts in applying a complex system having numerous subcategories would be required to make a host of decisions

regarding whether the underlying facts were sufficient to bring a case within a particular category. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity the guidelines were designed to reduce."

That was marvelous advice at the time; it is still marvelous advice. I urge you to keep it.

Indeed, what the complexity does is create the illusion of eliminating disparity, because it sounds like, "Well, two fellows get the exact same guideline, same adjusted base offense level, and that's fair," but that decision obscures the fact that the calculation results from things that often have very little to do with underlying criminality.

How much the loss is in a postal inspector's investigation or SEC investigator's case doesn't depend on the act of the criminal; it depends on how long the investigation progresses.

A busy postal inspector with a full docket ends his investigation in a few days so the level is X. Another one in another part of the country has a lighter docket, and he continues the investigation a little more. The amount is higher so they get three or four years different sentences. They both did a mail fraud scam. They should be punished approximately the same.

Here is one other thing you said. You still say this. This is in your current guideline.

"A sensible system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment."

For example -- this is your example. I love it -- "A bank robber, with or without a gun, which the robber kept hidden or brandished, might have frightened or merely warned, injured seriously or less seriously, tied up or simply pushed a guard, teller or customer, at night or at noon in an effort to obtain money for other crimes, in the company of a few or many others."

That is your example of something that is too detailed, but other than the time of day, your present guidelines assign different values for every one of the characteristics your own introduction says would render the system too complicated.

So I urge you to step back from the current system. I appreciate that you are going to hear many small suggestions, not unimportant suggestions, but small in scope, and they are useful, but I urge you to step back and look at the whole system.

Your guideline manual right from the very first manual to now says this is a, quote, evolutionary process.

In fact, it has never evolved. It has simply gotten more complicated, more refined, more adjustments, more explanations.

As the chairman has pointed out, we are now 25 years from the Sentencing Reform Act. In 2012 it will be 25 years from the effective date of the guidelines in 1987, a quarter of a century of experience.

The evolution that you, your predecessors -- I don't mean to state you --

your predecessors promised us in 1987, that evolution is long overdue so I urge you to take a look at the premises on which the guidelines were originally adopted, look to the state systems which are working marvelously as a flexible system, and I think the way to do it, I think the hearings you are having are marvelous. When you finish your hearings, I urge you to do one other thing: I urge you as a commission to take a retreat for a day or two, just the commissioners, no staff.

If you want to occasionally invite some respected scholar to take lunch or dinner with you and discuss broad thoughts, fine, but basically the commissioners should step back and rethink the premises on which the guidelines were first developed and on which they remain.

There has been no change whatsoever in the philosophy of the guidelines.

My plea is simply you promised an evolution; let the evolution begin.

We have the talent, the wherewithal, the intelligence and the dedication to do this job, to structure discretion in a useful way so that punishment in this country

can be, instead of, frankly, ridiculed around the world -- which it is. When I travel abroad, foreign judges, when we talk about discretion, they say, "Well, we are certainly not going to have the federal guidelines. They are too complicated."

I say, "They are not the only guidelines. You should look at our states."

The time has come for this Commission to step back, take a long look and let the evolution begin.

Thank you, Mr. Chairman.

ACTING CHAIR HINOJOSA: Thank you, Judge Newman.

You will be happy to know that there is nothing about the time of day offense changes with regards to any additions to the manual on that.

Judge Kavanaugh?

JUDGE KAVANAUGH: Thank you, Mr. Chairman and members of the Commission. I first want to thank you for the work that all of you do on this important topic.

I am sure, and I know, it is often a difficult and sometimes thankless task, and

all of us who are members of the judiciary and studying your work appreciate the effort and the time that all of you spend on this task, and at this particularly important moment in federal sentencing, the 25th anniversary of the Sentencing Reform Act, as the chairman stated.

It is a good time to assess where we are in terms of federal sentencing and where we are going.

Of course, I don't think we can assess where we are and where we are going without first pausing to say, "How did we get here?"

How we got here is not just the history, of course, of the original Act with Senator Thurmond, Senator Kennedy, and Judge Newman's description of how the guidelines came about in the first place.

Of course, the more recent history is dominated by the Supreme Court's decision in *Booker*, and in later cases.

So I will begin by talking a little bit about *Booker*.

When it came out, of course, after people digested it and it didn't go down easy on

first read or second read, *Booker* seemed quite unstable; eight of nine justices in the *Booker* decision disagreed vehemently with the ultimate result.

It was only by the strange group decision-making process at issue in *Booker* that you could end up with a system where the courts said the guidelines were advisory; recall, four justices would have said the guidelines as mandatory and as they existed then were fine, the four dissenters from the *Booker* constitutional ruling, and four of the justices in the *Booker* constitutional ruling would have said the guidelines as mandatory are fine so long as the jury finds certain additional facts that are used to enhance the sentence.

Eight of the nine justices were fine with a mandatory guideline system. Eight of the nine justices were not in favor of an advisory guideline system.

It was only through the odd dynamics of how the decision came about that *Booker* ended up producing what we now call advisory guidelines.

It was odd for other reasons, and

the ironies of course abound in the wake of *Booker*.

Indeterminate sentencing, completely inderminate sentencing the court acknowledges is completely constitutional.

At the same time, completely determinate sentencing, where judges had no role at all to determine the exact sentence, perfectly constitutional, yet the court said that the way the guidelines were structured, something between completely determinate and completely indeterminate, was unconstitutional, and that presents a logical challenge, as Judge McConnell has eloquently written in his article entitled "The Booker Mess."

Booker is a bit of a jurisprudential mess. Not because any one justice wanted it to be that way, but, again, because of the dynamics of how the decision came out.

Now, when I said it was unstable, when I first read *Booker*, I thought this may not have staying power, right? When so many justices disagree with the bottom line, even though you know that's the way it had to come

out in that case, that is not the most stable precedent in the Supreme Court.

I think now, four years later, I think *Booker* is likely here to stay. *Booker*'s approach to the constitutional issues is likely here to stay.

Justice Thomas, of course, has had second thoughts and said he is now off the train; he no longer would rule as he did in *Booker*.

Justice Alito, who was not on the court at the time, has expressed grave misgivings about the whole line of decisions.

Obviously Justice Souter will no longer be there; Judge Sotomayor, Justice Sotomayor, may have different views.

That said, I think *Booker* is here to stay in terms of the decision itself.

Why is that? Because I think ultimately the current advisory guideline system is workable. It may have been jurisprudentially messy, and no one can figure out why this part of the decision fits with that part, but at the end of the day what we now have is a fairly workable system.

The guidelines are workable because the Court has made crystal clear that they are advisory only.

That was still somewhat debated in the wake of *Booker*, that first year or two. When I first confronted a *Booker* issue as a judge, I wrote an opinion really questioning whether we have departed that far from *Booker* at all or really just reverted back to the same system.

I think *Gall* and *Kimbrough* removes much of the doubt that existed previously about whether the guidelines are truly advisory, and the *Spears* summary reversal this year certainly underscores that the guidelines are advisory.

So I think it is really important for all of us who think about sentencing law now to recognize that from the perspective of an appellate judge, at least this appellate judge, the guidelines are advisory, and therefore the appellate role with respect to substantive review of sentences is going to be very, very limited.

Our circuit has issued opinions saying it will be the very unusual case where we

reverse a sentence, whether above, below or within the guidelines as substantively unreasonable, and ultimately that is because we take it seriously, and if we didn't take it seriously after *Booker*, or even after *Gall*, after *Spears*, we are taking seriously the guidelines are advisory only.

It is important not to be in a state of denial about that as judges, as people who think about federal sentencing.

Now, as advisory guidelines, this Commission still has an incredibly valuable function to perform, because, number one, the Supreme Court has said you still have to calculate the correct guideline sentence before the judge does the full 3553(a) analysis, and, number two, many judges still want to sentence within the guidelines. They take comfort in the fact that this Commission, with its expert analysis, and hearings like this, and its constant review and excellent staff, has assessed sentences throughout the country and has been able to come up with guidelines that reflect for the most part what most judges are doing around the country so many judges will

still sentence within the guidelines even though they are advisory.

But the fact that they are advisory in *Booker*, I think the elephant in the room is, from the perspective of the Congress and the Commission, do you want the guidelines to be advisory? Do you want them to be advisory only, or do you want them to be mandatory again? Does Congress want them to be mandatory again?

Because *Booker*'s result does not mean that you can't go back to a mandatory guideline system. It is easy to tweak the current system to make it mandatory again and to pass muster onto *Booker*.

You could, for example, broaden the ranges that are out there and allow judges to sentence within the range based on the jury's finding without having enhancements or adjustments based on offense characteristics or offender characteristics, or you could, as Justice Souter proposed in one of his separate opinions, that the jury find individual facts relating to the offense or offender that are used to bump up or bump down the guideline range from that determined by the offense conviction.

So it would be very easy to go back to a system that is mandatory and that passes muster under the Supreme Court jurisprudence.

It seems to me there is a fundamental choice that needs to be assessed by Congress and the Commission, and I won't purport to decide who can do what in that, but a fundamental choice, do we want advisory guidelines? Because we now have them. It is clear we have advisory-only guidelines, or do we want mandatory guidelines? Do we want to go back to mandatory guidelines?

In terms of that policy question, it seems to me I share -- you know, in opinions I have written, I have said the Supreme Court has said advisory, advisory, advisory. I have hit that theme multiple times in opinions I have written, and I believe that strongly. I don't think that is wise as a policy matter.

I am greatly concerned. I share the concerns expressed by Justice Alito about the disparities that result.

It is the same problem ultimately that existed before Senators Thurmond and

Kennedy got together in 1984 to create the Sentencing Reform Act, the same problem that troubled Judge Newman in the late 1970s when we have advisory-only guidelines.

We are seeing more disparities now. We are going to see more and more.

Even if it seems okay now, remember that the judges who are on the bench now, most of them came up under a guideline system. That may not be true five, ten years from now. Things could change dramatically. Judges could have an entirely different view about the guidelines so there needs to be fundamental consideration of whether the disparities that are going to result in an advisory-only system are acceptable.

The other thing that concerns me about advisory-only guidelines is when we become judges, and we go through this process, often difficult process to become judges, the one thing we always say, which is true, is: "When I become a judge, I am going to follow the law, I am going to hear the law. My personal policy views, check those at the door. My personal views, political views on issues, check those at

the door."

We all believe that very strongly as judges. We try to apply that on a daily basis.

When sentencing becomes completely unbounded, though, it seems to me that the sentencing judge almost necessarily will be bringing his or her personal views or policy views on certain kinds of sentencing issues right into the courtroom and right into the individual defendant's sentence, and have an effect on that person's liberty.

Some judges might think drug crimes should get really long [sentences], some might think they should be shorter. Fraud crimes; longer, shorter; violent crimes . . . .

Judges are going to have very different philosophies. We do have different philosophies. In an advisory-only system, judges not only are going -- the disparities are not only going to result, but judges necessarily are going to bring their own personal philosophies, their personal views on particular issues into the courtroom, and that troubles me as well.

So it seems to me there should be consideration given to returning to a mandatory system with the kind of tweaks that Justice Souter proposed or other tweaks that could be made to pass muster under *Booker*.

Now, I think it would be easy to make those tweaks. As a substantive matter, I recognize it may be hard as a political matter reopening something as major as this where the Congress, for example, threatens to create a whole set of collateral issues, and can be problematic. I realize that.

As a substantive matter, it would be easy to make the guidelines mandatory again. That is a fundamental choice.

Whether they are mandatory or advisory, there are a couple of other quick points I want to make whether the guidelines are mandatory or advisory.

I second completely, from my far more limited experience, Judge Newman's point about simplification.

It seems to me the guidelines are, in fact, way too complicated. We see it constantly on the appellate bench; obviously

district judges see it much more often.

When we are having lengthy oral arguments in our court, which we did on minor versus minimal versus in between minor or minimal participation in the offense, and whether it is two or four or maybe three levels, that struck us as not the most wise construction in the guidelines.

In fact, it seemed to us that it was too complicated so I would second Judge Newman's point about simplification, particularly when the guidelines are advisory.

Our oral argument when we were having it about this minor or minimal issue in one case, let's make sure the thermostat is on 68 when the house is on fire. It just didn't make as much sense.

It seems simplification is a good goal regardless, but it is particularly important if the guidelines are advisory.

One personal point: Whether they are mandatory or advisory, I think acquitted conduct should be barred from the guidelines calculation. I don't consider myself a particular softy on sentencing issues, but it

really bothers me that acquitted conduct is counted in the Guidelines calculation.

I have written about this, and I think I am not alone. I know I am not alone. Other judges have written about it. I know Justice Kennedy has written about it, and other members of the judiciary. It is just very problematic symbolically.

Put aside the substance, because I realize it still can come in on the back end, particularly in an advisory system, but telling a defendant, "Yes, you are acquitted but yes, we are going to calculate that sentence to include that acquitted conduct" just sends the wrong message. It seems to me in too many cases it seems inconsistent with the nature of our system. I would urge careful consideration of that issue.

Finally, I would say that it is important to recognize from the Commission's perspective and from our perspective, as appellate judges and as district judges, Congress has a hugely important role here. I think there is sometimes a perspective on the part of the judges of, "Well, sentencing is our

thing. Congress should stay out of it. Congress doesn't have a particularly important role here. When they get involved, they mess it up."

It is important to deal with or criticize particular decisions Congress might make on certain sentencing issues, but it seems to me Congress is assigned by the Constitution with the legislative power, the power to define offenses. They are the ones who are more in touch than anyone with the community, the reaction to sentencing issues that go on, with the crime issue.

It seems to me that as judges, we need to remember that Congress has an important, powerful and proper -- it is not an improper -- a proper role to play in this whole sentencing issue.

With those thoughts, Mr. Chairman, I will conclude.

I want to thank you again, and all the members of the Commission, for inviting me. I want to thank you again for all the work you do that is so valuable to all of us.

ACTING CHAIR HINOJOSA: Thank you,

Judge Kavanaugh.

Judge Howard?

JUDGE HOWARD: Thank you, Chairman Hinojosa.

My name is Jeff Howard, for the record, and I sit on the United States Court of Appeals for the First Circuit. My chambers are in Concord, New Hampshire.

I, of course, have an advantage of having just listened to two very thoughtful presentations so I get to either agree or disagree, but I am going to spend most of my time probably on what would be considered nits.

But before I get there, three things I want to mention: First, Judge Sessions threw out the term mandatory minimums.

My own personal view, I grew up as a state court prosecutor, then I was a U.S. attorney, and then I went back and I was an attorney general back in the state court system. My state does not have mandatory minimums for any crimes.

We considered them when I was working for the state. I especially considered them when I was the Attorney General having had

experience as a United States attorney.

The judgment call we made at that time was that we thought judges knew what they were doing, and mandatory minimums were not something we would support and I didn't support them.

Having served as a federal judge now for seven years, I am convinced that they are a bad idea. I am not saying they were a bad idea at the time when they first started being enacted. I just think they are unnecessary.

I have seen too many cases where the mandatory minimum sentence is what makes the case unjust.

I hadn't intended to talk about this, but I will try to do it in one or two sentences.

Also from my state court experience, I think Judge Newman is probably right. A much simpler system would probably work better.

Federal judges, at least in my experience, know what they are doing. They know when a sentence -- sure there are going to be some differences -- but they know when a

sentence is good or bad.

Frankly, I would endorse what Judge Newman has said.

With respect to some of the things Judge Kavanaugh said -- actually, they were all things that, having read some of his opinions I thought about, I thought they were very good points, but he did say, I believe, that the advisory system is, in fact, working.

As one who became really enamored with the mandatory system, both as a federal prosecutor and in my first couple of years as a judge, I was not in favor of what happened after *Booker*, and it becoming an advisory system.

My view is changing. I think it is working so I don't envy any of the large or small decisions that you have to make, but I just wanted to add those thoughts, and then get into some of my perspective.

You know, we do get these sentences over the transom, and they give us a certain perspective, and I will tell you how I perceive things in my circuit and then address four specific issues for you.

In the few years before *Booker* was

decided, which roughly coincides with my time on the court, three-fourths, three-quarters of the sentences in the First Circuit were within the guidelines ranges.

Since *Booker*, it has been about two-thirds so there has certainly been an impact.

In fact, in the last several months to a year, it is even lower. There is a greater trend downward toward within guideline sentences so certainly there has been an impact.

However, the lion's share of sentences outside of the guideline range continue to be, in our circuit anyway, government-sponsored downward departures.

I can't go behind that number to tell you why that is. I have some sense that it varies from district to district, but, nevertheless, that still seems to be the case.

However, variant sentences, off the guidelines, based on the 3553(a) factors, do make up between 10 and 15 percent of all the sentences in our circuit, and that has held true for a few years now.

We are a small circuit, but there

are disparities across our circuit.

In Puerto Rico, for example, non-guideline sentences make up, depending year-to-year, between five and eight percent of the sentences, whereas in Massachusetts, it is 15 to 25 percent. They are our two busiest districts. They produce about the same number of criminal cases, but there clearly are some distinctions.

I am not going to try to get behind them to tell you what I think the reasons are, because I would just be speculating. It is not my area of expertise. I suspect that it is yours, and you may want to look at that; if those same kind of disparities are holding true across the country.

The one other statistical insight I want to offer comes from fiscal year 2008. My take on the national statistic is that sentences were upheld on appeal when challenged about 80 percent of the time, and the First Circuit was about there, it was about 77, 78 percent.

But as best I can tell, in that year, as well as any other year since *Booker*, my circuit has not overturned any sentence on the basis of reasonableness. It has always been on

the basis of procedural errors with a couple of outlier cases where -- actually the names of them are *Godin* from the District of Maine in 2008, and [*Ahrendt*] from the District of Maine in 2009, where the Commission had come out with further guidance after the sentencing while the case was on appeal, and although the new guidance didn't apply to that particular sentence, we thought that the district judge in those two cases might want to know about that guidance so we did sort of a prudential remand in those two cases.

You know, soon after *Booker*, actually a number of weeks after *Booker*, our circuit did its first post-*Booker* case, called *Jimenez-Beltre*. We took the case en banc.

In that case, my view was -- I am getting into reasonableness, following the theme of reasonableness -- my view was that a within-guideline sentence was conclusively reasonable. To paraphrase Paul S. Graff (phonetic), I didn't think reasonableness should be determined in the air but should be tethered to what the experts thought about what was a reasonable sentence.

That view of mine gathered precisely one vote, my own, so it is not the view of the court, and I have learned since that time as well, because, after we all, we have had *Rita* and *Gall*, and things have changed.

But the first issue of the four that I wanted to mention, which are more in the area of nits, are sort of harkening back to my first point that going to reasonableness, it seems to me in that area, the First Circuit, at least, is basically taking a very limited role, and the role is becoming even more limited.

Since *Gall*, we have described sentencing decisions as judgment calls. We did so first in a case called *Martin* last year, and later in a case that I authored called *Thurston*. We upheld the sentence of three months, in which the bottom of the guideline range was 60 months.

We upheld that case largely on the basis that the district judge -- and I disagreed with the sentence, but the district -- and twice before we had said the sentence was unreasonable before *Booker* -- the district judge gave an explanation for it, and it was very hard for us to say that a reasonable person could not accept

that explanation, even though I thought that the Sentencing Commission's guideline range made a lot more sense, but so be it.

We call them judgment calls.

That said, many circuit courts of appeals, not our circuit, but several have gone out of their way to emphasize that deference does not mean abdication, and ultimately in my view it boils down to two things, really, and that is the degree of variance from the guidelines, and the explanation given, which is pretty much what *Gall* said.

The court said that if the sentencing court decides that a non-guideline sentence is warranted, it must consider the extent of the deviation to ensure that justification is sufficiently compelling to support the degree of variance.

Even post-*Gall* in my circuit, we said that there is still a sliding scale effect from the guidelines.

I don't think any of that is necessarily bad. You know, I have had a chance to review a lot of sentences, even since *Gall*, and we can understand what the district court is

thinking, and I figured I would give it a chance.

The second issue involves the teaching of *Kimbrough*. This is not following any theme. I am now moving to a different topic.

As you recall, the Supreme Court made evident that district courts may vary from guidelines ranges based solely on policy considerations, including disagreements with guidelines.

Kimbrough, of course, spoke to the issue of the crack cocaine disparity.

I should mention in that regard, we have a case called *Rodriguez* that applies *Kimbrough*'s teaching to fast track. There was a defendant from Puerto Rico who argued to the district court -- I think it was a reentry case -- he had argued to the district court that there was a disparity in the sentence that he was receiving compared to fast track districts, and the district court determined that it had no authority to consider that disparity.

When we got the case, we applied *Kimbrough*, and we said this is an area where as

in *Kimbrough*, the Sentencing Commission had criticized the congressional policy that was at stake, and, as in *Kimbrough*, the Sentencing Commission at the direction of Congress had issued a policy statement that sort of went outside what the Supreme Court considers the traditional expertise of the Sentencing Commission relying on empirical data, but instead was relying on policy considerations.

So we sent this fast track case back to the district court overturning our own prior precedent, saying that it ought to consider these *Kimbrough* factors in resentencing.

There are other areas where the *Kimbrough* teachings I think are going to come into play. Perhaps cases like our *Rodriguez* case can be instructive. One is in the child pornography, child obscenity area.

Defendants are making the same sort of arguments as were made in *Kimbrough* in our fast track case that the sentencing ranges in child pornography cases are not necessarily based on the Commission's reliance on empirical data and its traditional expertise.

Furthermore, that the commissioner[s], or at least members of the Commission, have criticized the direction the sentencing has headed in some of those cases, and you probably know that several of the district courts, at least, have accepted those arguments, and circuits are going to be dealing with them soon.

The third issue I want to mention is also a recurring one, and it involves section 4B1.2, the Career Offender guideline, which substantially increases the guideline range for a defendant convicted of a drug or violent felony who has had at least two prior felony convictions for either a crime of violence or controlled substance.

One definition of crime of violence in the guidelines is burglary of a dwelling, or an offense that involves conduct that presents a serious potential risk of physical injury to another.

For many years, the First Circuit held that prior conviction for any burglary, including a non-dwelling, constituted a crime of violence within the meaning of that guideline.

Just last year in a case called [*Giggey*], we took that case en banc, and we changed our mind. It seemed to us that it was not the Commission's intent that all burglaries be considered crimes of violence. That left us to consider the residual clause.

We went to the Armed Career Criminal Act for guidance, but, then again, we noted that the Armed Career Criminal Act has a slightly different definition of burglary than the guidelines do, and we thought that might also play into the residual clause.

Ultimately we decided on a categorical approach for determining whether the burglary of a non-dwelling would qualify.

You may wonder why I am going on about burglaries. We see a lot of those cases in our circuit. I don't know about other circuits, but the New Hampshire state prison is full of burglars, which is another issue, I suppose.

It comes up all the time, so we said that we are not going to look at the facts of a case; we are going to take a categorical approach.

Some circuits agree with that, some circuits have a per se rule one way or the other, and I think others are somewhere in the middle.

You know, I know that the Commission has been looking at this issue. It would be useful, I think, in terms of a nit, anyway, if you could tell us what the Commission intends if you are able to get to the bottom of that, and we will follow it, of course.

And then lastly, I just want to briefly mention a circuit split with regard to the counting of victims in economic crimes cases. This is pursuant to section 2B1.1 of the guidelines.

In a case involving debit credit card fraud, recently my circuit concluded that there is no requirement that the victim bear final burden of financial loss. Thus, in that case, numerous consumers whose accounts had been accessed were victims who suffered, in our view, actual pecuniary loss, even though they were ultimately reimbursed by their banks and other retailers.

So we joined at least one other

circuit in this holding, but there are several circuits that go the other way and say you are not a victim unless you bear the final ultimate loss.

I also know the Commission is working to resolve this circuit split in one way or another by giving some guidance, and I do commend you for those efforts.

Again, I just want to thank you for holding these hearings, and especially for letting me come speak to you.

Thanks again.

ACTING CHAIR HINOJOSA: Thank you, Judge Howard.

Judge Fisher?

JUDGE FISHER: Thank you, Mr. Chairman.

My name is Mike Fisher, a member of the U.S. Court of Appeals for the Third Circuit, and my chambers are in Pittsburgh.

I came to our court in 2003, having served primarily in the state system for the prior 30 years, and my familiarity was much greater with the state guidelines and state sentencing system in Pennsylvania than it was in

the federal guidelines when I arrived in our court.

In the early 1980s, as a member of the Pennsylvania State Senate, I was involved with legislation which at that time created the Pennsylvania Commission on Sentencing, which led to the Pennsylvania sentencing guidelines, which have been referred to very favorably by commentators across the country since that period of time.

I quickly learned when I got to our court of the thoroughness of the federal sentencing guidelines, and the enormous work that the United States Sentencing Commission put in to those guidelines.

Certainly the framework which was in place prior to *Booker* brought about uniformity and eliminated much of the unwarranted sentencing disparity that prompted Congress to pass the Sentencing Reform Act in the 1980s.

That said, even 20 years into the guidelines, it hadn't stopped, it wasn't stopping defendants from continuing to litigate various aspects of guidelines themselves.

And then along came *Booker*, and *Booker* obviously ushered in a new era of sentencing by making the Guidelines advisory, and directing the courts of appeals to review sentences for reasonableness, which was a function which we did not have before, and certainly we have still been trying to determine what that means.

What I would like to do just briefly is touch upon some of the issues we have dealt with on the Third Circuit since *Booker*, and then give you my perspective on where I see the sentencing system, the federal sentencing system, where it is today.

In the four years since *Booker*, our court has said that a district court should continue to adhere to, or should adhere to a three-step process in imposing a sentence.

First, the district court should start by calculating a defendant's guidelines sentence.

Second, in doing so, the court has to rule on departures.

Third, the district court has to give meaningful consideration to 3553(a)

factors.

Following *Gall*'s instructions, we have said that our court's appellate role is two-fold. More specifically, we must first ensure the district court committed no significant procedural error in arriving at its decision, and then review the substantive reasonableness of the sentence under abuse-of-discretions standard, regardless of whether it falls within the guidelines range.

We said that the touchstone of reasonableness is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated, and that is very important, because in many, many appeals you have reference to some specific comment that the sentencing court may have made. It didn't reflect at all the totality of the sentencing record, and we continue to see that from time to time.

We said that the Due Process Clause affords no right to have the facts that are relevant to enhancements or departures proved beyond a reasonable doubt, but rather that the preponderance of the evidence standard

continues.

We have said that although the guidelines are advisory, the district court must still calculate the applicable sentencing range using the guidelines extant at the time of the sentencing, and we will continue to review the propriety of a sentence based on those same guidelines.

We have said that where the district court miscalculates the advisory guidelines range, and that still happens from time to time, our court will hold such procedural error harmless only if it is clear that the error did not affect the district court's selection of the sentence imposed.

We have said the defendant is not required to object at sentencing to the district court's explanation for imposing a particular sentence in order to preserve his or her right to appeal.

We have also said that we will not apply a presumption of reasonableness. This is where we differ from -- a point in which our circuit differs from others on appellate review to a within-guidelines sentence. A

within-guidelines sentence is more likely to be reasonable than one that lays outside.

Most recently, our court sitting en banc decided a case *United States v. Tomko*, in which we explored the contours of substantive reasonableness under *Gall*.

The *Tomko* case was interesting, the facts were interesting, because the defendant pled guilty to tax evasion, and [his] advisory-guidelines sentence was 12 to 18 months; however the district court chose to impose a downward variance, which included community service, probation and one year home confinement, and ordered a fine of $250,000.

This case was interesting because it was a contractor who had passed through the expenses of building his own home, a multi-million dollar home, and put those expenses into a school construction contract which reduced his tax obligation to the federal government, plus there was an indication the contractor had done the same thing in building a vacation home prior thereto.

It was argued that if appellate reasonableness review means anything, that this

particular sentence had to be substantively reasonable.

But our court in *Tomko*, by an eight to five vote, found that *Tomko*'s sentence was, in fact, reasonable.

I was part of the minority in that vote; in fact, wrote a dissenting opinion when it first came through to the panel.

At the same time our court decided the case of *United States v. Olhovsky*, or shortly thereafter, which vacated the defendant's six-year prison sentence for possessing child pornography on a computer, and concluded the sentence was substantively unreasonable.

What the *Tomko* and *Olhovsky* decisions, which have just recently been handed down by our court, indicate, some of us believe at least in our court, where a district court adheres to the correct processes for imposing a sentence and fully explains its reasoning, it is unlikely that the resulting sentences will be found substantively unreasonable so it should not take long for sentencing judges to realize that this is, in large part, what our circuit

expects.

Under our current sentencing system, the Sentencing Commission is responsible for providing its expertise in this field to district courts by compiling data that provide the ranges within which a particular sentence should fall, but the ultimate decision of tailoring the sentence to fit the individual rests in the hands of the district court, which is responsible for fully explaining the reasons.

Absent significant sentencing disparity, this kind of advisory guideline system may be the best that we can expect at this time of history.

That said, such a system may not be what Congress intended when it implemented the federal sentencing system and federal guidelines 25 years ago. Again, we begin to see why the disparity.

Particularly in those areas where Congress believes the American public expects incarceration, Congress might be prompted to impose a more rigid sentencing system than the one the Supreme Court reviewed in *Booker*. That would be my fear.

I have heard my colleagues on this panel talk about the need for simplification. Simplification probably has a lot of overhaul for this Commission to pursue, but I would have, and I have concern that too much simplification -- not correcting some of the nits referred to with specificity here -- too much simplification is only going to promote further disparity in the calculation of the guidelines sentence.

I would refer you to, and I have included with my written remarks that I have submitted, a law review article that I authored in the *Duquesne University Law Review* in September of '07 entitled "Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing," which called for a form of what I referred to as "guided discretion."

I think this kind of discretion, implemented and utilized by sentencing judges, and applied in our role by judges on courts of appeals, is the kind of discretion that would take into consideration the work that you have done, and the data which has been accumulated,

and the reasons why the guidelines specifics have been incorporated in the guidelines system, and use that as a guide for sentencing judges to temper their discretion.

I think if that is done, we probably will continue to have a system that Congress will accept, but if it isn't done, as one who over the course of my career has felt the judges should have significant discretion, and mandatory minimum sentences do nothing more than set down arbitrary guidelines that don't fit the particular cases, I would be fearful if we don't use the discretion given to us through *Booker*, that in some year, maybe not this year, next year or the next five years, in some year, Congress will wade back in in the system, and 25 years from now this Commission will be sitting here saying -- the courts will be sitting here saying, "What did we get ourselves into? Because we have a system that really provides no discretion at all across America."

I thank you for the efforts that you put in over many, many years and I know many, many hours, and I would encourage you to continue, as others have said, to look carefully

at what has taken place, and we thank you for your efforts.

ACTING CHAIR HINOJOSA: Thank you, Judge Fisher. We will open up for questions.

VICE CHAIR SESSIONS: I appreciate very much your testimony, and you talked about simplification. It is an issue we have been dealing with for years and years and years.

One of those issues is very positive, and yet difficult to implement.

What I would like to ask, Judge Newman, I like the fact you said simplification should have been addressed by the first Commission. I guess I am interested to know how you do that in light of 25 percent rule?

Historically, you look back at the guidelines and you see all of the categories, the 43 categories, and then you delineate criminal behavior and try to punish based upon the individual behavior, but one of the reasons there are so many offense levels, and one of the reasons there are so many different enhancements which dice and slice behavior is because of, it seems to me, the 25 percent rule.

Because if you can only have small

ranges of sentences which you want to reflect individual criminal conduct, then you have to do it in such a small and precise way to be able to reflect that punishment for that conduct.

Is the only way we can deal with simplification to eliminate the 25 percent rule, or can you think of some other way in which you can reduce the number of offense levels, reduce, perhaps, the number of criminal history levels, broaden up the ranges so there is more flexibility?

I guess my question is, how do you do that when you have a current sentencing structure which is regulated by the 25 percent rule, which was, of course, set by Congress in the Act in 1984?

JUDGE NEWMAN: I recognize the 25 percent rule is an issue, and in my testimony I acknowledge it.

The first part of the issue is to what does the 25 percent rule apply?

In the statute, it applies to the difference between the top and the bottom of a sentencing range so clearly it applies to that.

You can have, instead of the

43-step table, a table with fewer steps. I am not here to argue any particular one, but various writings have suggested different models of tables, sentencing tables, that conform to the 25 percent rule and have much broader ranges that you can do.

The second issue under the 25 percent rule is one that I am sure you are aware of, because it has been discussed within the Commission, and that is, does the 25 percent rule apply not only to the difference between the top and the bottom of the sentencing range that you described, does it also apply to the process by which the sentencing judge calculates the adjusted offense level?

A former commissioner wrote an extensive brief saying it applies to that.

There is an opposing brief written by Catherine Goodwin, an associate counsel of the Administrative Office of the Courts, which is in your records, which argues the other side.

Not surprisingly, I think Ms. Goodwin was correct.

I would take the 25 percent rule only as far as Congress literally applied it,

and you can meet it, as I said, by broadening the ranges of the sentencing tables. It need not affect at all the addition and subtraction of the various adjustments that go into the calculation of where the person should be within the sentencing range.

So I think Ms. Goodwin was right and you can have that flexibility.

If the Commission thinks she was wrong, then I think you do need to go to Congress to get some added flexibility and modify the sentencing rule.

Before you do that, I wish you would take a look at the two opposing briefs.

I hope you decide with her and on her view. I don't think the 25 percent rule poses a significant barrier to fundamental simplification.

COMMISSIONER HOWELL: I just wanted to join my colleagues here in thanking all of you for coming.

I have to say that I joined the Commission in 2004, just before *Booker* was decided so I never went through an amendment cycle on the Commission, but the congratulations

I got, mostly from my smart-alecky friends from the U.S. attorneys in the Eastern District were, "That's great, you got on the Sentencing Commission, but do you have a job anymore? It is advisory."

It has been very interesting that we have been incredibly busy on the Commission, and one of the things that keeps us busy is Congress.

Congress, although clearly recognizes that the guidelines system is now advisory, hasn't slowed down its directives to the Commission.

Among the things that I want to talk about were the two issues that most of you addressed, simplification as well as acquitted conduct.

On simplification, among the complications we have in simplifying the guidelines, because it may not look that way from the bulk of the *Guidelines Manual*, every time we consider an amendment, we look at the most simple way to do it, and sometimes we fail at that effort more often than we succeed.

One of the complications, it is

not just the 25 percent rule, which is -- I know, Judge Newman, you have been a counselor to many commissions, including not just now but also given very good advice to the original Commission, and you have commented on the 25 percent rule, but in addition we have Congress to consider, and as Judge Kavanaugh said, Congress has a very important role and takes its role very seriously in sentencing policy.

A number of the specific SOCs that complicate the manual are the product of directives from Congress. Just in our current amendments that are pending before Congress are a number that are responsive to congressional directives.

In some of those directives we told Congress, "We don't think the directive you gave us warrants, after consideration, any change in the guidelines." I am thinking specifically of the identity theft record where we were given 13 separate factors to consider, that if after study we thought all 13 factors warranted an amendment, you would have seen more complicated SOCs as a result of the

congressional directive. That is not what happened.

How do you -- do you have any recommendations on how to deal with not just what Judge Newman calls "our philosophy" in the manual of incremental factors that contribute to sentencing, but it is a philosophy of Congress that they give us directives of specific factors that they want expressly articulated in the guidelines that also help complicate -- that also complicate the manual so do you have any suggestions on how to address, you know, the interaction with the Congress on these directives?

JUDGE NEWMAN: I have two thoughts on that. When they say that there are several factors that they want you to consider, it seems to me the key word is "consider." The problem comes when you start assigning values, precise numerical values, to a factor.

If they want to say there are 13 factors to be considered in identify theft, I have no problem whatsoever with a guideline or a commentary or a note -- I don't care -- that says in the case of identity theft, the judge

should consider, or may consider, should consider, must consider, if that is what the Congress says, the following factors, and assess an increment within a range of whatever you all think is right; one to four, one to six, one to eight, within that range, but don't price each one. So I think can do the flexibility if you will take them at their word, and their word is considered.

Let me add one other point that I think is perhaps more responsive to your very, very good question.

If there is to be significant simplification, it cannot be done by the Commission alone laboring in a vineyard and then serving it up on a platter, if I can mix metaphors, to the Congress, and they say, "We don't like this; we are sorry. We are going to vote it down."

It would have to be a cooperative effort. This is a political problem.

As you begin the process, it seems to me you are going to have to enlist in a cooperative effort with certainly the leadership of the judiciary committees and their staff.

Whether you take the route that Judge Kavanaugh pointed out, going back to mandatory instead of advisory, mandatory might work as part of a package in which there was some simplification.

It strikes me as very interesting that the very precision of the first system drove the court to say they are unconstitutional, which evokes from Judge Kavanaugh the response, "Well, go back to mandatory, and you can get there by making them simpler." It is full circle. It is not a circular argument; it just happens to complete the circle, and it may be the way to do it.

But I think working with the Congress, you could work out a package. It may include modification of mandatory minimums. It probably would not include elimination. I think politically, that is not feasible today.

But eliminating some of them, yes, I think that is feasible, but a package that says to them, "We want to do the general outlines of the Sentencing Reform Act, but we want it to work," and work with them to find out what is acceptable politically even as you bring to bear

your expertise on what appropriate sentences are, so I think it can be done.

JUDGE KAVANAUGH: I would second Judge Newman's point that it is going to require cooperation from Congress, and I understand completely when we say "simplification," if simplification were simple, it would have been done by now so it is difficult.

When we say this, I think we say it with the understanding that you are striving for that, and that Congress makes your life more complicated at times.

I think it also -- I go back to what I said in my comments -- the initial fundamental question to me is are you sticking with advisory, are you going to go to a mandatory system, for you or the Congress working together, or however it works out.

If it is advisory only, maybe you will have a different approach to simplification than if you are going to mandatory. I can't game all that out, but it seems to me that is wrapped up, as Judge Newman was just saying, in the same question.

I understand it requires work from

Congress, and I understand simplification is complicated by the fact that Congress gives you those directives. I don't have particular advice on how to succeed necessarily other than it will require their support.

COMMISSIONER HOWELL: Among the things we may consider doing is aggregating a number of the SOCs that now have specific value increases attached to them, and there is a possibility for simplification to aggregate those.

We do on a number of occasions do exactly what you suggested, Judge Newman, essentially to say for a factor that Congress directed us to consider, whether downward or upward departures -- we do have to look -- parts of the manual says if a judge sees this factor, they may consider upward departure without giving any factor or numerical increase, you know, attached to that.

You know, I take your point, and I think it is well put, that for a wholesale simplification effort, this is something we have to do in close consultation with the Congress.

Let me turn just for a second to

acquitted conduct, because acquitted conduct is also something if you explain it to laymen on the street, they just find it, you know, surprising and blame the guidelines for it, when the guidelines are, in fact, silent on the use of acquitted conduct, and the use of acquitted conduct by sentencing judges was long before the sentencing guidelines were even a flicker on the scene.

So one of the -- and I think that judges who have heard a trial and heard the evidence related to conduct for which the defendant is ultimately acquitted, can't -- I guess can try, but may, in fact, be influenced by it.

Do you think that in the ultimate sentencing of that defendant, do you think addressing acquitted conduct in the guidelines by indicating that should acquitted conduct be considered by the sentencing judge, it should just be considered in the context of where within a guideline, the adjusted guideline range to sentence the defendant as opposed to being used as part of a calculation of relevant conduct to actually increase the offense level

and the range?

Is that sort of a compromise between barring consideration of the acquitted conduct all together, and basically requiring a judge who may have heard all the evidence related to it to wipe it out of his or her mind, but to preclude it from being considered as part of the relevant conduct calculation? Is that something that would be practical?

JUDGE KAVANAUGH: That seems to me good progress on the issue, and to go back to the premise of your point, one of the things the guidelines did was to bring into the open, into the sunlight, things that had happened for years that no one knew or didn't think about in the same way, and all of a sudden you are having a precise increase based on acquitted conduct, and people say, "Well, it always happened that way."

Well, okay, but now you are actually seeing it, the actual impact.

As you say, quite rightly, no one understands that in the real world. It fails the common sense test, and it brings disrespect to the process, and it weakens confidence in the judicial process, and maybe you can reason your

way from point A to point B to point C logically for why it should be part of the process, but when you take a step back, it just doesn't work, and I think even if it is purely symbolic, the effort to bar the consideration of acquitted conduct; even, in other words, if there is a logical reason to do it and the only reason not to do it is symbolic, symbolism has value in the criminal justice system at times, and I think this is one of those areas where it would be warranted.

ACTING CHAIR HINOJOSA: I have a follow-up question on that. What is the difference between saying that and then saying when you have been convicted of something and I'm giving you 20 years -- I think part of the problem with acquitted conduct is the general public thinks you are going to sentence somebody to higher penalties than they have been convicted of, and you are not being sentenced to a higher penalty; it is within the conduct of the conviction that you actually received where the maximum is 20 years. Should the judge be able to take that into account in trying to determine where within that 20 years you

sentence somebody?

For example when you have two defendants that got convicted of the same count that you heard no evidence whatsoever of any other involvement on the part of one of the defendants, when you have the statute that says a sentencing judge should be able to consider any evidence with regards to making a decision as to the sentence, what is the difference between staying within the guideline range or within the statute of the conviction if you use that information that you have seen to make the determination as to where to sentence?

A lot of the concern, I think, about acquitted conduct, when you talk to the general public, they think that you are going to sentence somebody to a higher sentence than they were convicted, and you are not, because you are still at whatever the maximum was of the conviction.

JUDGE KAVANAUGH: I guess I am still on for this question since I bought it up initially.

In my mind, blending in the multiple factors and saying it is just one part

of an overall calculation really just blurs the issue, because when you unpack those pieces at the end of the day, you are using the acquitted conduct to sentence at a slightly or greatly higher level than you would have sentenced had you not considered the acquitted conduct, and I think that, when it is unpacked, and explained to people, people just don't understand.

There are reasons, very sound, logical reasons, and the equitable reason that you point out when you have several defendants together, I understand that completely, but I do think it is just hard to explain a system that says, "You can go to a jury, and this is the system we have set up, and you are not guilty until you are proven guilty beyond a reasonable doubt," and you win, and then the judge says, "Oh, you won, but I am still jacking your sentence up as if you were convicted." It just doesn't feel right.

We had a case recently with a sentencing transcript when I read it on appeal, the defendant in speaking to the judges, "I just don't understand this. How can this be?"

He went on at some length about

that.

To me that was fairly compelling. It is not the first time I have heard it, but just to see it right there in the transcript in a way that harmed that individual's sentence, it just struck me as a point that is widely shared.

VICE CHAIR CASTILLO: I want to thank all of you for the work you do on opinions, and I will tell Judge Fisher, we did read the *Tomko* opinion on-line -- there was pages of it -- and we saw the back and forth.

One of the things we are dealing with here is just what the Supreme Court itself has done with sentencing.

For example, in acquitted conduct, the Supreme Court in the *Watts* case said on the one hand you can consider acquitted conduct in sentencing, and on the other hand we have *Booker* that is seemingly doing justice to a jury's verdict.

Let me get to one other thing, which is downward departures and departures in general under the sentencing guidelines.

It seems to me if you do justice to the Supreme Court opinions, Justice Breyer in

the [*Rita*] case says that departures are still very much viable under the advisory sentencing guidelines, and I think the Third Circuit, Judge Fisher in particular, has gotten this right in emphasizing the three-prong analysis to sentencing, and, unfortunately, my circuit has not gotten it right and said downward departures are obsolete.

I saw that just the other day, that the Third Circuit has vacated a district court opinion where the district court judge refused to rule on the downward departure motion, and one of the interesting things about downhill is that the district court judge did not rule on the downward departure motion that was a very viable motion, but instead varied.

So I would like to get the judge's reactions to what about downward departures and departure authority in general?

It seems that whatever we do, the sentencing, the architects of the Sentencing Commission and the sentencing system wanted judges to have departure authority, and yet we are now in a world where judges would rather vary than actually use their departure authority

that exists under the guidelines.

JUDGE FISHER: If I can comment briefly, in our case of *U.S. v. Gunter*, 2006 case, one of the earlier cases post-*Booker*, we made it clear to calculate the guidelines first, and it just seemed to us, and still seems very clear to me, the district court calculated the guidelines but ignored the departures, because part of the guideline calculation also is the determination on departure that is before the court so that is our second step.

The third step is 3553.

We are still seeing cases, 2009, that you pick up a 2008, 2007 appeal that gets to you, where the court, at least in its sentencing, you know, sort of combined the discussion on departure and variance, and it wasn't clear. That is why we have taken a look at the sentencing record as a whole in making a determination as to whether or not the calculation was procedurally reasonable or unreasonable.

I think it definitely has to stay a part of the process.

VICE CHAIR CARR: Judge Kavanaugh,

you paid enough attention to these matters probably to know among the district and appellate court judges we have heard from, you are somewhat unusual in calling for a return to the mandatory system.

Most of the judges that we hear from at both levels say it is working much better and it is much more fair now that it is advisory.

We routinely hear judges complain that the system needed to be simplified, that, as Judge Newman mentioned, the ways in which it gets complicated also tend to make the guidelines harsher as you keep tacking on penalties for different kinds of factors; that the mandatory minimums are too severe; and that the Sentencing Commission tailoring guidelines to mandatory minimums to encompass them makes the sentences for those crimes that have mandatory minimums too harsh; in particular, the drug and child pornography guidelines are too harsh.

What we hear from many of the district court judges is, "We do care about the guidelines, we want your guidance, but if you

could deal with some of these other problems, both by making them more simple, by sort of fighting back against Congress and issue the drug guidelines that you think should be in effect -- there are going to be cliffs out there because of mandatory minimums, let Congress sort of take the heat for that -- don't keep jacking things up the way that you do; that district court judges will have more respect for your guidelines and they will have more credibility, and that the district court judges will therefore not feel the need to vary as much."

Do you see that, again, understanding maybe the political unrealities of going back to a mandatory system, as a way to get more following the guidelines and less deviance from them?

JUDGE KAVANAUGH: The last part was?

VICE CHAIR CARR: If we have guidelines that district court judges are more comfortable with because the other problems of simplification and dealing with mandatory minimums have not jacked them up so much, then the concern that you have about more deviance

from the guidelines may not, in fact, be true several years down the road.

JUDGE KAVANAUGH: A couple of points in response.

First, mandatory minimums are a separate issue so the question of mandatory versus advisory guidelines is a separate issue.

VICE CHAIR CARR: Except they have affected the guidelines that the Sentencing Commission has promulgated so they are not out of whack with the mandatory minimum.

JUDGE KAVANAUGH: I understand that, but it still seems to me that is an issue that is somewhat logically distinct from mandatory versus advisory guidelines system.

Secondly, to have mandatory guidelines is not to say they should be high or low. The goal of mandatory guidelines is uniformity. That was the goal of the 1984 Act due to the problems that existed before; to reduce the disparities. I think we are seeing more disparities now, and I think we will see even more in the future so I think mandatory guidelines might have a value in preventing those kind of disparities, but they can be

improved as well, and part of that is simplification, broader ranges.

I think most district judges, most judges, would like more flexibility within the range, and that may bring greater support for mandatory guideline systems; simplification, greater ability, maybe the 25 percent rule -- I am not sure exactly how that will play out, but maybe that is a hinderance to proper reform that would have the support of the district court judges as well.

But it seems to me the sole reason, I think, I am concerned about advisory-only guidelines is the disparity that I think we are seeing and going to see more of. That is not to say the sentence should be high, low or where you come out on particular guidelines.

VICE CHAIR CARR: Just to bring you back to acquitted conduct, because this is something my colleagues have heard me say, there are many things that are not obvious about what happens if you take acquitted conduct off the table.

One of them is just the

relationship to relevant conduct in general.

If I am an assistant U.S. attorney and I charge someone with five drug offenses, and for the first one I only have the word of an informant, for the second one I have some surveillance because it is the beginning of the investigation, and transactions three, four and five I have DEA agents wearing a wire. As long as we have relevant conduct out there, I may charge three, four and five and not give the defendant the opportunity of getting acquitted of one and two, knowing that that is still going to come in in terms of relevant conduct.

If I do charge all five, some defense attorney might say to his client, you know, "Normally I would say you can plead guilty, but we might be able to beat number one and two so we are going to go to trial because there are more drugs in those."

I only mention that because while it strikes everyone at first as flunking the smell test, how could you ever take into account acquitted conduct? It is not as simple an issue as just saying, "Okay, we will [take] it off the table."

JUDGE KAVANAUGH: I couldn't agree more that it is not as simple as that. Again, another example, if it were that simple, it wouldn't be done.

There are reasons why it is used, and I know that, and they are strong reasons, and people understand those, but I think in the end they are outweighed by some of the points I made.

JUDGE NEWMAN: Two points. Point one, I just want to fully agree with your thought that the mandatory minimums need not drive the Sentencing Commission's judgment as to what the appropriate sentence should be. I thought the Commission made a mistake years back in building its guideline table on top of the mandatory minimums.

The Congress is a political body. They will react to political pressures.

You are the Sentencing Commission within the judicial branch. What we need from you, even under the era of mandatory minimums, is your best judgment of what the sentence should be for a person who transports a certain amount of heroin or has a certain kingpin role

or a certain mule role.

We, the country, needs your judgment what the right sentence should be.

If you come out below the mandatory minimum, that sends a message the mandatory minimum is too high. Some might think it is too low, but at least we will have your dispassionate judgment so I agree with you on that.

As to the other use of mandatory, and we have to be very clear there are two uses of mandatory here, Judge Kavanaugh in your question was talking about whether the guidelines should be mandatory.

You say, "Well, the district judges are happy at having them advisory."

The effort here is not to make district judges happy or even appellate judges, I might add. If we are happy, so much the better. That is not the objective.

The objective is to have a sentencing system that is politically viable, because if it is not politically viable, you are not going to get it past the Congress so it must touch first base and be politically viable.

But in the end, whether it is good or not depends on whether it makes sound penological sense, whether it is a good way to administer criminal justice.

If the system is mandatory in its application, but is sufficiently flexible in the way the guidelines are structured, and the departure authority is adequate, in penological terms there will be virtually no difference between a mandatory system and an advisory system.

The judge will calculate the guidelines under either system, the judge will have departure authority under either system.

If there is enough flexibility in the mandatory system, the outcomes will be, for the most part -- there will be outliers -- for the most part, it will not be different than the advisory system.

Politically, if making them mandatory but simple is the way to work out a package that is politically feasible, then I think it is something you ought to consider very seriously.

ACTING CHAIR HINOJOSA: Thank you

all very much.

COMMISSIONER FRIEDRICH: Judge Kavanaugh and Judge Newman, if the Commission were to take your advice and create a binding, more simplified system, [and] succeed in doing that, have either of you given any thought to what the appropriate standard of appellate review should be? Should it be the deferential abuse of discretion standard that exists today, and the pre-PROTECT Act reasonableness standard, or should a more rigorous standard of review be applied on appeal?

JUDGE NEWMAN: I guess I would want to see what the system was before I voted on how a court should implement it and review it, but taking the question in your terms, if it were generally simplified, I am not sure you are going to get away -- you are always going to have the issue of did the judge start with the right guideline. That is sort of a yes or no decision. If it is right or wrong. If it is wrong, it is going to be sent back.

On the issue of whether the sentence is too high or too low, substantive, what many courts call substantive, the word

"reasonable" is going to be in the articulation of the standard no matter what else we call it.

If you say abuse of discretion, you will then drive courts to looking at different bodies of law in which abuse of discretion is somewhat strict, and in [] others [in which] it is very lenient.

I think what is going to happen is, no matter how you verbalize the standard, and I think reasonableness will always be part of it, in the end you will develop something of a common law of sentencing, the way the British have lived with it for decades, and you will build up a body of case law.

One sentence that is thrown out because it was too high, whether it was called unreasonably too high, abuse of discretion too high or some other standard, it was too high.

And then the district judges, at least in that circuit, and maybe the Supreme Court if they took it as a national issue, would say, "Oh, in that kind of case it is too high; in some other case, government appeals, that kind of sentence is too low."

You will develop your benchmarks

of what is too high and what is too low by outcomes, I think, more than the articulation of the standard. If I had to have a standard, I think reasonableness is going to be in it no matter what else you call it.

JUDGE KAVANAUGH: I would just add, I think in a simplified system it would go back if it were mandatory to no appellate second-guessing of the district court's choice of a sentence within the range so conclusively reasonable if it is within a probably devised range based on analysis of the offensive conviction and offense characteristic.

As to the legal determinations, de novo and applying the law to facts, the standard was due deference before, which is a little bit hard to apply, but if it is more legal it tends to be more *de novo*, and if is more factual, it tends to go to clearly erroneous type of review.

I think your question went to would we second guess the sentence within the range if there were broader ranges or simplified ranges, and the answer is no.

ACTING CHAIR HINOJOSA: Judge Howard, Judge Fisher, would you want to add

anything?

JUDGE FISHER: I would concur with what Judge Kavanaugh has just said. I think you would significantly lessen whatever remaining role the appellate courts have in review, and I think you would -- perhaps you may want to look up [what] Pennsylvania has done, called presumptively reasonable sentences, which really has led to very few sentences being overturned over the 25 years.

ACTING CHAIR HINOJOSA: Thank you very much. We took more of your time than you bargained for.

Instead of a 15-minute break we will take a 5-minute break.

(A recess was taken.)

ACTING CHAIR HINOJOSA: Next we have a “View from the District Court Bench”, and we are very fortunate to have judges from the federal district court from this area.

We have the Honorable Richard Arcara, who has been the chief judge of the U.S. District Court for the Western District of New York since 2003. He has been on the court since 1988.

He has also served as an assistant U.S. attorney in the Western District of New York from '69 through '73, when he was first assistant U.S. attorney in that district, and then was the actual U.S. Attorney for the district from 1975 to 1981.

He received his bachelors degree at St. Bonaventure University and his law degree from Villa Nova University.

Next we have the Honorable John Woodcock Jr., who is a judge in the U.S. District Court of the District of Maine where he became the chief judge of that district court this year, and he has been on the court since the year 2003.

Prior to that he was in private practice where he also served part-time as an assistant district attorney in Maine.

He received his bachelors degree from Bowdoin, his masters degree from London School of Economics, and his law degree from the University of Maine.

Then we have Judge Denny Chin, who has been a judge for the U.S. District Court for the Southern District of New York since 1994,

and has been recently in the news. Prior to that he served as a law clerk to Judge Henry Werker in the Southern District of New York. He was in private practice and served as an assistant U.S. attorney for the Southern District of New York. He also serves as a part time professor at Fordham University School of Law, and he holds his bachelor's degree from Princeton and his law degree from Fordham so we are very fortunate to have all three of them, and we will start with Judge Arcara.

JUDGE ARCARA: Good morning, Mr. Chairman and members of the Sentencing Commission. I want to thank you very much for inviting me here to make my remarks at the 25th anniversary of the Sentencing Reform Act. I am honored to appear before you to offer my "View from the Bench" on the state of sentencing jurisprudence post-*Booker*.

I feel like I am really getting a little bit older here. I may be one of the few speakers that testified back in 1986 before the Sentencing Commission.

At that time I was the president of the National District Attorney's Association.

I was serving as the president, and the Commission invited the National District Attorneys Association to give input on the guidelines, and I remember quite vividly, and needless to say I was probably somewhat nervous appearing before the Commission in D.C. circuit, D.C. court -- I was in the courtroom there, and there were a number of judges, district judges, that were sitting off to my left, and I was giving a strong argument, proponent of the guidelines and how valuable they would be in the future because of the unwarranted disparity that I had seen when I was the U.S. Attorney in Buffalo.

I can tell you quite candidly, I was getting the evil eye from those district court judges, because they were not well received at that time.

I think that has changed dramatically, because most of the judges who are sitting today have grown up with the guidelines. I, on the other hand, had a couple of years where I was [a judge] pre-guidelines, and I think that they are certainly a very valuable asset to district court judges.

I would like to begin by commenting on how the advisory guidelines after the *Booker* decision has changed at the district court level.

We are the ones that are really under the microscope every day by the appellate courts in what we do.

Perhaps the greatest benefit from the *Booker* decision has been the return of sentencing discretion to judges.

I know some of my colleague, and I read some of the transcripts of some of the other proceedings, and you now had the pleasure of hearing four very distinguished appellate court judges, and Judge Newman in particular who I am very familiar with -- he always took a high interest in the guidelines right from the very beginning, and certainly many of his opinions helped us in the district court level.

Much of the remarks I am making now you probably have heard them, but I think they are important to repeat, and I hope you will bear with me.

I am in agreement with many of the comments that were made earlier. I do not agree

with Judge Kavanaugh on mandatory guidelines.

Permitting judges to consider the factors in 3553 and impose a sentence that is just and fair in all circumstances is, I think, tremendously beneficial to the parties and the public.

I believe the guidelines in their advisory state continue to serve a very, very important function. The systematic approach provided by the guidelines provides judges with an understanding of what is a fair and just sentence for the criminal conduct at issue in a particular case, and the task of imposing a sentence is, by far -- and I think this has been said many times by some of my colleagues -- a very difficult job we have as district court judges.

I always thought from my prior background that it would be quite easy to impose a sentence, put the person in jail for the rest of his life, coming from a prosecutorial background.

That is not the case. We have much more personal contact with an individual when you are sentencing someone than maybe when

you were prosecuting an individual.

There you are sitting there in judgment, there is the family out there waiting for a sentence, and there is a lot of anxiety in the courtroom at that time.

I believe all of us at the district court level take this very seriously.

First, we need a very complete and accurate picture of the criminal conduct at issue, which is the information that is normally provided from the probation office and from the government.

Then we need a complete picture from the defendant, the nature of the characteristics of the individual, his or her family history, the extent of the remorse, which obviously is a very important factor, and any other mitigating circumstance that may be available, and that is ordinarily performed by the probation office and particularly defense counsel.

But another crucial piece of information that is needed is what is provided by the Sentencing Commission guidelines, how the information about the sentence that we are

considering compares with the overall sentence that is being recommended or suggested for this particular type of conduct.

For me this puts things in a better context. It helps me assess whether the sentence that I am considering is in step with the sentences that are recommended for the conduct at issue, and where it is not, it causes me to pause and consider whether the circumstances that I believe warrant a different sentence are sufficient to justify a deviation from the norm.

All of this is to say that my view of *Booker* has improved the quality of the sentencing jurisprudence.

On the one hand it provided judges with the authority necessary to impose a sentence outside the guidelines range when the circumstances so warrant, without being limited to the more strict departure that existed in pre-*Booker*.

On the other hand, *Booker* mandates that judges continue to consult with the advisory range before imposing sentence, and I believe this serves a very important check --

reminding judges that uniformity and unwarranted disparity are also important sentencing goals.

That is what this is all about, not disparity -- I have heard that word used -- it is unwarranted disparity.

In my opinion, these two elements together have led to the imposition of more reasoned and just sentences.

Now, we heard this a lot this morning, and I am going to repeat it again, and I think it is important, and I know you are aware of it, but I am going to talk about it again.

And that is the simplification of sentencing, and I think imposing a sentence, I said we take it very seriously.

As of last week, I had over 230 criminal cases on my docket consisting of over 340 defendants. This is in addition to my civil cases.

The reality is that preparing for and imposing each sentence is a very time-consuming task, and post-*Booker* the task has become even more consuming, in my opinion.

Before *Booker*, judges were

required to perform guidelines calculations, resolve objections and address any applicable departure motions.

Now, in addition to that, the judges must address motions for a non-guideline sentence under *Booker* to determine whether a sentence outside the guidelines range is appropriate.

In my experience, a motion for a sentence outside the advisory range is made in almost every case, unless it is precluded by a plea agreement.

I mention this only because I think it is important for the Commission and for the appellate courts to be mindful of this reality in determining how extensive an explanation will be required for any given sentence.

Regardless of whether a sentence is within or outside the advisory guideline range, judges, I believe, district court judges, should not be required to render a treatise justifying the reasons for a particular sentence.

A brief explanation as to the

basis for the sentence should suffice, particularly where the sentence being imposed has been agreed to by the defendant and the government in a plea agreement.

This ties into another comment that I have regarding the highly detailed findings that need to be made before arriving at the advisory guidelines range.

The number of specific defense characteristics applicable to each type of crime seems to be increasing. When the guidelines were mandatory, the Commission undertook considerable efforts to address all of the different circumstance that might warrant an increase or decrease in the base offense level so as to ensure uniformity in sentencing.

But now that the guidelines are advisory, I question whether so many sentencing enhancement determinations need to be made before arriving at an advisory guideline range.

Let me give you an example: a bank robbery case. Before the sentencing, the court is required to determine whether taking the property was the object of the offense; whether a gun was brandished, discharged or

otherwise used; whether any other dangerous weapon was possessed; whether a death threat was made; whether anyone was injured, and, if so, the extent of the injury; and whether a person was abducted or physically restrained.

The court is also required to determine the amount of loss with the same degree of certainty.

Where a weapon is used, the court is required to apply three levels if a dangerous weapon was possessed or brandished, four levels dangerous weapon was otherwise used, five levels if a firearm was brandished, six levels if a firearm was otherwise used, and seven levels if the firearm was discharged.

Each of these specific enhancements requires the court to not only look at the facts, but also to the applicable case law to see how the courts define the terms "used," "brandished" and "discharged."

The incorrect application of any enhancement is reversible error, at least in the Second Circuit.

Certainly the existence of the numerous specific offense characteristics made

sense when the guidelines were mandatory. This would serve to reduce unwarranted disparity. But now that they are advisory, I question the utility of requiring sentencing courts to make so many factual determinations before imposing sentence.

In my view, requiring a sentencing court to determine whether a gun was brandished so that a five-level enhancement would apply, or whether it was otherwise used so that a six-level enhancement would apply, unnecessarily complicates the sentencing process.

What is important is the entire context surrounding the use, brandishing or possession of the weapon, and whether such conduct warrants a four- or seven-level enhancement, should be left to the sound discretion of the sentencing judge.

I would offer this as one illustration of how restructuring the guidelines might [make] sentencing proceedings more efficient post-*Booker*, without compromising the overall goal of eliminating unwarranted disparity.

Judge Newman today quoted -- and I am going to quote it again, because I thought it

was important -- the Commission noted in its initial guidelines that a sentencing system "tailored to fit every conceivable wrinkle of every -- each case can become unworkable and seriously compromise the certainty of sentencing and its deterrent effect," and it goes on, and Judge Newman quoted further. I won't repeat that.

Perhaps in light of *Booker*, the Commission should revisit the issue of creating broader subcategories.

You have heard this time and time again this morning, and I don't know that I want to keep repeating that.

I add that although the Commission initially rejected this argument years ago, a broad category system out of concern that it would have risked correspondingly broad disparity in sentencing, you might be wise to reconsider it.

Another area that I highlighted -- well, I want to mention another point, and it is in my statement, but I think it is worth noting, and that is in the area that relates to the parsimony clause of 18 U.S.C. 3553(a), which

instructs a sentencing court to impose a sentence that is "sufficient but not greater than necessary to meet the objectives of sentencing."

This provision was quoted to me as the reason why I should impose a sentence below the advisory guidelines range.

Many defense attorneys take the position that a sentence within the guidelines range is greater than necessary to achieve the purpose of sentencing and cite this quote, and I think it happens in almost every case that I have, and I think it would be helpful for the Sentencing Commission to provide some guidance as to how this clause interacts with the guidelines and the other 3553(a) factors.

When you hear that, you can see it on the expression of the defense lawyers saying like, "Judge, you don't have to do any more than is greater than necessary," and it is quoted so many times to me that it doesn't mean anything to me anymore. It is just a phrase. I listen to it and just dismiss it, because it is used so often.

I guess the defense lawyers feel

that they have an obligation to say it in the hope that the judge will give a sentence lower than the guidelines range, even though they agreed to the guidelines range during the plea agreement.

In the plea agreement it indicates that you won't ask for a sentence lower, but then they put this phrase in, and obviously the purpose of it is you give a lower sentence than maybe the guidelines and what they agreed to.

Another area where I think we get these incremental enhancements -- and I am not going to go into it. This is in my statement -- that is in the area of child pornography.

I probably have one, maybe two child pornography cases a week. I never even knew that this stuff existed until maybe about three, four years ago, but there seems to be more and more cases. It has a high priority with the FBI, and they are very difficult cases to get.

In every case I have, the enhancements are always there in every case, whether it is masochistic misconduct, whether it is on a computer. Every one I did is on a

computer. It automatically gets a higher level.

It just seems to be, as we talked about earlier, there should be some simplification in this area.

No one wants it in any way at all or doesn't understand the seriousness of child pornography. It is something that I had no idea that existed to the extent that it does in our country, and I guess the computer brought this out.

It is certainly one of those areas that you have an individual who, let's say, is somewhere in the area of 60 years of age, whatever, is involved in this kind of activity, and he is an individual that deserves a very, very tough sentence; and then you get someone who is 17, 18, 19 years old who has a computer at home, and based on his curiosity, whatever, is looking at this stuff, and he is facing sentences that are really very, very harsh.

I think the circuit courts are very sensitive to this; that in many of these cases, maybe the sentencing range should be lower, and the district court should have more discretion in this area. I guess we have it now

with *Booker*.

I feel very uncomfortable following the guidelines, putting a 17, 18 year old young man in jail for an extended period of time.

You got the family out there. There [are] 20 people sitting out there, they are all out there crying, and you are trying to give a just sentence, and the family is in total shock that their son or their brother, whatever, has been involved in this kind of activity.

I think that is something I would like you to take a further look at; again, the simplification argument.

Another area -- and I guess I am running out of my time here -- and this is the area -- I don't know how the Commission can address this, but that is the prosecutorial influence over sentencing.

I think the sentencing guidelines place a great deal of emphasis on, for example, the amount of drugs that are involved, and, unfortunately, the consequences has been to cause the government and defense counsel to engage in sort of fact bargaining regarding the

amount of drugs to be included in the relevant conduct.

I know the Department of Justice has a policy against fact bargaining, but the simple fact is that it exists, and I believe this is a byproduct of the emphasis that the guidelines place on the quantity of the drugs over other equally important factors such as the defendant's role in the offense.

I believe that this leads to the prosecutor -- and I guess rightfully so -- it is an avenue where there is manipulation of the guidelines, based on my experience, and which I believe causes unwarranted disparity out there in the real world of sentencing.

I also think that with regard to the substantial assistance motion, which I think was a very important aspect of the guidelines -- I know when I testified back in 1986, there was a limit that the original draft in the guidelines had that it would be no more than 25 percent, and at that time I was a prosecutor, and I argued to the Commission that you have to give more than just a 25 percent reduction.

When you are dealing with

organized crime, when you are dealing with major drug dealers, someone who is facing 30 years in jail says, "Well, you know, I can knock off about six, seven years if I help the government, but, again, my life is in danger, my family's life is in danger; it isn't worth it to me to cooperate with the government."

I remember talking to Judge Wilkins, and I mentioned to him, "You have to give us more latitude," which they did, which I think is very responsible today for the large number of pleas that we get in our district court, 98 percent rate of pleas, and a lot of it deals with the 5K1s, particularly the drug area and the area involving guns.

Again, I think that is an area that I don't know how the Commission can deal with, but it is certainly something that is out there, and that we have to deal with in our world.

To summarize, ladies and gentlemen, I believe that the Advisory sentencing guidelines do provide great assistance to the district courts in giving us an idea, a context as to what a sentence should

be, and I believe it does help in the world of uniformity, and I think it helps even under the post-*Booker* sentence decision.

I want to thank you again for this opportunity to provide you with my comments and my observations, and thank you for inviting me here.

ACTING CHAIR HINOJOSA: Thank you, Judge.

Judge Woodcock?

JUDGE WOODCOCK: I too join in thanking members of the Commission for the opportunity to be here today.

Although, Judge Hinojosa, you were very kind in your remarks, you omitted one essential part of my background, and that is my sister Elizabeth was a Supreme Court fellow years ago for the Commission and so around Maine, I tend to be known as Judge Woodcock, but around the Commission, I am Libby's brother.

ACTING CHAIR HINOJOSA: That is definitely true.

JUDGE WOODCOCK: I think it is remarkable how far we have come in 25 years. The Congress created the Sentencing Commission

in 1984 based in large part on the perception that the phrase that is above you here today, "Equal Justice under the Law," was not initiated in this country; that it was an aspirational goal, and that we had not fulfilled the promise; that it mattered too much, all too much, which judge you drew in terms of the sentence you received.

There are regional differences, racial differences, gender differences and other differences which are impermissibly infiltrating the sentencing process.

Congress directed the Commission to create a guideline that would provide a national analytic uniformity for sentencing, and that was extraordinary challenging, but somehow that guideline was created, and it has changed, I would submit, the way we think about sentencing, and I think much for the better.

We are now closer to the aspirational goal and the constitutional mandate of equal justice under the law.

Now, the *Booker* case and its progeny have tested the effectiveness of the guidelines as a national standard for

sentencing.

What I would like to talk about briefly is what has not happened post-*Booker*, the dog that did not bark, why it did not happen and discuss some implications with the Commission.

Before *Booker*, the conventional wisdom was that sentencing judges in this country did not like the guidelines; that they rankled with the restraints that the guidelines imposed, and they looked fondly back at the good old days when they could act as judges and impose a fair and just sentence; that the guidelines forced them to engage in endless arguments over subtle distinctions, reducing the art of judging to an act of calculation; and that once free from the guidelines, the judges would do what judges like to do best: Exercise judicial discretion.

But what has happened since *Booker*, *Rita*, *Kimbrough* and *Gall* has defied conventional wisdom.

Although the statistics can be analyzed in many ways, somewhere between 83 and 90 percent of the sentences fall within the

sentencing guidelines, and once certain outliers such as child pornography are removed, percentage of guidelines compliance is even higher, and upward variances are at a paltry one percent. Why?

I think there are a number of reasons. The first could be judicial inertia. Judges, despite *Booker*, are arguably simply continuing with the familiar, but that credits judges very little, and I think the main reason is the desire to avoid unwarranted sentencing disparities, which is, of course, a 3553(a) factor; the thought that the same defendant with the same criminal history who has committed the same crime should get roughly the same sentence regardless of the court before whom he appears.

The third, however, is another factor, and that is the convincing power of numbers.

We have been taught early on that there is a right answer to a mathematical equation, and when we work through the guidelines and we arrive at an answer as reflected in the sentencing grid, we have a tendency to credit the result.

Fourth, it seems to me the guidelines have thoroughly permeated our sense of what is a fair and just sentence.

We think we know what it is a felon-in-possession with a criminal history category of II should get as a sentence, because we have sentenced a number of those people using that guideline.

The fifth is that the specificity and comprehensiveness of the guidelines tends to predict, and to some extent preempt, the generality of the 3553(a) on analysis.

3553(a), for example, may tell us to consider the nature and circumstances of the offense, but if we have already considered the salient aspects of that offense, we have already considered what we have been directed to do.

The sixth is appellate review, and the function of appellate review.

It is much more likely for a sentencing judge to be reversed if he or she has made a mistake in calculation under the guidelines, and a mistake in judgment under 3553(a).

As a consequence, taking into

consideration appellate review, a district court judge refocuses on the guideline.

The last is that 3553(a) represents a sentencing cliff; that once you walk out of the confines of the sentencing range, where do you go? Do you go higher, do you go lower, and how much lower do you go assuming it is lower?

Once you begin to consider the generality of the statutory directives, we run the risk, we fear, of reinfusing into the sentencing guidelines the very regional, social, philosophical and religious differences that were unacceptable in 1984 and are even more so today.

So the judges, as a practical matter, start with the guidelines, and often after applying 3553(a), return to the guidelines to impose a sentence.

With that said, it seems to me the *Booker* legacy does free sentencing judges to do what is fair and just in a case where the guidelines do not properly address the unique circumstances of the crime and the defendant, but they have tended to operate more as a safety

valve than what would have been anticipated post-*Booker*.

This leads me to a couple of thoughts. One is that the sentencing judges have given the Commission a road map, it seems to me, as to the area of variance with the guideline that the Commission would be well-advised to review -- we have heard them today, those two areas are mostly drug cases and child pornography -- and determine, reevaluate whether the Sentencing Commission got it right.

The second thought is this: I think, and I would respectfully suggest, that the Commission should re-examine its emphasis on the guidelines alone and run to a different task, one that it is statutor[ily] required to perform, and that is to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy.

In many ways, that is a more difficult task than creating the guidelines was. In effect, the Commission should be and could be, it seems to me, a national advocate for sentencing policy.

We know under the guidelines how to calculate the right sentence, but do we know that the sentence is right?

And there are very few people in our political process who are going to speak for reductions in sentences.

Now, the Commission as I said, has the statutory authority to do this. It is uniquely positioned to do it. It has recognized expertise in sentencing. It alone can call upon, as it is here today and tomorrow, members of the federal judiciary, probation, the Justice Department, the defense bar, law enforcement, academia and, I would add, the Bureau of Prisons.

It has over time amassed an impressive set of empirical data. It can be mined and analyzed, and it has constituted the political balance and speaks with authority, and it has retained an excellent staff.

It seems to me that the Commission has an obligation, and it has a directive, to challenge the assumptions that underlie our sentences, to challenge what we have assumed is correct: The impact on the defendants, the

impact on the victims, the impact on our community of our current sentencing policy.

I know the Commission is engaged in this work. It seems to me, and I am urging you to continue to press ahead, to re-examine the basic assumptions that underlie our sentences even when the results run against conventional wisdom and against the popular grain.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge.

Judge Chin?

JUDGE CHIN: Judge Hinojosa and members of the Commission, thank you for this opportunity to share my thoughts with you, and welcome to New York City.

Last week I presided over one of the most anticipated and closely watched sentencings in recent years in the Madoff case.

The sentencing was scheduled for a Monday, Monday morning, and news trucks started jockeying for parking spots outside the courthouse over the weekend.

By early Sunday afternoon, there

were fifteen news trucks up and down Worth Street trying to claim the best spots for their reporters for Monday, and Monday morning by six o'clock there were lines of media and victims waiting to get into the courthouse for the proceedings, which were scheduled for 10:00 o'clock.

In the days since, since the sentencing, the sentence I imposed has been dissected and debated both in the popular press and the academic media.

I think the discussion has been healthy: What are the goals of punishment? Did the sentence further those goals? Should helping victims heal be a goal of punishment? Is a financial crime such as securities fraud really evil?

There has been much discussion about whether my use of the word "evil" in describing the crime was appropriate.

Is there any point to a sentence of years far longer than a defendant is expected to live, and is such a sentence merely pandering to the public?

Of course, we are here today not

to take on these questions, but to discuss the sentencing guidelines, but the Madoff case underscores how difficult the process of sentencing a defendant is.

Judge Arcara put it well, I thought. It is a very personal process and very personal decision.

Even when you have the right answer in the grid, it is still hard to impose the sentence.

The challenge is not just to decide the appropriate sentence to impose, but to preside over the proceedings in an efficient manner in a way that will give parties and victims a fair opportunity to be heard while maintaining the dignity and decorum that the public should expect from proceedings in our courts.

I have been sitting now for almost 15 years, and I never had a challenge of sentencing under pre-guidelines law. It must have been extremely difficult. I don't know that I would describe them as "the good old days." I have heard some of more senior colleagues refer to it as a free-for-all.

From the time I started, I found the guidelines to be enormously helpful. They provided a useful starting point for me, and in the vast majority of cases, I felt I had sufficient flexibility to depart if the circumstances warranted, including, for example, the departure based on the combination of circumstances.

On some occasions I did find the mandatory minimums to be unduly restrictive, and I join my colleagues who have expressed the view that mandatory minimums sometimes result in unjust sentences, as they often require judges to ignore sentencing factors that usually are an important part of the mix.

On the other hand, we have some additional flexibility through the safety valve and the 5K1 departures, and I think Judge Newman is correct, a mandatory system isn't so bad. There is sufficient flexibility.

It was a real challenge for me as sentencing law evolved so dramatically with *Apprendi*, *Blakely* and *Booker* and the other decisions that followed, but I have to say it was a lot of fun to be there on the cutting edge

applying these cases as they were decided. Seemingly on a daily basis between the Supreme Court and guidance from the circuit, the law seemed to be changing every day, and we were trying to determine what the cases meant and how to proceed.

As the law in this area has continued to develop, we district judges have gained even greater discretion and flexibility, and the Supreme Court has now held that the guidelines are not even presumptively reasonable, and that district judges are free to reject a particular guideline based even on personal policy disagreements.

One could argue under these circumstances that the guidelines have lost their significance.

In my view, however, the guidelines still play a critical role. They still provide an enormously helpful starting point, for it is comforting to be able to begin with an empirically-based heartland range which is drawn from the collective wisdom and experiences of colleagues from all around the country.

In addition, the required analysis frames the issues in a way that makes it more likely that we will reach a fair and just result.

Finally, the goals of the guidelines, honesty in sentencing, reasonable uniformity in sentencing, and proportionality in sentencing, are still laudable, and the guidelines continue to advance these goals.

The guidelines are now as they should be: true guidelines, advisory in nature, rather than mandatory rules. They are something to which we should give, appropriately, fair and respectful consideration.

I do believe that post-*Booker* is much better than pre-*Booker*, and I am confident that most, if not all, of my colleagues in the Southern District of New York would agree.

We have more [inaudible] flexibility to do what we are supposed to do -- to judge -- and we are not limited to merely applying mechanical rules and doing mathematical calculations.

Notably, sentencing is more difficult post-*Booker* than before when the guidelines were still mandatory. Back then a

judge could hide behind the guidelines and say, "Sorry, my hands are tied. There is nothing I can do." Now we can't say that, and instead we must make the hard decisions.

One by-product of *Booker* is that defense lawyers are now talking longer, but I think that is a good thing, because it means that defense lawyers are trying harder, as they now have a greater chance of getting a below-guidelines sentence for their clients.

There are a few areas that I wanted to mention specifically, briefly.

The first is the question of departures versus variances. Judge Castillo posed a question earlier, are the departures obsolete.

I wonder whether there really is a need for both. Very few lawyers even ask for departures anymore, and when they do, they usually pair the request with a request for a variance and do not distinguish between the two.

I know the Sentencing Commission has encouraged district judges to rely more on departures and less on variances, but to me it seems inefficient to do a departure analysis

first under the stricter standards for departures, and then to do the analysis again in the more flexible context of a variance.

I also think it is more intellectually honest in most cases to consider the mitigating factors in the context of a request for a variance rather than to force the issue in the narrower confines of departures.

Although departures and variances clearly are distinct, the courts have recognized that at times the same analysis must be applied to both.

The second area I wanted to mention is a technical issue that arose in the Madoff case. What happens when there are multiple counts of conviction? The guideline calculation calls for a sentence of life imprisonment or a range of a fixed term to life, and no count carries a possible sentence of life.

The relevant guideline section is section 5G1.2(d), but there is some ambiguity in the language.

The section tells us to impose consecutive terms of imprisonment to the extent

necessary to achieve the "total punishment," but what is the total punishment? And there isn't guidance on that.

Fortunately for the Madoff case, we found a Second Circuit case that was right on point, because the guideline range or the sentence called for by the guidelines was not a range but just life, and there is a Second Circuit case that says you stack the maximums for all counts to reach the total, and that is the total punishment.

But I did have another sentencing the same day as the Madoff case in a child pornography case, and there the guideline calculation called for a range of 360 months to life.

The two counts in question had statutory maximums of 30 years and 20 years respectively, and thus life imprisonment was not a possibility.

There I had to determine the total punishment, but, frankly, I just didn't know how to do so. I could not find any guidance, because I think the language suggests that one should pick a single number as the total

punishment, but it was unclear whether that number should be 30 years or 50 years, stacking the two together, or something in between, and it was unclear how I should make that determination so I think that section should be clarified.

The third area I wanted to mention is the early disposition program under section 5K3.1 of the guidelines.

Under this section, a court may depart downward up to four levels on motion of the government if the district has an early disposition or fast-track program.

We do not have a fast-track program in our district, although we do have many illegal reentry cases, which is where this departure is most often applied in other parts of the country.

Some defendants have argued in our cases that we should impose a below-guidelines sentence to account for the disparity that results because of the unavailability of this fast-track program in our district.

In preparing for today, when I looked at the numbers, I saw that for the

country as a whole, seven percent of all sentencings applied a government-sponsored below-guidelines sentence on this basis. In other words, seven percent of all sentencings apply to departure based on the fast track, and yet it is not available to defendants in our district, and this is a significant disparity that is inconsistent with the goals of the guidelines, and I think it should be addressed.

Some judges in our district have granted variances to account for this disparity, and I think our district I know is high in terms of variances, and I think this is one of the reasons why.

Thank you for giving me this chance to share my thoughts with you, and thanks to the Commission for its continuing efforts to help make the difficult task of sentencing a little bit easier.

ACTING CHAIR HINOJOSA: Thank you, Judge.

We will open it up for questions.

COMMISSIONER HOWELL: Thank you all for being here.

Judge Woodcock, I just wanted to

say that I think this Commission has also looked at the statutory mandate that you also cited about advising Congress about sentencing policy more broadly, and I just wanted to point out that in our priorities for this, for the next amendment cycle that we have issued for comment, one of them is to review the child pornography offenses and possible promulgation of guideline amendments and/or report to Congress as a result of such review, and included in that report, some of the things that we are contemplating includes a review of the incidents of and reasons for departures and variances from the guidelines sentences, and more to your point, a compilation of studies on and analysis of recidivism by child pornography offenders, which I think is the kind of policy research you are also talking about to help advise Congress about what are the recidivism rates that might warrant sentences of a particular length, because child pornography sentences are quite lengthy, and recommendations to Congress on any statutory changes that may be appropriate.

I just wanted to point that out to all of you, that the Commission keeps close

track of where there are significant variances, and child pornography is certainly one that I think many judges have told us, both directly and through our review of departure and variance rates, that is an area where the sentences are quite high and they are opting for sentences below the guidelines. That is one area that we want to focus attention on.

At the same time, and this goes back to something we talked about with the prior panel, one of the policy decisions the Commission has made with regard to how we address mandatory minimums, and whether or not there should be linkage or de-linkage between the guideline offense levels and the mandatory minimums, is that generally the Commission has opted to link guideline offense levels to the mandatory minimums for a number of reasons, and I'll just name a couple of them: One, proportionality within the guidelines and avoiding the cliffs, and part of the equal justice under the law is ensuring proportionality between -- in sentences between similarly situated defendants and avoiding the cliffs that de-linkage might provoke.

I am interested in what your views are on whether that is a policy decision that the Commission should reconsider. Certainly we heard from the prior panel, Judge Newman thought it was a mistake when the Commission before us linked mandatory minimums and the guidelines.

I am just curious about what your views are.

Certainly the mandatory minimums that are applicable to child pornography offenses have helped -- have resulted in higher guidelines.

What is your view on the linkage issue?

JUDGE WOODCOCK: Let me first talk a little bit about child pornography.

I think the basic assumption I gather from a calculation of the guidelines is that these unfortunate defendants are virtually irredeemable. They represent an ongoing lifetime risk to children. That may be true, and it may be true particularly to some defendants, but I don't know it is true of all defendants.

To some extent, the child

pornography has become our modern day scarlet letter.

My thought about how you approach that, along with mandatory minimums, is that Congress has a constitutionally imposed responsibility to do what it feels best in the interest of this country in terms of mandatory minimum.

We wish occasionally they were not there, because it seems to us when we look at an individual defendant across the courtroom, that they are not fair and just.

My thought about it is that generally I would try and avoid, if I were in the Commission's shoes, a confrontation with Congress over congressional authority. I don't think it is going to bring you down the road very far, because ultimately they have the final say.

What I would urge you to do, and I am sure you do this, is to open the lines of communication with the appropriate congressional committee. It is hard work, it is terribly hard work. You have to have ongoing continuing staff interaction -- it really takes place at the

staff -- between this Commission and the appropriate staff members of Congress so that not in a sense that you are educating them, but you are listening to them as well in order to avoid the imposition of congressional mandates that you know, because of your empirical determinations, are not in accordance with the best sentencing practices.

And you do have, I might add, now an enormous amount -- you have so many sentences that have gone on that you calculated, and you have empirical data to back up your sense of what is right and what is wrong, and it seems to me that if you have those lines of communication open, as open as they can possibly be, that you might deflect Congress from doing what it has the authority to do but should not do in your best judgment.

JUDGE ARCARA: In the area of child pornography -- I think I alluded to this earlier -- it seems like in many of the cases, at least in my experience, if not most of the cases, the sentencing is imposed is right at the statutory maximum because of all the enhancements under the advisory guidelines. it

just seems to me it is almost a built-in unfairness that in almost every case, because of all the enhancements, we are right up to the statutory maximum.

I really question whether Congress really intended that, and I have done a lot of research and reading on the child pornography, because I am dealing with it so often, that it seems to me some of those cases where I am up in the advisory guideline range at the statutory maximum, that is this really the fair and just sentence, to put a young person in jail for really a very, very lengthy period of time?

In my experience, it is a very difficult thing for me to do, be in that courtroom and to have that family there, and they have this young man out there -- it is usually a young man -- who is absolutely decimated because of the embarrassment to his family -- his family is in a state of shock -- and here this person is going to jail for 10 or 20 years. That is a long time.

COMMISSIONER HOWELL: We are hearing you.

JUDGE WOODCOCK: If I could just

also respond, I think that regarding child pornography, a lot of us analyze child pornography in a way that is not reflected in the guidelines at all, and when I am talking about that, I am talking about one of the ways I look at a child pornography case is when you look at pornography, how young are the victims? Is this a victim who was 15 years old or 12 years old, or is it a victim who is one year old? That, of course, is going to change your attitude toward what you see.

The second is, what is the nature of the pornography? Is this pornography that is simply a picture of somebody, or is it a picture of somebody engaged in a sexual act?

And there are a number of other factors that I look at that don't have anything to do with the guidelines.

I also look, for example, at whether or not there is any indication that the defendant has been using the Internet to approach victims.

If a person has not, has just been sitting in a room downloading pornography, that may be one thing.

If he is reaching out and actually trying to attract victims, then I think of that as being much more serious.

The guidelines don't deal with this at all so I see these as being an area the Commission really needs to look at.

JUDGE CHIN: If I could just add something on the area of child pornography, I was struck when Judge Arcara said he sentences perhaps two defendants in these cases a week, and it shows you the influence of the charging decisions.

In my 15 years, I have had perhaps five child pornography cases total; just very, very few.

I have only had one go to trial, and in the one that went to trial, I actually had to see the pornography. When you actually see the materials, you can understand why there is so much emotion in Congress; because the videos that I saw and that the jury had to see were repulsive and despicable, and this was not a young man. The defendant also was convicted of actually producing child pornography and molesting a 5-year old in the process so it was

an easy case sentencing-wise.

I haven't had the ones where you have a 17-year old who is looking at 20 or 30 years.

VICE CHAIR SESSIONS: Judge Woodcock, you made a really interesting observation about our role with Congress. Frankly, that is one of the most significant functions we play – [to] try to ameliorate directives through Congress. We are in a very political world, and we are in particular almost at the vortex of the branches of government, all demanding a role in the sentencing function.

I am interested to know -- this is the general policy, and I know it is a very difficult question to ask and to answer, but in *Booker*, of course, the court said the ball is now in the court of Congress.

You know, as I, that various proposals were made after *Booker*. Obviously those were not implemented to this point, but could be very well implemented in the future.

You heard Judge Newman talk about even a mandatory guideline system which may be acceptable to the judiciary, assuming that you

get, if I heard him correctly, a reduction in a number of mandatory minimum sentences. My guess would be it would be in the field of drugs and child pornography, but a reduction in the number of mandatory minimums; elimination, perhaps, of the 25 percent rule, but more flexibility within the guidelines structure so that there is flexibility for the judges with wider ranges, perhaps fewer offense levels, but then ultimately a mandatory system would replace, theoretically, in Congress' eyes, mandatory minimum penalties.

I know Judge Arcara -- we have talked about that many times. You believe that the *Booker* system is the best there is at this point.

I am concerned about going to my next Second Circuit retreat and being bombarded by judges who assault me because I proposed a mandatory guideline system.

My question is, is there a system that you can imagine that would be fair and that would be acceptable to the judiciary that would also be mandatory? Would there be things that you would look for that could possibly be

acceptable to judges? Because you are so -- obviously so vital to the system.

JUDGE WOODCOCK: I would say no, and the reason I say no is because I think the sentencing process is too variable, and I will give you one example.

I don't think, with all due respect to the Commission, that either the guidelines or we as a society have been able to handle mental illness very well.

Many, many people who come before me for sentencing have significant mental illnesses, and if you look, they don't follow the very strict provisions of insanity, and for one reason or another they may not get diminished capacities, but I see a number of people who really, when I take a look at the guideline, the guideline really does not address somebody who is pretty severely mentally retarded and has somehow done something violent.

How do you deal with someone like that? What is the appropriate sentence?

There are other examples we can all think of.

I think the *Booker* safety valve is

an essential component of the sentencing process, and ultimately -- I say this with a great deal of respect for Congress, because they have the constitutional obligation to do what they do -- but the people in this country do not want to be sentenced by their Congressmen. They want to be sentenced by judges, and ultimately I think the people of this country want to have a judge who has the authority to consider the guidelines and the policies that have been promulgated by this Commission, but also to allow the judge who is sitting in the room to make the ultimate decision.

JUDGE CHIN: I guess I would ask, if we go back to a mandatory system of some kind, wouldn't we have a *Booker* problem again? Wouldn't the constitutional issues exist again as to whether defendants would be entitled to a jury trial for these factual findings?

JUDGE ARCARA: Judge Sessions, one thing about mandatory, it was a lot easier to impose a sentence. Sentencings, as you know, are not easy. When you had mandatory, it made life a lot simpler for us. It is a lot more difficult for us today.

In fact, pre-guidelines, I had two years where I was sentencing a bank robber, and he had this probation for 20 years, and talk about just pulling things out of the ear at times in the sentence that was imposed. Mandatory makes it a lot easier, but our job shouldn't be easy. Our job should be difficult.

When you put somebody in jail, as you know as a district court judge also, it is not an easy thing to do.

I was shocked how hard it is for me to do that.

It is always easier, many times, to go to a lighter sentence than maybe a harsher sentence.

The mandatory is easier. If we have it again, I will deal with it again, but right now it makes my job harder, but that is okay. I like it being hard. I don't want to ever feel comfortable imposing a sentence on somebody and saying, "I really feel good putting that guy in jail." It never feels good.

VICE CHAIR SESSIONS: Judge Newman was talking about increasing the discretion within the guidelines ranges, much

broader ranges, but you don't think that would in any way ever be acceptable to the judiciary?

JUDGE ARCARA: That you have a wider range?

VICE CHAIR SESSIONS: If you have a much wider range. That is basically what he was talking about.

I am interested to know, when you said well, maybe you would agree with Judge Newman, I wondered if that is what you meant.

JUDGE ARCARA: You are asking a very difficult question.

VICE CHAIR SESSIONS: That is what judges do, ask tough questions.

JUDGE ARCARA: I don't know the answer to that, I really don't know. This whole area is so gray. We are all stumbling around, let's face it, to try and have a fair system.

There is never going to be a simple way to do this, and I think we have to realize no matter how many studies, how many statistics you get, it is never going to be an easy thing to do, and it is never going to be perfect.

Okay, we are human. It won't be

perfect, but is it fair and just? Under the circumstances right now, I think post-*Booker* it is going to be fair and just. As a society, I think we are going to have a better system than when it was mandatory. That is my view.

Again, mandatory, that is easy. You go out there, you make the calculations, and then where do you want to put it in the range? Okay, you figure out some way to do that. If there appears to be true remorse, plea, it's easy, you usually go with the lower end. I do.

If there is a trial, I will start considering other factors because I learned more about the case.

Mandatory, if that is the wish of Congress -- I hope it isn't, that we go back to that again somehow or other, because I don't know how it will withstand *Booker*, but we will deal with that, I guess, some other day.

JUDGE CHIN: I think ultimately we accept it. We may not like it, but if it is imposed upon us, as long as it is constitutional, we will deal with it as best as we can.

ACTING CHAIR HINOJOSA: Judge

Arcara, I like you sentenced people for five years before the guidelines, four-and-a-half years, and I agree with you about what the system was like before the guidelines, but what I always wondered is the use of the term "mandatory guidelines."

I don't think Congress intended that there would be no departures within what we call the mandatory system, and there was a lot of discretion, just like there is today, under what we called the mandatory system in that judges had to make individual decisions with regard to the fact finding as to relevant conduct, as well as all the other offenses and all the other factors we had to decide. I found it difficult that you still had to go through that whole process.

It was much more open, as you had pointed out, because we were at least telling people what we were thinking about and needed to be convinced about, either mitigating or intensity, and there was a departure availability. It was not prohibited. I think the post-PROTECT Act pre-*Booker* period was more difficult, but post-*Koon* pre-PROTECT Act, we are

not that far from where we are today. Can you tell me about that?

JUDGE ARCARA: I think one thing about the departures, the departures the district court made were scrutinized very carefully by the circuit courts.

ACTING CHAIR HINOJOSA: What situation and what circuit?

JUDGE ARCARA: In the Second Circuit, they looked at it very careful.

The question came up variance and departure, if you had a choice to go either way, variance is a lot easier. You have a much better chance of getting an affirmance. We like to get affirmances; at least I do. Most judges do. I don't want to get reversed; yet again, I don't want to be sitting here paranoid about the fact if I make a mistake I am going to get reversed.

You can't operate that way. You make a decision the best you can. If you are in error, a higher court will take the appropriate action.

The variance is just a lot easier to go that route, and if everyone is happy, that

is the end of it, rather than go through the departure, which if you don't go -- maybe the one side requested it, or the other side, the government, appeals it, the circuit court is going to look at that very carefully.

In a variance you have so many different options. You can use a lot of different factors in there, and I find it a lot easier to do that.

I find also I as a judge sentence most of the time within the guidelines. I think -- I know you can't say they are reasonable, but by and large they are, in my opinion. I find the guidelines in the range many times to be very fair.

The calculations, again, like in the child pornography area, in some of these other things, bank robbery and all that, some of those kind of bother me a little bit, but generally speaking, the number of sentences that I impose every year, I find the guidelines are very, very meaningful, and to be in most instances reasonable.

I know I can't use that as a district court judge. I know that is a standard

for the appellate court, but I find it to be very important, very helpful.

VICE CHAIR CASTILLO: I appreciate the honesty of all of your testimony, but don't you think -- I wasn't going to touch this -- this issue of departures versus variance, don't you think in light of *Booker* that there is a lot of antiquated circuit court case law on departure that is no longer valid, and that if a judge really follows what the Supreme Court is saying we should do in terms of the three-prong analysis, that there is a lot of departure authority that is out there and probably has even overtaken some of its older circuit court case law that is out there?

JUDGE ARCARA: I think you are right. Variance is definitely -- departures are out there, but, as I said, Commissioner, I don't want to get involved in all of that. We are trying to simplify it. When you sentence so many people -- as I indicated in my statement, I sentence anywhere -- I have as many as four a day in addition to doing everything else.

To review a presentence report on the average take an hour, I would say.

Complicated ones could take a lot more time.

I had one this week that I think my law clerks and I, we probably spent six to eight hours trying to work through some of the issues that were being raised, and that is a lot of time in the course of a day.

I don't accept that, because you want to be -- most district judges, in fact, if not all, want to do the right thing. No one is sitting there trying not to make the right sentence. I hope there isn't anyone who wants to do that.

JUDGE CHIN: There are also more procedural hurdles. If I am going to do a departure, I am supposed to give the government notice. Does that mean we adjourn the sentence for another day? With the variance, I can just do that.

JUDGE WOODCOCK: The irony on that is you have to give prior notice if you anticipate or begin to contemplate a departure on the ground it has not been previously identified, but then you can go right ahead and do exactly the same thing without giving any prior notice under 3553(a) so there is an uneasy

analysis currently between downward departures and the 3553(a) analysis.

ACTING CHAIR HINOJOSA: You are going back to where we were pre-guidelines for people don't really have the notice to be able to respond whether it is the prosecution or the defense. That was one of the things that was batted about the pre-guideline system, that either a prosecutor, defense attorney or defendant didn't really know we were thinking of certain issues, and we might just do it without notice.

A lot of times, whether it is departure or -- if I was going to give a variance, I think it is the fair thing to do to go ahead and have somebody respond to what you are thinking, because they might be able to convince you that they didn't know you were thinking of doing this and didn't have time to get the information.

Wouldn't that at least be a notice aspect of it?

JUDGE ARCARA: I think, Mr. Chairman, when that happens, you just don't surprise them, just sentence them to a different

sentence. You say, "I think I am considering a variance here, and here are some of the reasons why I am going to consider that. If you want me to take a recess, you want to think about it for a moment, please do. If you even need a day, but I am just thinking about it." You say what the reasons are, you tell them what the reasons are.

ACTING CHAIR HINOJOSA: Giving them notice?

JUDGE ARCARA: Due process, I think, requires you to do that, I think. In all fairness, the last thing you want to do is shock people and surprise people.

One of these things that these guidelines have done, and they have added so much assistance to the defense lawyers when they are working on a plea, "Look, here is the guidelines. Here is what I think the judge will probably sentence in this range -- I can't be certain -- but here is the range, zero to 20 years" when he had no idea what the sentence would be.

I think in the sense of fairness, Mr. Chairman, you have to at least give him some

type of notice. You can't hit him cold turkey out there. That is unfair. That is ambush, and I don't think we want a system where we are ambushing anybody. I don't do it, and I doubt if most judges do it. I can't imagine a judge doing that.

COMMISSIONER WROBLEWSKI: I just want to pick up a little bit, Judge Woodcock and anybody else on the panel, from the discussion with Judge Sessions and also Commissioner Howell.

I take issue with a couple of things I heard. One is, Judge Woodcock, you suggested that the changes that have come about since *Booker*, I think you said the dog hasn't barked yet, or something along those lines.

JUDGE WOODCOCK: I was referring to the federal judge dog.

COMMISSIONER WROBLEWSKI: It seems to me that the *Booker* decision was very fundamental in a lot of ways.

In the older system under the guidelines, and in the current mandatory minimum system, the sentences are driven largely by the offense conduct and criminal history. Other

offender characteristics were not largely taken into consideration.

Now under *Booker*, for those cases that don't have mandatory minimums applicable, offender characteristics like you were describing in terms of mental illness, can be taken into consideration to a much larger degree or at least easier without going through the departure analysis under the existing guidelines.

So in that sense it seems to me it was fundamental change.

The other thing I have some problem with is this discussion between mandatory guidelines and advisory guidelines as though it were a binary choice.

There are now mandatory minimums that apply to a very large percentage of the cases across the country, and in those cases we still have sentences driven by the offense conduct and criminal history.

What I want to know from you is, should we try to reconcile all that? Should we have one system where the sentences are driven by a combination or a coherent combination of

offense conduct, criminal history and offender conduct, or should we have this sort of strange hybrid system that we have now which is if you don't have a mandatory minimum, you can take into consideration the mental illness or the background, other offender characteristics under 3553(a)(1), but if you are in a mandatory minimum case, in large measure you can't. Should we try to reconcile that, even if it means some restrictions on the judge in terms of how much of the offender characteristics can be taken into consideration or not?

JUDGE WOODCOCK: That is a great question. I heard, I think it was, Judge Newman discussing his strong impression that the Commission went off the tracks basically in trying to reconcile the guidelines with mandatory minimums.

I guess my reaction is first that we don't have that choice. That is not a discretionary decision for us. It is mandated by the Congress so it is what it is, and we'll simply do it.

COMMISSIONER WROBLEWSKI: Should we as a commission go back to Congress and try

to reconcile that, which means engaging Congress on mandatory minimums and, in essence, with the very possible result that there is some mandatory nature to the guidelines, but addressing the fundamental question?

JUDGE WOODCOCK: I would have to see what the ultimate result is before I commit myself on it.

I think that the mandatory sentences in part cause a counter-intuitive problem as well, and that is if you take many of the child pornography cases where the guideline is below the mandatory minimum, the defendant is virtually guaranteed to go to trial, and basically you are trying a number of cases where the guidelines are so significantly below the mandatory minimum that ordinarily it would not be tried before a jury.

I think that that -- I don't think people have -- I don't think that Congress is aware of that. You have jurors sitting there watching horrific images of child pornography for no good reason, it seems to me. If the defendant were allowed or had been allowed to be sentenced under the guideline range, which is

tough enough, rather than the mandatory minimum, he would have pleaded guilty, and he would have been sentenced, and he would have gone on.

I think it is counter-intuitive to many of the ways mandatory minimums work.

As far as dealing with Congress, my thought is that -- and I know you have tried to do this -- you need to have as much as you can a collaborative relationship, as I mentioned earlier, with the relevant people on the Hill.

If you have that kind of relationship and you continue to work it, I am hopeful that perhaps the congressional inclination toward mandatory minimums would be dissipated.

I think in the long run when they look at the impact of mandatory minimums, they are not as they seem.

ACTING CHAIR HINOJOSA: Since you brought it up, Judge Woodcock, I will not have a question, but I have one last comment.

One of the things I have learned since I have been on the Commission is the amount of congressional work the Commission actually does working with both sides of the

members of Congress and the effect the Commission has in ways that I would never have seen sitting on the bench in Texas with regard to matters that are so important to what I do in McCallum, Texas.

It is also enlightening to see that they come under a lot of different pressures that I don't as a judge in McCallum.

They may have constituents that don't want to be sentenced by them, but they certainly would want them to set sentencing for somebody else that is going to come before me in McCallum, Texas so it is a hard process, as Judge Sessions admitted, a position to be in, but rest assured we have a lot of contact with Congress as well as the courts. We do have a lot of contact with the different branches.

Thank you all very much. We will take a five-minute break.

(A recess was taken.)

ACTING CHAIR HINOJOSA: Our next panel is a "View from the Probation Office." We are very fortunate to have four individuals who are sharing their time with us.

We have William Henry, who

actually became a U.S. pretrial services officer in the District of Virginia in 1989 and served in that district as an officer. In 1995, he was appointed Chief U.S. Pretrial Services Officer for the District of Maryland, where he served from May of 2001 until that district decided to consolidate so he has been the Chief of [the] Pretrial and Probation Office since then.

From January of 2006 until December of 2007, he served as a member of the Chiefs Advisory Group for the Administrative Office of the Courts and has been chair of that group since January of 2008.

Michael Fitzpatrick was named the position of Chief Probation Officer in the Southern District of New York on January 1st of this year. He is the brand new chief. He has a lot of experience having become a U.S. pretrial services officer in New Jersey in 1993, where he was promoted to electronic monitoring specialist in 1997. In June of 2005, he was promoted to supervising pretrial services officer, a position he held until July 1st, 2006 when he was named pretrial services officer in the Southern District of New York before he became

the Chief Probation Officer.

C. Warren Maxwell was appointed a federal probation officer for the District of Connecticut in 1992, and in 1995 he served as visiting probation officer at the U.S.N.C. Commission where he did help at some point manage the Commission help line, and in 1997 he was promoted to guidelines specialist and continued conducting investigations in addition to providing training and monitoring to the staff, and in 2002 he was promoted to deputy chief U.S. probation officer in that district.

Wilfredo Torres is the senior deputy chief of the United States Probation Office in the District of New Jersey. In that capacity he is responsible for assisting the Chief Probation Officer in the day-to-day operations of the office and overseeing budget, human resources, IT and special projects staff, and he oversees the district presentencing investigation unit, and has previously served as a sentencing guidelines specialist as a unit supervisor.

I will say that I have a lot of respect for the work that is done by the

probation officers in my district, and certainly the chiefs and the deputies so I realize what a hard job you have and thank you for taking your time to be here.

We will start with Mr. Henry.

CHIEF PROBATION OFFICER HENRY: Thank you, Judge, and thank you to all the members of the Commission for the invitation to be here at this regional hearing.

In preparation for my comments today, I reflected upon the impact of the guidelines on federal probation officers.

As you no doubt would expect, the guidelines were a major change for probation officers. Before the guidelines, our work, as was stated earlier, was on writing presentence reports, but I focused on the developing and providing information about the history and characteristics of the defendants and their background.

We were charged with discovering those underlying factors that may have had some impact on their specific offense and the conduct of the defendant. Officers tried to get to know the defendants and develop some insight into

their lives.

Our earlier reports were actually referred to as social history investigation or social diagnosis.

The sentencing guidelines brought about dramatic change in our work. The dimensionality of the guidelines redefined how our work was viewed and conducted.

The focus changed from the offender to the offense and the offense history, the criminal history of the defendant.

The *Guidelines Manual* became our bible. Its dog-eared pages showed our diligence, reliance and determination. Our language even changed. We began talking in codes like aggregate, base offense level, 5K1.1, enhancements, departures; and then there were the tables, the loss tables, the drug equivalency tables, the conversion tables. It seemed a law degree or mathematics degree might have served us better than our social science degree. The focus of these reports required hard study, analysis and the application of a complex set of guidelines and notes.

The Sentencing Reform Act created

a major swing in the criminal justice pendulum. Probation offices followed that pendulum swing. We trained and studied under the tutelage of Sentencing Commission staff. Commission staff helped us develop our expertise and to accept our critically central role in calculating the guidelines.

So where are we today? How has the advisory nature of those guidelines after the Supreme Court's decision in *Booker* affected federal sentencing?

Just a brief look at some statistics from the District of Maryland in FY 2008.

Nearly 50 percent of the offenders are sentenced within the guideline range, which is about nine percent below the national average, I believe.

Government sponsored departures, primarily 5K1.1, we are slightly above the national average at nearly 28 percent.

Approximately 21 percent of the offenders in Maryland received a sentence below the advisory guideline range based on either a 3553(a) factor or a combination of the

guidelines-supported departure and a 3553(a) background. I believe the national average is in the range of 13 percent.

So what can we conclude from those numbers? *Booker* appears to be having some impact on the sentencing practices in Maryland and throughout the country, but that impact is slight. At this point the pendulum seems only to be swinging in a slight swaying motion, not that huge swing we experience[d] 25 years ago.

The sentencing guidelines seem to be standing the test of time. Not surprising, given that they have strong empirical underpinnings and the Sentencing Commission's commitment to the dynamic and evolutionary nature of sentencing reform.

When Congress enacted the Sentencing Reform Act of 1984, it was seeking honesty, reasonable uniformity and proportionality in sentencing. Although the Sentencing Reform Act has and will continue to have its critics, I believe most could agree that the sentencing guidelines have made federal sentencing more rational, more certain and more transparent than it was two decades ago. There

can be no doubt that punishment is far more predictable.

The development of the guidelines were intended to further the basic purpose of criminal punishment: to deter, incapacitate, provide just punishment and to rehabilitate.

The deterrence aspect is complicated given the multi variant factors. It is not apparent that crime has been deterred to the extent that was anticipated or hoped. What is clear, however, is that since the implementation of the guidelines, more defendants who enter the federal system have been incapacitated.

The question now being posed by some critics of the guidelines is whether the punishment is just, or is it too severe? Justice Kennedy expressed that sentiment in 2007 when he stated, "Our resources are misspent, our punishments too severe, our sentences too long."

So what is the right amount of just punishment? This is an ongoing analysis that I recommend be made by the Commission in collaboration with the legal community and those of us in the criminal justice profession.

There are many factors to consider, including the cost of incarceration, and many viable and effective alternatives to incarceration. Collaborating on these topics to include sharing data will improve decision-making and continue to help the evolutionary process of sentencing reform.

What recommendations should the Commission consider? Well, practices that will keep the pendulum in sway towards the center to achieve the right balance.

As a system, we are learning more about what motivates and controls criminal behavior. We have better data collection systems today than we did 25 years ago. In probation we are looking more closely at evidence-based practices that focus on outcomes of various treatment and intervention modalities in reducing recidivism.

The Second Chance Act is yet another sign that the pendulum is in a sway toward that middle, recognizing that reintegrating offenders back into our communities is critical to their success and to the safety of our communities.

What can probation officers do? I would suggest refocus and recommit. In a sense, go back to our roots. We must look more closely at 3553 factors in preparing our presentence reports, in my opinion. The advisory nature of the guidelines makes this matter.

Over the years, we have disproportionately spent less time evaluating those factors than calculating the guidelines. We must help officers to refocus and again look more closely at the characteristics of the defendant and the rationale and justification for variances.

What might the Sentencing Commission consider? Well, any work the Commission can do to simplify the guidelines and remedy the seemingly conflicting intent between the various policy statements in the guidelines and the sentencing factors enumerated in 18 U.S.C. 3553 would be helpful.

As for the big picture in sentencing reform, two important areas to address are eliminating the sentencing disparity between crack and powder cocaine, and revisiting the role of mandatory minimums.

The pendulum is in motion. The slow, deliberate and balanced sway towards the center, towards purpose, will help achieve the goals envisioned by the Sentencing Reform Act.

In the words of Oliver Wendell Holmes, "The great thing in this world is not so much where you stand, as in what direction you are moving."

I think the evolutionary direction of federal sentencing reform shows the character and value of our system. The direction is important to every defendant who appears in our courts and to every citizen of our country.

Thank you again for the opportunity.

ACTING CHAIR HINOJOSA: Thank you, Mr. Henry.

Mr. Fitzpatrick?

CHIEF PROBATION OFFICER FITZPATRICK: I would first like to thank the United States Sentencing Commission for giving me the opportunity to address this group today. On behalf of the United States Probation Department, I am pleased to welcome you to the Southern District of New York.

Those of us who work in the Southern District sit in the cradle of the federal judiciary. The Judiciary Act of 1789, which created the Supreme Court, the circuit courts and district courts, was enacted by Congress when it sat in session in Federal Hall, which is only several block away from this courthouse. The District Court for New York, which was later split into four districts, including the Southern District, first sat on November 3, 1789, making it the first district court to sit under the sovereignty of the United States.

Of equal importance to the probation department is the fact that in 1927, the first salaried federal probation officer was appointed in the Southern District of New York.

When I consider the role of the probation officer in relation to the judge in the sentencing process, I find that it can be compared to the roles of personnel on a ship, an appropriate analogy as we sit in the Court of International Trade. The probation officer can be likened to the navigator. The role of the navigator is to plan the journey, to advise the

captain of the estimated time of arrival at ports of call, and to identify any potential hazards and make plans to avoid them.

The probation officer plans the journey to sentencing by conducting a presentence investigation and computing an accurate guideline range. The probation officer keeps the captain, or in our case the judge, on schedule by meeting the deadlines for first and second disclosures and identifies hazards by investigating any areas where the judge can depart from the guidelines, or can cite 3553(a) factors as a means of a variance.

The judge, who fills the role of the captain in this example, will have the final decision by imposing a sentence, and does so after weighing information provided by the probation officer.

I already mentioned the Southern District of New York's historical significance in relation to the establishment of the federal court system. The Southern District of New York is also prominent in the formulation of the federal sentencing guidelines. United States District Judge Marvin E. Frankel sat in the

Southern District from 1965 to 1978. Frankel's book, *Criminal Sentences: Law Without Order*, was a principal influence on the sentencing reform movement which led to the creation of the federal sentencing guidelines.

Drawing on his experience as a federal judge, Frankel argued that unrestrained sentencing discretion on the part of individual judges resulted in arbitrary sentences and wide disparity between the sentences imposed on similar defendants for similar crimes.

His proposal to create a commission on sentencing has been credited with being the foundation for sentencing commissions which were created in the late 1970s and early 1980s, first in the states of Minnesota, Washington, Pennsylvania, and eventually in the grandest of these agencies, the United States Sentencing Commission.

Recently, the Supreme Court has issued several decisions which have had a major impact on the sentencing guidelines. These decisions are notable on their own, but I believe they take on even greater significance when they are viewed within the context of the

state of sentencing in 2005.

Only two years earlier, in 2003, Congress had amended the Sentencing Reform Act when it passed the Feeney Amendment of the PROTECT Act. The Feeney Amendment contained numerous provisions which would have a negative impact on the district court's ability to depart from the guidelines. The amendment substituted a *de novo* appellate review as opposed to the previous abuse of discretion standard. It barred district courts whose departures have been reversed on appeal from giving a new reason to depart again on remand.

The amendment required the Sentencing Commission to collect and report more data on departures, and it required the Department of Justice to report its efforts to oppose unwarranted departures. It instructed the Sentencing Commission to amend the guidelines within 180 days "to ensure that the incidence of downward departures are substantially reduced." It also imposed a two-year moratorium on guideline amendments that created new downward departure grounds.

This amendment, to say the least,

was not popular with the federal judiciary. In December of 2003, 27 federal judges from around the country issued a statement calling for repeal of the Feeney Amendment. The Judicial Conference of the United States Courts voted unanimously to support overturning the law. It wasn't long before the Supreme Court weighed in.

Starting with *United States v. Booker* in 2005, which rendered the federal sentencing guidelines as advisory, and then with *United States v. Gall* in 2007, which established an abuse of discretion standard for appellate review of sentencing, the Feeney Amendment has been nullified, and the district court has been granted greater sentencing discretion.

More recently, in December of 2008, the Second Circuit in *United States v. Cavera* conducted an en banc review of a case from the Eastern District of New York. In this decision, the court affirmed the decision of the district court and provided a clear explanation of the guidelines.

The court held that the guidelines are the starting point and the initial benchmark

for sentencing, but in the same opinion, the court also held that a district court may not presume that a guidelines sentence is reasonable. It must instead conduct its own independent review of the sentencing factors.

In determining the effect of *Booker* and these subsequent opinions, one can look at the departure rates in the Southern District of New York and see a clear relationship between these decisions and sentencing decisions as they relate to the guidelines.

In 2003, a pre-*Booker* year, 78.4 percent of offenders received sentences within the guideline range; 13.2 received a downward departure based upon substantial assistance; 8.3 received a downward departure; and 0.1 received an upward departure.

In 2006, a post-*Booker* year, 58.2 percent of offenders received sentences within the guideline range; 15.2 received a government-sponsored downward departure; 7.9 percent received a non-government sponsored downward departure; 18.2 percent received a non-guideline below range sentence; and 0.2

received an upward departure.

And now in 2008, a post-*Booker* and post-*Gall* year, 44.4 percent of offenders received sentences within the guideline range; 20.2 percent received a government-sponsored downward departure; five percent received a non-government sponsored downward departure; 30 percent received a non-guideline below range sentence; and only 0.3 received an upward departure.

I believe the guidelines, as they exist in their present form in the Second Circuit, satisfy Judge Frankel's concerns, and also allow the judge the opportunity to consider all of the 3553(a) factors when imposing sentence. In the *Gall* case, the court gave new legitimacy to the competency of the district court in sentencing, by acknowledging the sentencing judge is in a superior position to find facts and judge their import under 3553(a) in the individual case.

As a matter of substantive sentencing policy, a system of carefully thought-out guidelines that are subject to broad judicial discretion to depart, but accorded

respect by the courts and followed more often than not is a highly desirable system for the federal courts. It would be difficult to not have a starting point when imposing sentence, and by calculating an offender's criminal history and assigning a severity to an offense, a judge has an excellent point at which to start.

And now, with the freedom to not only depart from the guidelines, but by also having the ability to use 3553(a) factors to vary from the guidelines, judges have the ability to take into consideration factors not considered by the guidelines.

The role of the probation officer will be to conduct thorough investigations, calculate appropriate guideline ranges, and identify all possible areas for departure and variance. By doing so, the probation officer will help the sentencing judge when they craft their sentencing decisions.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Mr. Fitzpatrick.

Mr. Maxwell?

DEPUTY CHIEF PROBATION OFFICER MAXWELL: Thank you, esteemed members of the U.S. Sentencing Commission, for allowing me to appear before you today. At the onset I'd like to thank Senior U.S. Probation Officer Ray Lopez for his assistance in helping me prepare my statement. I have read the testimony of other chiefs and deputy chief U.S. probation officers and will try not to reiterate their well-articulated points.

After sitting through this morning's hearings I am deeply encouraged by the practices you bring in improving the system. Thank you very much.

How has *Booker* affected us?

My observations relate primarily to the District of Connecticut, which has a reputation for having a high departure rate. I don't want to reiterate the statistics I have in my written statement.

Suffice it to say in 2008, 41.8 percent of our cases were sentenced within the range compared to 59.4 percent nationally.

As our statistics reflect, in our district the guidelines have always been viewed

as more flexible than many other districts, given that we've embraced the fact that departures are a part of guideline sentencing and authorized by the guidelines.

In addition to offense conduct, criminal history and victim information, our presentence reports tend to have robust social history sections. It is in these social history sections where mitigating circumstances are often uncovered and often relied on at sentencing.

Our courts have always calculated the guidelines honestly, and by this I mean that if special offense characteristics or criminal history points were applicable, they were factored into the calculations, not jettisoned or ignored or plea bargained away.

In short, our judges, who are passionately committed to justice, have tried not to let the math take precedence over the people, situations and circumstances that make some cases genuinely unique.

If the guideline range appeared too high and mitigating circumstances were present that justified a departure, our courts

departed.

Shortly after *Booker*, there was concern that Congress might enact a radical legislative response. This was a season of wait and see. We have come a long way since then, and case law has provided sound direction for the court.

The advisory nature of the guidelines since *Booker* has allowed further flexibility in this regard.

What should the role of federal sentencing guidelines be in federal sentencing? And what, if any, changes should be made to the sentencing guidelines?

Federal sentencing guidelines should be what they finally are, guidelines. In terms of what changes should be made, I have one observation that may lend itself to changes in the future.

One of the greatest impacts of the Sentencing Reform Act of 1984 was that it transferred jurisdictional authority for revocations from the U.S. Parole Commission to the district courts as parole was abolished and replaced by supervised release.

Perhaps because Chapter Seven has always been advisory, the Commission has not promulgated much sentencing data regarding revocation sentencing.

I hope the Commission studies whether disparity exists around the country in terms of revocations. I would be very interested to know how judges feel about this added responsibility, and whether they think that jurisdictional authority over violation conduct is the most efficient use of judicial resources.

I wonder whether a hybrid approach might lend more consistency to violations nationwide. For example, with statutory modifications, district courts could retain the authority to handle modifications of conditions and technical violations including drug use, while the Parole Commission or another like organization could handle all Grade A violations, and perhaps Grade B violations, as well as warrant requests. Such an approach might alleviate some of the workload courts are under, while at the same time allow district courts to participate in evidence-based

practices that work, such as drug courts.

Does the federal sentencing system strike the appropriate balance between judicial discretion and uniformity and certainty in sentencing?

Keeping in mind that the guidelines as we know them are the result of over 20 years of sentencing practice, judicial review and legislative reform, I believe that they lend to uniformity and some certainty that similarly-situated defendants will receive relatively the same sentence.

However, research regarding incarceration, its benefits and detriments, must be conducted to determine what to do about mandatory minimum sentencing as some of the guidelines are set by the statutory minimums.

Sentencing length in mandatory minimums seems to have been chosen arbitrarily without much regard to research in what is most effective in deterring crime and reducing recidivism. It could be five years in prison is appropriate for most offenders dealing a certain amount of a certain drug, but what is the justification?

It could be that mandatory minimums should only apply to defendants with criminal history categories V and VI. Judges, I note, are required under 18 U.S.C. 3553(c) to state their reasons for imposing sentence. Perhaps something similar should be required of Congress when setting the minimum number.

We need to ask ourselves the tough questions. Does the gender and racial makeup of a legislative body significantly impact the law in ways that may be unfair? Despite the best of intentions, might one racial group legislate harsher penalties for another racial group? Is the Sentencing Commission, under its legislative duty to reduce disparity, able to research whether such issues exist? Are there other more creative ways to increase uniformity than tying the hands of district court judges? What percentage of disparity among sentences should be expected and is appropriate?

Sorry to be asking so many questions. I know you had questions.

How should offense and offender characteristics be taken into account in federal sentencing? What, if any, change should be made

with respect to accounting for offense and offender characteristics?

There should be a logical balance between the offense and offender. Again, the guidelines provide a starting framework, which is enlarged by the existing case law. The goal of simplification regarding offense characteristics should still be a priority.

Regarding offender characteristics, I think Chapter Five is fairly adequate and complete; however, I would recommend the following change to guideline section 5H1.12, which reads, "Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted."

I think it might allow courts the ability to fully appreciate defendants' characteristics if the guideline did not prohibit the departure, but rather discouraged it by noting that lack of guidance as a youth and similar circumstances are not ordinarily relevant in determining whether a departure is warranted.

Finally, there may be disparity across the country in the application and interpretation of 5K1.1 that can be addressed. In some districts like Connecticut, defendants typically only receive 5K1.1 motions if they have assisted in the prosecution of a defendant. The assistance had to have led to a conviction, while in other districts a motion can simply be based on assistance in an investigation. This is a problem, not to mention the varying degrees or percentage of a departure that may cause unwarranted sentence disparity. It would be a daunting task to try to create more uniformity in this process, but one that would be worthwhile.

What type of analysis should courts use for imposing sentences within or outside the guideline sentencing range?

I believe the Second Circuit's decision in *U.S. v. Crosby* outlined a solid analysis of *Booker* and provided a sound approach, which has been followed by other circuits and framed in the most recent decisions of note, such as *Kimbrough*.

Considering that the guidelines

embrace all the 3553(a) factors in sentencing -- that was the goal at the beginning -- establishing the guideline range, or possible ranges, is a proper place to start. Thereafter, the courts look at the applicable range in making an assessment of whether it is sufficient, but not greater than necessary to comply with the statutory purposes of sentencing. If not, the courts look to see if the departure is warranted.

Finally, if there is still not an adequate range, the courts should consider a variance from the guidelines under 18 [U.S.C. §] 3553(a) that is specific to the individual defendant and his/her circumstances, rather than a rote recitation of the statutory language.

What, if any, recommendations should the Commission make regarding the Federal Rules of Criminal Procedure?

There was a recent request by the American Bar Association to amend Rule 32. Our office respectfully recommends that this request be denied for reasons that Chris Hansen, Chief U.S. Probation Officer from the District of Nevada, articulated in his testimony before the

Commission in May.

What, if any, recommendations should the Commission make to Congress with respect to statutory changes regarding federal sentencing?

Our nation's all or nothing approach to punishment has created a penal system that warehouses large numbers of men and women in huge prisons located outside our inner cities for lengthy periods of time. What we really need is a more enlightened approach to punishment.

The Sentencing Commission recently hosted a conference on alternatives to incarceration. This was an excellent step in the right direction. I think we also need a new criminal justice paradigm. I wonder whether departures or variances or even alternatives to incarceration would be so topical if prisons themselves were different; if instead of warehouses in the country, we have smaller prisons located in the inner cities. In these modern prisons certain non-violent offenders, after serving a percentage of their sentences, could be allowed out into the community for good

reason such as employment and other purposes that further the goals of rehabilitation and protection in the community. These would not be halfway houses, but prisons where inmates would remain locked up in a cell for half a day, and perhaps large portions of the weekends. Currently, all at once, we drop liberty like a rock on inmates. A few months in a halfway house does not begin to reintegrate inmates who have been imprisoned in highly structured environments for many years. It is no wonder that most violations occur during the first six months of release.

Would it make better sense if liberty was something that non-violent inmates earned a little at a time? These new prisons would allow prisoners the opportunity to still be, in some small way, contributors to the community and parents to their children. Inmates could pay victims restitution, provide child support for their offspring, and contribute to Social Security so they don't further burden the public later on down the line. If the inmate fails, we'll always have the warehouse prisons to send them back to.

Perhaps the birth place of such modern come and go prisons is in the guidelines themselves, through the expansion of Zones B and C of the sentencing table.

I note the seeds of what I described here are already in the guidelines in Section 5C1.1(c), which talks about "intermittent confinement." This is a great idea, but is unworkable in most districts because our prisons are rarely located in highly populated areas that would allow for such an idea to actualize. In the District of Connecticut, there are no centrally located male federal facilities in which offenders could be intermittently confined, nor does the current system of warehouse prisons, whose main duty is to keep people locked in, support the notion of inmates coming and going.

Additionally, the disparity between crack and powder cocaine should be eliminated, and the mandatory minimum penalties in drug cases should be amended to apply only to defendants who possess firearms.

Finally, Senator Jim Webb has introduced legislation to create a National

Criminal Justice Commission tasked to conduct a top to bottom review of our nation's criminal justice system and provide recommendations for reform. My hope is that any final recommendations will include expanding the U.S. Sentencing Commission's role to look beyond sentencing, to use its data, expertise, and connections to play an active role in bringing the criminal justice stakeholders together to help recreate how we punish and rehabilitate criminal offenders. *Booker* has not only provided for more discretion to district courts, but it can also free the Commission to create a new vision for itself, to take another look at what it does and how. The Sentencing Commission, as the nation's experts in this area, should request that Congress consider expanding its role beyond sentencing to leverage its expertise in the coming years as we begin to redefine crime and punishment.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Mr. Maxwell.

Mr. Torres.

SENIOR DEPUTY CHIEF PROBATION OFFICER

TORRES: I recall a couple of weeks ago being called into the office of our Chief U.S. Probation Officer Chris Maloney, who asked me if I wanted to come and testify before the United States Sentencing Commission. Immediately I said no. I didn't want any more anxiety. I didn't want any more work, and I walked out of his office, and I thought of my mother, by now 70-year old mother.

She always told me to never deny an opportunity to be involved in something important.

So I came back in about five minutes and said, "Is the offer still on the table?"

He said, "Yes."

And here I am. I am definitely honored to have been selected to speak before the U.S. Sentencing Commission today, and the equally esteemed community that is present here today.

From the moment that I was afforded this opportunity, I realized how fortunate I am to be part of the process that reflects the Commission's ongoing commitment to meet its statutory responsibility and purpose of

evaluating the effects of the sentencing guidelines on the criminal justice system. I sense an even greater opportunity today for all of us to advance our duty as government entities, to cooperate with increased transparency, and advance our efforts to earn the public's trust.

I had a few statistics. I am going to stay away from that.

The only thing I do want to share with you, to get away from the notion that we are the most corrupt state in the nation, subjectively I will state we are not, but I will say that we are one of the most populated.

We are clearly the number one in terms of density of the population.

New Jersey is a diverse state. Using the most recent figures, by race, persons living in New Jersey include 62 percent were White, 15.9 percent were Hispanic, 14.5 percent were Black, and 7.5 were Asian. Some of our counties are actually in terms of Hispanic population up to 39, 40 percent.

Of defendants and offenses in New Jersey, by gender, those sentenced in 2008 were

90 percent male and ten percent female.

By race they were 34 percent White, 36 percent Black, 32 percent Hispanic, 4 percent Asian, and two identified as other.

The nature of the offenses involved 34 percent drug, 34 percent property, 12 percent firearms, 7 percent violent, and 4 percent immigration. Those figures have remained consistent for the last three years.

The 34 percent property crime figure, however, is higher than national figures of 16.2 for similar crimes, fraud, non-fraud, white collar and larceny --

I would like the Commission to know that oftentimes the victims of these crimes in our state are working class and poor people when they are completely destitute. Those are the kind of people that probation officers interview consistently.

Post-*Booker* sentencing in New Jersey, I will stay away from some of the figures.

My sense from speaking to a few people within the circuit and within our region is that New Jersey has not engaged in variant

sentencing as much as other districts have.

When the *Booker* decision came down, I was lucky enough -- I think that month I had been promoted away from the presentence unit to the supervision unit, because I thought some people say the sky is falling, the whole sentencing scheme is going to go out of wack, but it hasn't. It has remained consistent.

I think that the role of the guidelines have now created a more balanced approach, and we are seeing that the way our reports are being prepared.

Prior to that decision, if you were to weigh the reports, to take the reports apart and weigh the offense conduct section together with the criminal history section versus the personal history -- personal characteristics of the defendant, clearly the offense conduct would weigh that. Now we are seeing more balance.

What we are seeing is post-*Booker* is a greater opportunity to look at the complexities of crime, the complexities of individuals that commit those crimes, and also the greater impact that occurs upon those who

suffer from those crimes.

We are seeing now a more involved probation officer in terms of really getting into the life of the defendant.

I remember back then talking to a few co-workers prior to the *Booker* decision, and I said to them, "One day we are going to sit in front of a computer, punch a whole bunch of numbers in and come up with an appropriate sentence. It is going to be some fantastic software program someone is going to come up." We may get that.

I think probation officers in general now have a sense and opportunity to get to know people I think at a much deeper level than we were in the past; to include more information about substance abuse issues; to include more information about mental health issues.

We talked about these types of situations in earlier discussions about child pornography cases. I think [] that is helping us not just to aim for a more appropriate sentence, but I think that [it] is also -- as has been testified to today and I think in prior

testimony that I read -- [helping us] in establishing a post-release system that addresses those issues that are being identified in the sentencing process.

What we have come to understand is that sentencing doesn't end when it is imposed; it just begins, and it carries through the post-release process, through the end of the supervision process, and, as we know, throughout a person's life.

I think the *Booker* world has allowed us and has moved us to really look upon those issues. I think that not only will it guarantee individual success through the supervision process, but hopefully throughout individuals' lives.

By way of recommending issues in addition to what I presented in my written testimony, I certainly welcome the Commission's decision to address the fact of disparity.

This is one of the issues that when it came down and our staff had to do the work, everybody kind of throws their hands up in the air, but we knew we were doing the right thing when we began to prepare for those

presentences.

Just to highlight that, I want to read from a letter that was sent to our chief judge concerning that, and it was from our federal public defender, who is one of probation's greatest friends. We have a great relationship.

He wrote what I thought was a very moving introduction. I want to read from that.

He said, "I want to acknowledge and thank both the United States Probation Office and District Court Clerk's Office for the resources and attention they have devoted to this project. They have responded to our inquiries with remarkable dispatch and made incredible efforts to provide assistance when possible. As a result, cases have been processed quickly and efficiently, and individuals who deserve a sentence reduction benefited directly from the full professionalism that was exhibited.

"On behalf of my staff, our clients, and particularly the client family members who have called and written to express their gratitude, I want to thank all of those

who assisted in making this such a productive and rewarding experience."

That was a letter submitted by our public defender, Richard Coughlin, to the chief judge on July 13, 2008.

To finish off my testimony, as I said, I could have gone on and on and told you about the great restaurants you will find in New Jersey because of all the diversity -- it is one of the most populated states. It does have a diverse population based on race, financial status and the issues that people who live there face in each of their unique communities.

However, as I reviewed the prior testimony that has come before you, I was impressed by the equally diverse groups of witnesses that have appeared in past hearings. Whether the dialogue emanates from the judicial or executive branch, the defense bar, law enforcement agencies, the American Civil Liberties Union, Families Against Mandatory Minimums and other advocacy groups, their inclusion by the Commission well demonstrates that the federal criminal justice system will not constrain any words that will move it

forward, including those that come from people who believe they have no voice in a process that seems to impact them the most.

Thank you for your invitation.

ACTING CHAIR HINOJOSA: Thank you, Mr. Torres.

VICE CHAIR CASTILLO: I just want to thank all of you, and I want to say to Mr. Torres, I think it is one of the greatest untold stories of federal sentencing, 20,000 individuals having their sentences reduced, and over 5,000 individuals have actually been released with very little recidivism problems, and I think that that speaks very highly of the efforts of probation officers throughout the country and so I didn't want to miss the opportunity to thank all four of you for all the work that you have done and that important aspect of the work.

It gets overlooked a great deal because people tend to focus on either criticizing the guidelines or criticizing the Commission, but this is a great story that has occurred over the last 18 months so thank you all.

COMMISSIONER HOWELL: Let me say that we have a Probation Officers Advisory Group, and we rely on POAG for their comments on everything we do, and particularly when we made the decision to apply our crack production amendment retroactively, POAG's comments were enormously helpful during the process so thank you.

I do have one substantive question.

Mr. Henry, you talked about asking the Commission to reconcile what you called apparent conflicts between policy statements and the 3553(a) factors.

I am reading between the lines, and I am assuming -- and I want you to correct me if I am wrong -- you are referring in that to our chapter 5H discouraged factors, including age, employment history and so on and the 3553(a) factors. Am I presuming correctly?

CHIEF PROBATION OFFICER HENRY: Judge, no. My answer to your question is no. My answer this time will be bingo.

COMMISSIONER HOWELL: One of the priorities we have that we are hoping to look at

in our next amendment cycle is looking at those Chapter Five departures. We have had very provocative testimony from the federal public defenders in some of our prior hearings that the Commission has, in fact, sort of interpreted statutory requirements incorrectly in the past, and it is one of the things we really want to take a serious look at.

Do you have any thoughts about what revisions to those Chapter Five departures we should make that would achieve the reconciliation that you commented on?

CHIEF PROBATION OFFICER HENRY: Specifically, at this point --

COMMISSIONER HOWELL: You can say no now if you want.

CHIEF PROBATION OFFICER HENRY: A fish out of the water -- not specifically. I think it would take a lot of study.

As I said, going back to our roots, what we do in probation, the work that we do every day, it centers on the lives of those we investigate and supervise. If they have lives, they have many, many aspects of their lives that are hard to capture in a report on a

piece of paper, in a simple analysis or even a complex analysis. There are so many different factors.

I think any opportunity we have to refocus and recommit on looking at defendants who appear before the court as individuals, and considering those individual aspects of their lives I think is critically important.

COMMISSIONER HOWELL: Does anybody else care to comment?

DEPUTY CHIEF PROBATION OFFICER MAXWELL: Only that I believe research has shown that age plays a significant role in recidivism, and it is something that we need to be considering in terms of sentencing.

COMMISSIONER HOWELL: Thank you very much.

ACTING CHAIR HINOJOSA: Just one last question before we leave.

A couple of you mentioned -- I think Mr. Henry, Mr. Torres mentioned it -- there is information, and I guess it varies from district to district. Would the report be -- I guess in some districts like in ours, we have a lot of information and continue to have a lot of

information about education, family background, brothers, sisters, whatever they were doing; mental health; with regards to the substance abuse, with regards to the jobs and a whole chronology of all the jobs they have had; their financial condition; schooling. Does that vary from district to district as to what was there pre-*Booker*?

CHIEF PROBATION OFFICER HENRY: I will go first.

I think in Maryland it seems to appear that way, and we got off in another direction and focused on the complex issues of the guidelines and calculations, and we lost sight of the fact of the human aspect.

SENIOR DEPUTY CHIEF PROBATION OFFICER TORRES: I think that what tends to happen to a probation officer preparing a report, he comes to believe that they are putting information into a report that is not going to be weighed properly or looked at or considered. They are probably going to be moved to sort of load up in those areas that they think are going to be looked at more closely, and I think in the pre-*Booker* world, criminal history, offense conduct sort of drove

that.

I think now the opportunity to take a closer look at departures under this era, and also look at variances, I think that has motivated the work force to include more information.

I think that is also the judges are requesting more and more of that information, because they are seeing how critical that is to making those decisions, those considerations, so I think there is a request and there is also more of a motivation.

I recall people basically were Saying, "I want to get to know this defendant more. I am doing all this; the defendant's conduct," and that is still being done. That is not being disregarded, but I think people are -- probation officers are feeling more a sense that -- assessing cases more comprehensively; is this the right thing to do and will it lead to an appropriate sentence.

ACTING CHAIR HINOJOSA: Thank you very much.

We will break for lunch. We do appreciate you taking the time to visit.

(A luncheon recess was taken.)

ACTING CHAIR HINOJOSA: We are ready with the next panel, which is the View from the Defense Bar, and we are very fortunate to have three individuals with a lot of experience with criminal defense work in the federal system.

We have Alexander Bunin, who was appointed by the U.S. Court of Appeals for the Second Circuit to establish a federal office in the Northern District of New York in 1999, and prior to that he established public defender offices in the District of Vermont and in the Southern District of Alabama. He is also a member of the faculty of Albany Law School where he teaches law practice. He received his bachelors from Bowdoin and went south to South Texas College of Law, where he received his law degree.

Michael Nachmanoff has been a federal public defender for the Eastern District of Virginia since February 2007. Prior to that he served as the acting commissioner and assistant in that office. He received his bachelor’s degree from Western University in

Connecticut and his JD from the University of Virginia.

Mr. Robert Mann is a partner in the firm of Mann & Mitchell in Providence, Rhode Island. He has been engaged in the practice of law for some 34 years, specializing in criminal defense. Mr. Mann's caseload consists of private cases, tort appointments. He is a member of the CJA panel, and his JD is from Yale, as well as his undergraduate degree.

I will say that Judge Sessions is not here because he is sitting hearing cases on the Second Circuit this afternoon, and he told us for a long time that he would not be able to attend this session in the afternoon, and he will try to come back as soon as they finish.

We will start with Mr. Bunin.

MR. BUNIN: Thank you.

I want to thank the Commission for allowing me to come and speak to you. It is a great honor. Both Mr. Nachmanoff and I speak on behalf of federal community public defenders. We have divided up our topics. They are related but different.

I would like to talk to you about

several items, the first being that charging disparity is the greatest factor in sentencing disparity.

Second, the judges are not themselves creating unwarranted disparity.

Third, that the Commission should respond to what judges are doing by reducing severity in guidelines.

And, briefly, fourth and fifth, alternatives to sentencing, as was discussed at the Stanford hearing, should include even those defendants that are (inaudible).

I will talk briefly about that, and then at the end if there is time -- there is a proposed change to Rule 32 -- defenders opposing the change, I would have comments on that.

As far as charging disparity, I am here to talk a little bit about my own experience, having been in a number of districts, and some statistical background that is in my written statement.

As you will see in my written statement, I talk about how my career kind of tracks the history of sentencing guidelines. I

began practicing law in Houston in 1986. It doesn't say it [in] my statement, but I am from New York City, from Manhattan. I was born and raised here, went to public school, broke in the 60s and 70s, and apparently had a happier childhood than Mr. Wroblewski. I enjoyed my time here.

As far as my legal history, I began in private practice in Houston. I did towards the end of my time in Houston practice in the Southern District of Texas, mostly the Houston District, and in the Western District in San Antonio a couple of times.

My first experience practicing in federal court came when I became assistant federal public defender in Beaumont Texas, the Eastern District. After that I was called -- I was hired to go to Alabama to open the Southern District of Alabama office, and then I came up here in '99 and opened Northern New York, which is a very large district. It goes all the way up to the border. We have a huge international border. We cover the cities of Albany, Syracuse, Utica, Binghamton.

In talking about my history and

talking about disparity, I first want to begin with some of my own experiences and then talk a little bit about the statistics in terms of why charging disparity is[] as important as sentencing disparity.

I teach a class at Albany Law School, and I try to explain to my students that the federal system is not a perfectly uniform system. They come to it thinking, "Well, every district shares the same statutes, they share guidelines, they share the U.S. Constitution so it is a pretty uniform system," and my example is the one I put in my statement, which is when I was an assistant public defender in Beaumont, which was the first city on I-10 when you are going east with a load of drugs, it makes a huge amount of difference where you stop and are arrested.

If you stop in Chambers County, Texas, which is in the Southern District, and have, say, 100 kilos of marijuana, that case is probably not going to federal court; very unlikely.

When I was there, I called someone Margaret Marris (phonetic) to ask her, and she said

no, it probably wouldn't go to federal court; it would go to Chambers County, and like many small counties in Texas, that case can be negotiated, and the defendant, if he doesn't have a history can get probation and get a big fine.

If you cross that line to Jefferson County and end up in the Eastern District, he is going to federal court, and he is going to get five minimum.

It is a huge difference, two districts.

When I was in Beaumont, the two years I was there, we never had an immigration crime, never. I mean, it is Texas, and although we have an international border there, there are certainly persons that could have been prosecuted for being in the United States when they were not allowed to, but [that] never happened when I was there, and that was a function of the fact that we didn't have a border patrol or what is now INS.

Now we come to New York, and a good part of our Albany docket is immigration, and they will take every case. Every case is prosecuted at that border, and they expect a

conviction and sentence in every case.

So the person who smuggles some people from China over, all those people from China, it is a misdemeanor, and a smuggler is looking at a possible mandatory two-year sentence and more.

Anyone facing an aggravated felon, there is no fast-track in the district so they are looking at fairly substantial guidelines.

Back when the guidelines were mandatory, none of our judges tried to depart from some of those cases. They are very sympathetic cases, immigration crimes, that were tried by the Second Circuit, finding they were not sufficient -- so very different from very different communities.

Now, most of you could say, "All right, that is just a function of where you are. That is not the prosecutors going out and trying to create disparity," but when I went to Southern Alabama in 1995, Judge Sessions was the U.S. Attorney -- now Senator from Alabama. He was the outgoing U.S. Attorney in the 80s. He grew that office from I think they might have had

five assistants when he started to about two dozen people, and most of their cases when I got there, these drug cases, were these big multi-defendant cases, and they were prosecuted very vigilantly. We had large staffs, and in every case defendants were offered the opportunity to plead guilty and cooperate, and cooperation there meant you just signed a cooperation agreement. You didn't have to have any information.

If I had a client and he said he would cooperate, they would say, "Fine, he could plead guilty to a cooperation agreement and we will recommend 50 percent off." Every case, 50 percent, so it created a huge incentive for everybody to plead guilty.

When the judges got these cases, they had the government recommend 50 percent off. Well, some defendants actually did cooperate so they gave them more so it would be 60, 70 percent.

Twenty years? They might get eight.

So you had a system that was designed and created by the prosecutor that created a great deal of disparity, because if he,

a defendant said, "I am not guilty; I am going to trial," you might end up with a very significant sentence.

So those are the kinds of disparities I saw just in my own practice.

I also saw, with great help -- I am not a statistician. That is why I went to law school -- a number of -- a great deal of information from the districts and circuits that you are covering today.

From what I can see, there is not a huge change since *Booker* in what has happened to judges and how they are treating these cases.

As I said, I practiced before judges, I would say at least 18 different United States district judges, including Judge Sessions who is not here, and my experience is that most of those judges are not looking to try to be outliers; they are looking to try to follow the guidance the Commission gives them.

Initially when the guidelines came out and they were mandatory, some judges felt, as you heard from the judges today, that that was too confining, and they are like anybody else. If you say, "Do this because I say so,"

they fight back, and they don't like it as much.

If you say, "Do it because here are the reasons why this is appropriate," I think judges appreciate that and appreciate the rationality behind it and will follow that.

That is why even today without mandatory guidelines, you are seeing that there is not a great change, and some of the changes are still motivated by the prosecutors; that a lot of these below-guideline sentences are motivated for reasons provided by prosecutors. You are fast-tracked, which is cause for a cooperation agreement.

In fact, the statistics show that for the first two quarters of '09, there was only about an eight percent judicially-based, without government-based, variance from the guidelines so that is not huge.

You are going to hear from Professor Rachel Barkow tomorrow, who is going to tell you about some of the state systems where it is pretty much standard that the outlier departures or variance from the guidelines are more like 20 to 25 percent so the difference in federal court right now is

extremely small, and I don't think it is causing any great problems.

In response to that, what the judges said this morning to the defenders, you should look at the cases that they are saying the guidelines are too high: the child porn, the drug cases.

The Commission did a great job by going back and reviewing crack guidelines. We have seen that in my district. That affected 200 cases. I work closely with my U.S. attorney and probation, and we got them done. A lot of people got out on March 3rd, because we planned ahead and got that done.

I think the Commission is doing a good job and can continue to do that if it reacts to what judges are telling them.

We go by circuit-by-circuit analysis, but most of these increases are not judicially-based; they are based because they are either consistent with what has gone on before, or they are based on what prosecutors are doing.

I urge the Commission to look at what judges are doing in response to that.

Now, in terms of what you can do specifically about guidelines now, of course there is the drug guidelines. We all thought as defenders the drug guidelines are too high, especially crack versus powder. It is a big issue right now. We hope the Attorney General will take a position clearly on that for an equal one-to-one ratio.

Relevant conduct is a big issue. It is very confusing, even for the probation officers who have to figure this out. There are many examples in the guidelines, and they try to follow it, but I found in every district I practiced in, the probation officers tended to err on including -- over acquitted conduct. They felt that if the defendant should have known about it, they should have included it so it is up to the defender to object. I don't think those are very clear.

I think if relevant conduct is written out, it clearly includes acquitted conduct, and that should be addressed.

I talk to my law class. I gave them an example about how acquitted conduct can be used to increase a sentence, and they said

that doesn't sound fair, and you heard that from some judges this morning.

Career offender, again, way too high, and too broad.

I remember a case I had in Beaumont, Texas in which I had a guy. He had been using crack cocaine, pretty burned out, although not incompetent, and what he would do was to get his own crack, he would go on the street and front some for a drug dealer, and, of course, that got him a number of convictions, and now he is in federal court on a one-rock case, and he is looking at 20 years to do.

I mean, literally, we were at the sentencing, and he said, "How much is 240 months?" It was just sad, because he was not somebody who needed to do 240 months.

Again, fast track should be extended, or we should at least be able to count the fact that we lack fast track. Our district is so different from say Southern District of Texas.

I had a mother call me the other day saying her son had just been arrested at the border of Plattsburg, and he is a Canadian

citizen.

What had happened was he and his friend were going to go to Florida, and they got to the border. They were asked, "Have you ever been turned away before?"

He said no, and of course nine years before he had, and they looked and they said he lied so he filed a false statement to a federal officer.

He is facing a felony. He is not a citizen. He is going to spend at least ten days in detention before things get sorted out.

That is the kind of thing we are looking at there.

Mitigating role adjustment, it is just not enough in cases where that is a really big factor: In drug cases, quantity controls, and often we can't take that into account.

The use of information under [1B1.8], if a defendant comes in first and cooperates and has a deal, well, then that information can't be used against him, but if a second defendant comes in, even if they didn't know the first guy was cooperating, probation is going to say that is an independent source, and

they are not going to be protected from use of that calculated guideline so that is something that should be addressed.

In Stanford you heard quite a bit about alternatives to sentencing. One of the points that was brought up, a lot of defendants, especially in drug cases -- it doesn't mean you can't look at alternatives to sentencing because -- for instance, I have had instances, for instance under bank fraud, which is a no-probation type of offense, in which the judge said, "I am giving you a day time served, and then I am putting you on supervised release."

It can be the same for drug cases, or at least split sentences, as long as there is some period of incarceration to satisfy [zone C].

I think a lot of judges are scared because there is a big black line. When you divide that zone, they see that and think, "I shouldn't be going between the zones."

To the extent you can, if the alternatives are appropriate, I think you should encourage that.

The last thing I just want to mention briefly is that there is a proposal to

change Rule 32 to provide -- require the parties to provide notice of any variances, departures, or any information that would be in furtherance of that.

I think you heard this morning from the judges. I think that is true of all judges. If you got down to the sentencing hearing and somebody said, "Wait a minute. I didn't hear about that," every judge I have ever practiced for said, "Okay, we will put this off."

To have rigid timelines just doesn't work, because the first timeline that everybody misses -- at least in our district, Probation doesn't get the report done on time. You are supposed to have it 45 days before sentencing. We never have that, ever. All of a sudden the timeline is thrown off.

We just work as best we can under those timelines.

I just can't think of one instance where we had a problem because the judge, even if somebody has to file their papers at the last minute, says, "You had enough time." I don't know any judges in our district that have shown up on the day of hearing and said, "I came up

with this new idea I haven't told you about, and I am going to vary from the advisory guidelines without any notice to anybody."

I mean, they are very good about letting us know what is going on.

With that, I will pass it off to Mr. Nachmanoff.

ACTING CHAIR HINOJOSA: Thank you, Mr. Bunin.

Mr. Nachmanoff?

MR. NACHMANOFF: Thank you, Mr. Chairman, Commissioners. It is a pleasure to be here. Thank you very much for inviting me to be here and giving me this opportunity.

I want to start out with a quote, which I almost never do. Senator Webb from the great Commonwealth of Virginia, as I am sure you all know, has decided to take on, next summer, calling a quixotic venture, but it is certainly a very brave one on his part as proposed legislation to really take a look at the bipartisan commission and look at the criminal justice system overall and how it can be fundamentally improved.

I know we have several folks here

from the Washington area. Maybe you saw the article about Senator Webb in the paper the other day.

There was a quote that struck me there, and it was this: "Either we have the most evil people on earth living in the United States, or we are doing something dramatically wrong in terms of how we approach the issue of criminal justice."

Senator Webb has spoken eloquently and persuasively on the floor of the Senate and elsewhere about the fact that we have rates of incarceration that far outstrip any other country in the world; those of the industrialized world and otherwise, democracies and totalitarian governments alike.

I thank this hearing for the opportunity to reflect at least with regards to the federal system on how we have gotten to the point that we have, and where we are going from here, is particularly appropriate.

I, for one, am very grateful that Senator Webb has taken up this issue.

I refuse to believe that we have more people in need of incarceration in the

United States than in other countries of the world. I refuse to believe that in order to protect the public and to make ourselves safe, that we have to fill our jails and send people to jail for as long as we do.

I was going to read my entire written testimony into the record. I thought that might not go over well after page 14, but there are a lot of statistics in there -- not even a crack of a smile --

ACTING CHAIR HINOJOSA: I have one.

MR. NACHMANOFF: Please let that be noted for the record.

ACTING CHAIR HINOJOSA: I saw someone in the spectator section smile.

MR. NACHMANOFF: One of the things that I note is that we have a prison population of over 200,000. That is a five-fold increase from when the guidelines began and mandatory minimums.

There is a direct correlation, especially between mandatory minimums and the number of people in our prisons. That is a significant problem that is one of the issues

that I address at length in my written
testimony, and it is what I want to talk a
little bit about this afternoon.

The Commission has forcefully
described in the past why mandatory minimums
fundamentally interfere with the fair
administration of justice, why they interfere
and interfere with the mandatory guidelines
system and, as we know, interfere with our
system of justice and sentencing today.

The judicial conference has spoken
forcefully on the importance and need to repeal
mandatory minimums, and the defense bar have, of
course, spoken for years about this.

Why is this topic important to
talk about here? And this morning there was a
discussion about Congress and the Commission and
the relationship between the two.

I think it is important because it
helps to explain where much of the problem lies
in our system, and it helps us identify where it
does not lie. Like my distinguished colleague
here, like the federal defenders who have
testified at previous hearings, I do not, and we
do not, believe the problem lies with increased

judicial discretion.

To the contrary, we believe that the system has improved as a result of greater discretion, and that an area to focus to the extent of we want to look at disparity or differences in the way people are sentenced, a key to that is look at mandatory minimums and decisions by the Department of Justice as to how they charge and how they proceed with regard to sentencing.

I am not going to repeat everything that my colleague, Alex, has said, but I do want to point out a couple of statistics, things that I think are relevant and important for the Commission to think about.

At a previous hearing, and I was not there but I read the written testimony and am familiar with some of what transpired there, there was a discussion about some changes on the west coast, and it was the U.S. Attorney from the District of Oregon who testified and submitted some suggestions about problems that were perceived with regard to rates of judicial discretion being exercised in Oregon.

I noticed something very striking

about the statistics. It wasn't so much that there perhaps was more discretion perhaps being exercised with regard to how sentences were being imposed in comparison to the guideline range -- it was greater in Oregon than it is in the Eastern District of Virginia, but that is not hard to achieve. The Eastern District of Virginia has always been a tough jurisdiction for sentencing, when the guidelines were mandatory, and even now we see less variation than we do in other parts of the country.

What struck me was this: The rate of sentences being imposed below the guideline range was a product far more at the insistence of the government than it was on the part of judges.

The government-sponsored rate of departures of variances was 33.3 percent in the first half of 2009. It was 18.7 percent on the part of judges.

Well, those variances on the part of the government came in three parts: One, 5Ks, which we know is a significant reason why judges impose sentences lower than the guidelines; fast track, which they have in

Oregon, though I would note it does not have it so far as I can tell by the Eastern District of Virginia and many other places where it would be great to have fast track; and then there was another category, and that category was for reasons other than fast track and 5K.
11.8 percent of the time the government was seeking a sentence below the guidelines in the first half of 2009, and that is consistent with 10.5 in 2008, for reasons other than 5K and fast track.

I, of course, was fascinated with that statistic, and I will tell you why.

In the Eastern District of Virginia, and my good friend and distinguished colleague Dana Boente here, and I know he will have a chance to speak to you as well, and maybe he will shed some light on this, the number of government-requested departures or variances other than for 5Ks was 1.1 percent.

So what does that tell us, or what can we learn from that? Is it like Senator Webb says, that the defendants in the Eastern District of Virginia are so much more evil or deserving punishment than the defendants in the

District of Oregon, that the government correctly requests a downward departure in only 1.1 percent of the cases, or is it something else?

I, of course, don't believe that is the case, and I don't believe that the U.S. attorneys in the Eastern District of Virginia believe that is the case. It is a reflection of a different culture, a different philosophy.

It is the same Department of Justice operating under the same national policies, but, for whatever reason, in the District of Oregon, the U.S. Attorneys are obviously permitted and do, in fact, in more than 10 percent of the cases, ask the judges to impose a sentence that is lower than the guideline range.

Now, I am not saying this in order to get the District of Oregon in trouble or to suggest that they are violating U.S. Department of Justice policy. I am also not saying this to suggest that the prosecutors in the Eastern District of Virginia are not honorably trying to discharge their duties and do their job, the prosecutors.

I am saying, however, that I refuse to believe that the kinds of crimes and the kinds of people who are being punished in the Eastern District of Virginia are any worse or any better than the kinds of people being punished in Oregon.

That is a disparity. That is a difference. It is a significant difference, and I think it is where attention should be paid by the Commission, because it helps us to identify where the problem lies.

As I say, I can't tell you what those departures were. I can't tell you whether they were for fast track or 5K or for other reasons, but clearly there are differences, significant differences in the way prosecutors approach cases around the country. Not just based on region, but even within districts and within divisions, and sometimes even on a hallway in the U.S. Attorney's Office where one prosecutor takes a particular view of how cases should be resolved with regard to sentencing and punishment, and a different prosecutor takes a different position.

I would just like to emphasize the

point that I do not believe that statistics show that it is differences in sentencing based on judicial decisions, where judges are seriously taking their responsibility to follow the mandate of Congress as set forth in 3553(a), to seriously take their responsibilities in looking at the guidelines, calculating them correctly, knowing that they are going to be subject to a review by a higher court, and then making an individualized determination about what sentence is sufficient and not greater than necessary, what sentence is fair and appropriate. That I think is a good thing for the system, and it is not something that we should be attempting to restrict or prohibit in any way.

Another area of differences or disparity that I think is important for the Commission to focus on also comes from the Department of Justice, and Alex touched on it, which is the charging decisions.

The Ashcroft Memorandum sets out a national policy regarding the importance for prosecutors to charge the most serious readily provable offense, and the Ashcroft Memorandum is simply a continuation of policies that existed

more or less in the same form going all the way back to the Thornburgh Memorandum.

However, we know, and statistics reflect, that all of these policies, including the Ashcroft Memorandum, have been implemented in different ways, and they have been implemented in different ways before *Booker* and after *Booker*.

I am not in a position to talk about what happens in other districts other than to know anecdotally based on the surveys we have done as federal defenders and looking at statistics, I know the history of the Eastern District of Virginia -- I know Commissioner Friedrich was a prosecutor there -- and the Ashcroft Memorandum has always been followed faithfully in the Eastern District of Virginia.

Now, the Ashcroft Memorandum gives prosecutors some latitude, especially with regard to the most draconian mandatory minimums for consecutive time, 851 enhancements and 924(c)s, and they give prosecutors the ability to exercise judgment in limited ways, sometimes overseen by supervisors, sometimes not depending on the district, when they can give away or

agree to forgo certain enhancements, and we see that.

But, my testimony reflects that the way that is done varies widely, and it has enormous impact in skewing the sentencing process, and has an impact that is negative.

Why, again, are we talking about this? Because I think, as Judge Woodcock stated this morning and other judges have said, that the Commission can play a vital role in urging Congress to repeal mandatory minimums.

I understand that there are enormous political hurdles, and that it is not a popular topic amongst everyone in Congress; however, I think the time now is much riper than it has ever been before, especially given the interest of the administration in fixing the crack/powder problem, but of course it shouldn't be restricted to crack/powder.

Statistics reflect that almost 70 percent of all drug defendants are subject to a mandatory minimum, and yet 82 percent of all those drug cases, there was no weapon involved. In 63 percent the defendants had zero to three criminal history points.

This issue of prison overcrowding, this issue of over-incarceration must be addressed through repeal of mandatory minimums.

As Judge Woodcock said, there is a statutory basis for the Commission to urge Congress to do that, to provide its expert opinion.

I think that I am very persuasive, but I know that I don't have a lot of sway with Congress. I know that the criminal defense bar, which I think can also be persuasive, does not necessarily have a lot of sway with Congress, but the Commission, I think, can, and I think the Commission has the responsibility and the capacity to be persuasive.

It was with crack/powder. I know that from personal experience. I come from the district that has, in my view, the dubious distinction of being the number one district for crack cases in the country, and I will be forever grateful to the Commission for what it did with regard to crack retroactivity. We have had hundreds and hundreds of people get their sentence reduced.

As the Commission noted itself, it

was a partial solution, not a complete solution, and the way to fix the problem is one that requires congressional action. That is the first issue.

The second is the issue of delinking. [It] was discussed a little bit earlier today with some of the judges, and it has been discussed at other sessions. We believe strongly that the Commission should de-link the guidelines, especially the drug guidelines, from the mandatory minimums, and we know that the Commission has the power to do so, because the Commission has done so before.

In *Neal*, the Supreme Court recognized that the Commission was within its power to change the way the guidelines functioned for LSD, because when Congress determined the triggering weights for mandatory minimums in LSD cases, they did it based on the actual weight of the carrying medium.

As we know, that made absolutely no sense. If someone was dumb enough to use cardboard as their blotter, they would be facing a mandatory minimum much faster than someone that caused the same harm, had the same number

of doses, but used a lighter weight paper.

The Commission recognized this problem and decided to fix it by choosing presumptive weight.

It was the right thing to do, and when it was challenged the Supreme Court said no; there is nothing about what Congress did in setting that mandatory minimum that was a binding directive that required the Commission to follow the same path, and therefore having this presumptive weight is appropriate.

This is the exact reasoning what the Supreme Court relied on in *Kimbrough*, and I know that with crack retroactivity, it took a lot of political courage, it took a lot of effort for the Commission to get to the point to agree on how it would play out, and at two levels it was what the Commission could do at that time, but the Commission changed how that guideline worked and could do so across the board, could do so across the board with regard to other drugs.

There is no reason why the Commission can't do it, and I think it would address some of the concerns the Commission has

with regard to the way judges impose sentence, because to the extent the judges find that drug guidelines are too harsh, and many do, and many have publicly said so, they would be more likely to comply if those drug guidelines were lowered in a way that was based on empirical evidence, that was based on the purposes of sentencing, that the Commission can articulate and provide reasons for.

It would also serve as a way of showing Congress that they need to change the mandatory minimums, rather than going along with the mandatory minimums which are not based on anything other than the raw political process.

They would show that the extra body, the body created by Congress to tell them about how sentences should be imposed, recognized that these sentences are too high.

Let me just finish that point very quickly by saying that I thought that Judge Howard this morning from the First Circuit had a very interesting and insightful perspective, as a former state prosecutor who operated without mandatory minimums, and as a federal prosecutor where he had mandatory minimums at his disposal,

and as a judge. He said that they are a bad idea, and that they are unjust.

I believe fully that the Department of Justice and law enforcement objectives can be achieved without mandatory minimums, and therefore that the Commission taking the position that they should be repealed is not the same as saying sentences should be lowered, wildly, without regard to what the Department of Justice and what law enforcement is trying to achieve.

There are many law enforcement agencies at the state level, and there were law enforcement agencies at the federal level before mandatory minimums who could do their job. There are many other ways to do their job. We've talked about the problems and incentives to exaggerate and to lie on the part of cooperating witnesses when mandatory minimums have these draconian penalties, and by urging Congress to repeal mandatory minimums is a way of solving that problem as well without creating some terrible situation in which the Department of Justice is hamstrung.

We cite a number of cases in which

courts were forced to impose really draconian and outrageously long sentences, and there is the case of *Angelos* from the Tenth Circuit, and these were really classic examples where judges found themselves having to impose 55 or 45 or 150 year sentences on people not who had committed violent crimes, not who had killed anyone, not who had any significant criminal history, but people who had mandatory consecutive time, 924(c)s, that required judges to impose these extraordinarily long sentences.

Why did they have to do so? They had to do so because the Department of Justice used a tool that they use all over the country to try and induce cooperation, and I understand why they do it, and I understand that it can be very effective when defendants are faced with the rest of their life in jail during 851 enhancement or 924(c)s, there are powerful reasons to plead guilty, but sometimes people insist on exercising their constitutional rights and going to trial.

In those instances, if they are convicted, and often they are, the courts are then left with no choice. They cannot impose a

sentence under 3553(a), they cannot engage in an individualized sentencing process, because Congress gave these rules to the Department of Justice.

The Department of Justice doesn't necessarily want to see this defendant spend the rest of their life in jail. They may not believe it is appropriate for this person to be separated from their family and the public to be protected for the rest of their natural lives, but they have no choice.

It is a bargaining tool that leaves the government and the courts with no choice, and, of course, when I am faced in those cases with that situation, I say to the prosecutor, "How well are you going to sleep at night if this person goes to trial and loses?"

And I get varying answers, but, of course, they are doing their job. They are following the Ashcroft Memorandum, or they purport to be following what the Ashcroft Memorandum requires, and as a bargaining chip, the response from them is, "Well, if we don't follow through, then the next defendants aren't going to believe we are going to use this

hammer."

Well, there is something grievously wrong with a system that ends up requiring people to spend dozens of years in jail, decades in jail, because a negotiation went awry. It is just not a fair result, and the repeal of mandatory minimums is a way to address that.

My final point is that we have addressed appellate review. We think that the process of appellate review is developing as it should, and one of the things that we are seeing that we think is very positive is that judges at the district court level are required to give more of an explanation for what they do. That improves the process, it increases transparency, it provides respect and promotes with respect for the law because families and defendants understand why they are receiving the sentence they are. Judges are articulating why the sentence conforms for the purposes of sentencing, and it gives the appellate court something concrete to look at.

We see that where judges don't do that, they can get reversed so the procedure is

important, as is the calculation of the guidelines.

With regard to substantive review, I feel strongly that substantive review will develop better if we did not have a policy in which appellate waivers were made part of the bargaining process.

The appellate courts don't see the overwhelming majority of criminal cases, because defendants will generally decide that they want to enter into a plea agreement and give up that right to appeal.

That leads to my final point, which is -- also was discussed briefly this morning -- which is the elimination of the policy statements that restrict consideration of defendant characteristics, and I know this issue has been discussed previously, but I think these issues relate, and Judge Castillo raised this issue; departures versus variances.

In the Eastern of Virginia, we see very few departures; 2.5 percent. We see more variances, although they are not overwhelming, and the question is why?

I think the answer to that, Your

Honor -- you articulated a little bit yourself -- which is that under mandatory guidelines, the development of the law in the appellate courts on downward departures was really very, very unfavorable to criminal defendants.

In the Fourth Circuit it was very hard to get a downward departure and have it confirmed. In the Eastern District of Virginia -- and I know this varies around the country. There are lopsided appellate waivers. The defendant gives up his right to appeal, the government retains its right to appeal, and therefore the government picked cases and developed case law in which basically no set of facts -- or perhaps without resorting to hyperbole, very, very infrequently was there ever a set of facts in which the appellate court agreed the departure was warranted.

I think you have district judges now who aren't trying to avoid departures, aren't afraid of departures, would be happy to use departures rather than variances, but are concerned based on the many years of experience they have that if they grant them, they will set

themselves up to be reversed, because the appellate courts have not been told, either by the Commission through the elimination of these prohibited, discouraged and restricted factors, or through any other mechanism that that law is obsolete.

Now, one can infer from *Gall* and from the Supreme Court, and from the fact that there is a statutory mandate to consider many of these factors that are prohibited or restricted, that they can and should consider them, and, of course, courts are, and that is a good thing, a positive thing, but I think they feel that if they do a traditional departure on one of these grounds, the law is going to say, "You are not allowed to," and they will be reversed.

They don't want to make that assumption, and judges, district judges, have good reason for that.

And so I think the Commission could do a great service to clarifying that issue and increase probably the use of departures if it was made clear to district courts that that law that developed under mandatory guidelines that is inconsistent with

3553(a)(1) is no longer binding.

With that, I thank you and I will end my long-winded comment.

ACTING CHAIR HINOJOSA: Thank you, Mr. Nachmanoff.

Mr. Mann?

MR. MANN: I want to thank the Commission for giving me this opportunity to speak before you.

I also want to thank the public defenders who have testified today and the testimony they have given at previous hearings, much of which I read.

I think one of the problems that has been identified is the complexity of the guidelines, and nothing highlights it more clearly than the detailed presentations of many of the public defenders.

We in the private bar who practice, and particularly those of us who have CJA clients, many of whom have basically the same type of charges, same type of backgrounds as the public defender clients, are continuingly indebted to the public defender's offices for doing the kinds of analysis you heard today. We

need that support, we rely on it enormously, but I think it also highlights one of the problems the guidelines have in terms of complexity.

I want to touch first on an issue that I see in my district, but I rely on all the national data. I said in my written comments that I think most participants in the federal criminal justice system strive consciously to avoid racism, but the inescapable fact is that statistics show that in many areas, the federal sentencing has disproportionate impact on minorities. That is particularly true with respect to things like career offender, statures with respect to -- some of the mandatory minimum statutes.

It is an inescapable fact. It screams at you when you go into a prison. Clients are always aware of it, and I submit that that appearance of racism is absolutely there, is an issue that cries out to be resolved and to be addressed so that it can disappear.

I will also say -- or at least be lessened.

I will also say, one of the things we mainly haven't considered fully is how much

the effect of state court adjudications on this system imports the lingering racism of some state court law enforcement systems in the federal sentencing system. It is hard to analyze that, it is hard to get data on that.

Indeed, it is very hard to do real data even in a small district on how much impact, how much disparate impact some of these statutes have on minorities, but it is very clear that it is a large impact, and I beg the Commission to try and address that.

The second point I would make, and it is related to the adverse impact on minorities of many of the sentencing rules, the sentences are just too long. I suppose at some point that is a value judgment, but at some point it is a judgment that is based on your own guidelines. So often we see sentences driven by mandatory minimums or 851 enhancements, and that sentence will be two years, five years, ten years higher than the guidelines sentence.

I agree completely with the public defenders that have argued that the guidelines ranges for drug sentences are too high, but then when you have existing guidelines trumped by

mandatory minimum or 851 sentences or career offender sentences that are much higher, it is just way too much, and I can't say it anymore simply than say there is a need to lower these sentences dramatically.

It is not like you will be left without the tools to impose significant penalties on people if mandatory minimums are limited. I gave some examples in my written testimony.

You don't have to have a ten-year mandatory minimum. You can still impose a 40-year sentence on somebody for relatively minor amounts of drug possession.

I don't want to limit my comments to drug possession, but that is perhaps the most dramatic and most visible statute in the federal system.

Also, it is impossible to explain to a client why the fortuity of whether they have been charged by a state court system or federal court system will dictate whether they get two years probation or two years jail versus a ten years mandatory minimum sentence.

I don't understand, and I can

assure you my clients don't understand, why a fair system prosecuted -- a fair sentence in the state court system if one-fifth or no jail in the state court compared to what the federal sentence is.

I was struck this morning when I had the opportunity to listen to some of the U.S. probation officers testify, and I did not put this in my written comments, and I wish I had, that there is an enormous resource in the U.S. Probation Office, and in the few cases I have had where my clients have been fortunate enough not to suffer a period of incarceration as a result of a federal sentence, or very short sentence where I stay in touch after they get out, the value of what the U.S. Probation Office has been able to do for them through alternatives to incarceration is really phenomenal.

Some U.S. probation officers -- we are very fortunate in our district to have a great probation office, but I think that is true in large part throughout the country -- do find alternative programs, do find good programs, do find mental health programs, do find drug

programs, do find educational programs, do find vocational programs that are meaningful, and we put more of our resources into letting probation officers work with our clients outside of prison before they go to prison; not send them into prison. I think that is another way of saying there should be alternatives to incarceration, and you already have the tools in place with probation officers, officers who can marshal those resources and make meaningful differences in clients' lives.

You can go on endlessly with anecdotal stories about how painful long prison sentences are.

I said to someone it is so hard to go to prison time after time and say to clients often in small drug cases that they are going to be separated from their families for five, ten, twenty years, and explain that to them and explain that to their families, and you don't even try and explain that to their kids.

We have gone through the rest.

I think as a society one of the things that we have to look at is that we are separating parents from their children, we are

separating them with long prison sentences, then often deporting those parents, primarily men, and creating a whole society of people with a parent in jail that they hardly know at all.

As we all know, as a practical matter, most federal prisons are far away from the locale of clients facing incarceration.

I want to talk briefly about the complexity of the system. Again, perhaps the easiest way I can do this is to talk about when you go to see your client and you explain to them the guidelines, and you spend a fair amount of time explaining to them the guidelines, and then you try and explain to them what the policy directives are -- and I totally agree with the public defenders who have made suggestions in those regards -- and then you explain to them what 3553(a) means and how that may have an effect, and then the probation officer comes in and does a presentence report and does a real detailed personal history, and then you have to explain to your client "but none of that is going to matter, because an 851 is on file, and the 851 is going to trump everything."

I want to add two other comments

briefly that maybe -- one I suspect affects all of us.

I don't know how much exactly, Commissioner, you knew about this, but there is a problem at the Bureau of Prisons. It is not an easy agency to deal with. We get constant calls from clients. There are a host of issues there. One of them that cries out all the time is medical care, but there are other problems too.

If there is any way to make that agency more responsive, more transparent, more open, I think it would help the whole process.

I mentioned a separate problem that is growing, and certainly in our district, and I suspect in other places.

The public defenders’ comments have often addressed problems of cases involving immigration offenses.

In lots of cases involving immigrants, regardless of whether the offense is an immigration offense or not, there are significant immigration consequences to the client.

If you are retained privately, you

have the option, and you very often use it, to retain immigration counsel to give your client advice as to what the immigration consequences of a criminal adjudication will be, but when you are court appointed in a CJA case, it creates a special problem that you can go to the court and ask them to authorize you to retain outside counsel. You ask them for an expert and have them address that issue. You begin to say there ought to be similar Gideon rights for information questions related to the criminal process. I raise that because it is an increasing issue.

I want to thank again the public defenders for all the work they do for all of us, and I just want to implore you, the two points I made, the two points I tried to make most strongly, the system has a terribly adverse impact on minorities. That is wrong. The sentences are too long.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Mr. Mann. I know you thanked the public defenders. I think every sentencing judge in the country would thank the public defenders and

the panel attorneys for the work that you do in representing such a large number of the defendants in federal court, and you do it very ably and make sure their constitutional rights are protected and make our jobs easier, and that goes for both the CJA panel of attorneys and defenders so it is appreciated.

I will open it up to questions.

VICE CHAIR CARR: Mr. Nachmanoff, I spent my career prosecuting in a district like yours that was faithful to the Thornburgh et al trial requirements so we basically charged what was readily provable and most serious as recommended by sentencing guideline calculations.

Putting aside whether or not someone gets charged locally instead of federally, and putting aside [that] one district has a fast-track program and another one doesn't, as we go around the country, we hear about different charging practices in different districts.

On the one hand, we might hear from a defender that yes, they agreed on the filing of an 851, mandatory minimums, "but they give us a short amount of time in which to

decide whether or not to plead, and they make us waive our appellate rights." And then we ask, "Would you rather have the Department of Justice uniformity?"

"Oh, no, for us, uniformity is uniformly bad."

On the other hand, unless there is some kind of uniform charging policy around the country which results in at least transparent sentencing decisions -- and I think you would agree with that -- how can we even evaluate what is being done around the country? Because if there is charging policy going on, we can't necessarily see it. It doesn't get disclosed. We don't know what wasn't charged.

Again, I understand why I would prefer to be a defender in a district where I can avoid some drastic charges, but how can the system even have a hope of some type of uniformity in transparency unless there is some kind of uniform charging decision?

I understand you have uniform charging decisions and still end up with different practices with respect to 5K and things like that.

How can we evaluate things, and how can things even approach uniformity under this system unless there is some kind of uniformity in charging?

MR. NACHMANOFF: I think that is an excellent question.

Let me first say that I echo all those who have said before me that we don't support uniformly bad policies and so we don't think a solution is to ratchet up punishment and to charge more mandatory minimums and more enhancements in order to achieve greater sameness.

I guess uniformity and disparity and these terms I think are very malleable and a little bit hard to use in a way that everyone is understanding of it the same way.

We want, I think, what everybody in the system wants, which is fairness. The Department of Justice certainly wants to be fair and therefore wants to have consistent policies. I think maybe that is a better term than uniformity.

We in the defense bar want fairness and justice for our clients.

Courts, of course, are all about fairness and trying to achieve appropriate, fair and just sentences.

I think policies that require prosecutors to limit discretion on the part of the judges interfere with fairness, and therefore to the extent the national policies of the Department of Justice tie the hands of judges and prevent them from looking at every case and every individual as a human being, that is something that I can't endorse and don't support.

Now, that doesn't mean that there shouldn't be guidance, national guidance to federal prosecutors about how to wield the enormous power that they have.

You know, it is interesting. I think one of the problems that we have as we review not only the history of the guidelines in sentencing, but also as we are talking more generally about the history of the charging policies of the Department of Justice, is that a close reading and a rereading of the Ashcroft Memorandum, which I have done, and others in preparation for this event, led me to realize

the Ashcroft Memorandum really has tremendous flexibility if it is read by the U.S. Attorney or the prosecutor to be used in a way in which not seeking the highest penalty in every circumstance is the ultimate goal.

So when I say, and perhaps in the Eastern District of Pennsylvania, Eastern District of Virginia, that there has been a rigid adherence or a faithful adherence to the Ashcroft Memorandum -- you know, it is a certain interpretation of the Ashcroft Memorandum that we have seen, where the negotiating away of 851s or 924(c)s is done in a certain way.

I am not suggesting that [in] the District of Oregon or some other parts of the country they are not following the Ashcroft Memorandum. They are simply interpreting it in a way that is consistent with their understanding of how to do justice and how to come up with appropriate punishment.

COMMISSIONER WROBLEWSKI: Should there be a uniform interpretation?

MR. NACHMANOFF: I think the problem that we, as lawyers, have is we look at words, and words are subject to multiple

interpretations, and then there is a subjective element in the decisions that prosecutors make with regard to how they treat a case; whether it is based on their caseload -- the Ashcroft Memorandum talks about, "Hey, if this is going to take you four months to try it, maybe the guy should get a life sentence."

I am not quite sure what the philosophical underpinning of that is other than convenience. We know that that is part of fast track. Fast track is on the board because they couldn't deal [with] all the cases if everybody didn't get some kind of compromise deal.

I am not sure why that is true within the fast track jurisdictions that are on board or where the pressures of convenience or volume mark the case.

This is not a hearing to try and tell the Department of Justice how to formulate its policies. This is a Commission, and the Commission has its agenda and its job to do.

I think what is important, and the point of our testimony, is to emphasize the fact that as we are looking at how the system operates now, that it is important not to focus

too closely on perhaps the greater latitude that judges have now compared to what they had prior to *Booker*, because there are many other parts of the system that are not controlled by judges that are affecting the fact that sentences are imposed differently.

VICE CHAIR CARR: But seeking the higher sentences, that is not what I understand the Department to require. There is a difference between what the Department has required in terms of charging policy versus what an assistant is supposed to seek in terms of a sentence.

If you could do away with mandatory minimums, have uniform charging policies, and an advisory system, then judges would have the flexibility to do what they need to do, and we would be able to see what they are doing and why.

MR. NACHMANOFF: I don't want to go out on a limb, but that is a very appealing prospect. The repeal of mandatory minimums and the flexibility the courts have to impose individualized sentences I think would go a long way to achieving greater variance in the system.

Whether the Department of Justice decides to try and rein in the differences amongst its prosecutors is really something the Department of Justice has to decide.

I think in a system like that, without mandatory minimums, and without mandatory guidelines, there would be freedom amongst the various players to achieve just sentences.

COMMISSIONER WROBLEWSKI: Mr. Nachmanoff, as you probably heard -- and I also want to get the opinions of Mr. Mann and Mr. Bunin on this -- you probably heard the Attorney General has testified about a working group in the department that is looking at charging practices, is looking at the structure of sentencing, is looking at alternatives to incarceration, all of this -- the one thing that I actually found very -- just put myself at ease a little bit -- was the commonality of values that are at the core of what we are doing and I think are at the core of what you are talking about.

So for example -- because we started out the process by looking at what are

the core values we want to have as we go about this process of examination?

We want a sentencing system free of racial and ethnic disparities. We heard that.

The judicious use of imprisonment, equal justice under law.

I heard from all of you similar people similarly; not every person who commits a crime is exactly the same, but equal justice under law; greater consideration of offender characteristics; sentencing that promotes public safety and is consistent with law enforcement priorities.

So at that level there is great commonality, and I think it is comforting, at least to me, but I do want to ask, because part of the process -- we are examining this for the Commission at its 25 year point, and this new administration at the very beginning of its work -- part of this is what should be the Justice Department policies given the law that we have now which includes mandatory minimums, we have the Ashcroft memo. I recognize there is criticism of that.

We have very little in terms of regulation of prosecutorial use of 5K1.1 motions.

What do you think should be the right policies regulating or charging in a 5K1.1 practice?

MR. NACHMANOFF: I don't want to --

ACTING CHAIR HINOJOSA: Although this is a Sentencing Commission hearing, I will let you have this discussion with him about the Justice Department.

MR. NACHMANOFF: I appreciate that.

COMMISSIONER WROBLEWSKI: I think it is at the core of sentencing. That is what you are telling us. You are telling us the core of the problem is the Justice Department in sentencing so let's try to solve the problem.

MR. NACHMANOFF: Let me start by making two points in response to your question and your comment.

First of all, fundamentally, I do appreciate the opportunity, but obviously it is not our job to set the Department of Justice

policy. You are not suggesting we have that power.

With that caveat, let me make two brief points.

Earlier today you brought up the issue of mandatory minimums and offender characteristics, and I think Judge Woodcock talked about the fact that the court system really fails in many ways to address people who have severe mental illness in appropriate ways.

You made the comment, I think, if I heard it correctly, that, "What about a system in which a mentally ill person is charged with mandatory minimum?" And now we have more flexibility with regard to *Booker* for a judge to take those factors into account. If there is no mandatory minimum, how is that fair?

To bring us back to your question about charging policies and changing them, I think the answer to that is that if a prosecutor sees that someone has committed a crime, maybe even a serious crime that carries a mandatory minimum, but they are laboring under a severe mental illness, well maybe the right charging decision is to charge something that doesn't

have a mandatory minimum so that the court can have the flexibility to impose a sentence that everyone believes is fair and appropriate.

Judge Woodcocks is exactly right. Insanity, there are very few cases in which the defendant can meet the burden of proving insanity, but there are many cases where mental illness plays a significant, a critical role in the decision to commit crime or how the crime is committed, and that is not taking into consideration mandatory minimums policy. So that is one area the Department of Justice could immediately address that.

Prosecutors should have the ability to tailor the charge and the ultimate result in a way that takes into account those kinds of factors.

Secondly, we were really delighted when the Assistant Attorney General testified before the Senate acknowledging the wonderful work the Commission has done with regard to the crack/powder disparity in advocating for a change that addressed that problem.

Unless I am mistaken, I believe at that sentencing hearing when asked by Senator

Feinstein, he categorically answered that he believed the ratio should be one-to-one.

I realize there is an open question as to whether or not that one-to-one ratio means reducing the crack and powder to an equal level, or somehow raising powder.

I would urge strongly the Department of Justice, the Commission and anyone else listening that we don't need to raise penalties for powder. I believe the Commission has come out strongly making that point, and my point about incarceration underscores that issue, but nonetheless.

I made a suggestion to our U.S. Attorney, and I understand that he is required to follow Main Justice policy, and they have done so in the Eastern District of Virginia, but one thing the Department of Justice could think about is taking a position now, before Congress acts, as a pilot program -- or perhaps in a region, maybe in the region where we have the number one practice for crack cases in the country, Eastern District of Virginia -- to make a charging decision in order to correct this disparity, this over-incarceration we see now

with regard to crack cases. The Department of Justice has the power to do that.

I know [Lanny Breuer] and I know Main Justice came out saying until Congress acts, we must adhere to existing law. Of course, we all must adhere to existing law: defense attorneys, prosecutors, judges.

There is no law that requires the Department of Justice to charge people with mandatory minimums of five years for five grams of crack, ten years for 50 grams of crack.

They could charge based on powder and give judges freedom to impose a sentence based on a one-to-one ratio, or some ratio.

In the Eastern District of Virginia, and I believe in many parts of the country, I believe, the mandatory minimums are still being charged. That injustice is being perpetuated right now, and it [is injustice], over and over again, and that could be fixed.

Now, it doesn't require anything other than a change to the Ashcroft Memorandum, and perhaps that is something to be considered.

MR. BUNIN: I am all for reviewing your policies and changing them, but I think the

real check on prosecutors is to give power back to the court. When you do that, you get rid of the mandatory minimums and let the judges use their discretion.

That is the only way you can get rid of them. You can have as enlightened policies as you want, you are still not going to be able to control every office in this country.

I am not saying disparity among prosecutors is a bad thing. Those examples I gave, except maybe the one about the cooperation agreement, those are facts, and you can't force uniformity on a system that already has disparity built in. That is all I am saying.

I think the real change has to be give power back to judges, but I am all for enlightened policies at DOJ.

MR. MANN: The mandatory minimums and the things like mandatory minimums, the 851s, things like that, I don't see why we can't get rid of them and give power back to the judges, and the judge can sentence for a long period of time if the case requires.

COMMISSIONER HOWELL: I just have one question, Mr. Nachmanoff. You, in your

written statement -- I read all 27, or a lot of pages of it -- you urged the Commission to give fuller explanations for its amendments and policy statements, and I have to agree with you, and we could and should do a better job of that.

But one of the comments that you make in your written statement that I wanted to explore a little bit, which this sort of puzzled me, about the whole defender empirical analysis argument, where you say a part of the reason that the Commission should give better explanations and talk about specifically saying whether or not the guidelines should be based only on congressional record or on mandatory minimum statute, the reason you say the Commission should make that explicit is because this would improve the ability of judges to decide on a reasoned basis whether or not to follow the guideline in a particular case, and to explain their sentences, and it would give the courts of appeal a rationale for reviewing the reasonableness of the sentence.

What I understand from that comment is -- correct me if I am wrong -- if there is a guideline or amendment to a guideline

that is based in direct response to a congressional directive, for example, that in some ways that should be given less weight than other guidelines. Am I understanding that correctly?

MR. NACHMANOFF: Well, if I understand your question, we believe that the more explanation there is, the better off everyone is, the better off defendants are for understanding what is happening to them, the better off the lawyers are for understanding what has failed or succeeded in their arguments, and the better off the appeals court is if there should be an appeal.

Judge Tjoflat, I believe, having read the transcript from the Atlanta hearings, he made a similar point, which is that the appellate courts would like to see greater information from the Commission about how the Commission came up with the particular numbers they have come up with, and to the extent the Commission can provide information about why a particular guideline is tied to the purposes of sentencing and how it was arrived at, and if empirical evidence, basis, was used for it, like

the Commission has done with regard to graft or with regard to recidivism, the 15 years review, then the appeals court is going to be in a better position to evaluate the judge's decision to impose the sentence, whether it falls inside the guideline or above it or below it.

COMMISSIONER HOWELL: But if there is a guideline that says that for a particular act there is an increase, because that is in direct response to congressional directive, so Congress is particularly -- its own policy judgment about what the appropriate sentence is, and we have incorporated that directly into the guideline as we are required by law to do, to my mind, that directive in some way should be given almost more weight than any other policy statement, because Congress, who embodied that, has the power to direct sentencing; has specifically said so.

I take it from your position that you sort of view it in reverse, and I want to make sure I understood what your point was about explaining whether or not a directive was the prompt for a guideline or an SOC.

MR. NACHMANOFF: Let me answer

that in two ways if I can. One is that, of course, the variance argument was made and accepted by many people in *Kimbrough*, where Congress decided what the penalty should be for crack, and who are we to disagree, and of course the disagreement was projected that instead, the Commission, like in *Neal*, was free to determine exactly what the punishment should be.

Mandatory minimums don't tell the Commission anything other than what the floor and ceiling is, and the Commission has an independent obligation to determine how the guidelines should operate.

I know I had a second point, but now I have lost my train of thought.

COMMISSIONER HOWELL: If you think of it, you can tell me.

ACTING CHAIR HINOJOSA: I have a question, and then Commissioner Friedrich can have the last question.

Just listening to all three of you talk about doing away with mandatory minimums, and guidelines should be advisory and no mandatory guidelines, and give the power back to the judges, you heard Judge Kavanaugh this

morning mention where that leads us is judges, although we all sort of follow the law, would be left in a situation where our own personal opinions with regard to certain crimes -- and I have to tell you that in the five years, four-and-a-half years I did sentencing without the guidelines -- that factored into a lot of our sentencings, how we viewed drug trafficking as to how harmful that was to society, and some of us had different views than others.

Do you all have any concern that this will affect individual defendants and society if there is nothing that provides some kind of guidance here that puts you within a certain -- and you are left totally to your own personal viewpoint?

Because if there is no law or nothing, then you are left with this is a personal decision that I have to make, and it is a tough personal decision that I have to make, and then you bring in all of your personal viewpoints into what is going on here.

How do we deal with that?

You heard his suggestion. Do you have a suggestion as to how we deal with that?

MR. BUNIN: I don't think there is any way we are going back to where it was before the guideline[s]. We have judges basically raised on the guidelines. They look to them, they see them as guidance.

Judges, typically, if you give them an explanation as to why this is appropriate, they will follow it. They are not looking for a way to avoid these guidelines, whether you call them advisory or not. They take them into account; they are required to take them into account.

I listened to Judge Kavanaugh this morning and I was thinking I can see he is very sincere about that, but I noticed he didn't give an example of --

ACTING CHAIR HINOJOSA: Should we be concerned at all that in one circuit we can have a 9 percent departure variance rate, in another you can have a 30 percent departure variance rate, and it does matter whether you get charged in a certain part of Texas versus another part of Texas; that this would be a certain part of the country versus another part of the country with regard to the same crime,

same amount of drugs, and that it does matter where you get caught, and whether prosecutors will then try to bring it in in a certain place, as you say used to happen in Texas? It is a big state, and people look at things differently both from county to county and federal to state.

MR. BUNIN: Those disparities are not one[s] you can fix.

Imposing a uniform mandatory system on top of that does not fix that. Those are inherent, and those are created by prosecutorial decisions, regional culture, whatever, and we have to leave room for judges to take those things into account and be fair to all defendants, and that is all we are asking for, and that is why I am not worried, because I think judges will do that.

ACTING CHAIR HINOJOSA: Even though some defendants will be treated differently wherever they may be caught?

MR. BUNIN: The issue is fairness, not uniformity. I don't think there is anything in the Sentencing Reform Act that uses the term "uniformity." What we are trying to get is justice for everybody. It may be a little

different --

ACTING CHAIR HINOJOSA: I guess the term is "unwarranted disparity."

MR. BUNIN: Unwarranted disparity, yes. We are trying to avoid that, and I agree that is not what we want, but you have to leave room so that individual judges, you can trust them to do that. I don't think it is wrong.

COMMISSIONER FRIEDRICH: Mr. Nachmanoff, you made the point in your written testimony as well as your oral testimony that over time and, in your view, substantive review is a lot more meaningful. That is really not what we are seeing or what we are hearing. What we are seeing and what we are hearing is that substantive review, there is very little teeth, no meaningful review. What we are seeing is that decisions are affirmed no matter how high or how low they are, and judges can disagree.

As a result of *Kimbrough*, sentences are being affirmed based on policy disagreements as well as judges' fairness to the guidelines based on the individual circumstances of a case.

I am just interested in your

perspective on why it is that you see over time the level of substance of review will become more meaningful? I just don't see it.

MR. NACHMANOFF: Let me answer that and then come back to my second point that I remembered.

Substantive, reasonableness, of course, is something that we live with as a result of the Supreme Court. It is constitutionally required, and what the Supreme Court did in addressing the Sixth Amendment issues that were created by the mandatory guideline system was exercise those provisions that required judges to impose sentence under 3553(b), and to exercise the *de novo* review by the appellate courts.

The constitutional solution was to keep an appellate process, but to fundamentally change that appellate process.

I don't think the question to be asked, really, is how can the appellate process become more like it was before, or how can it have more teeth?

The Supreme Court has made clear that in setting standard that it is the district

courts that are in the best position to determine sentences; that they must follow the procedural requirements that are set out in the Supreme Court cases, and they must correctly calculate the guidelines, and I think we are seeing the courts are doing a good job of following that mandate; that the appellate courts are carefully making sure the judges are adequately explaining the reasons for their sentences.

There has been some case law developed, and I cite one case from the Ninth Circuit in which a case was reversed for being substantively unreasonable, despite the fact that it was in the guideline range, and I think that reflects that the circuit courts are taking that responsibility seriously.

Let me just finish by coming back to the point that I had forgotten briefly, which is to the extent Congress gives directions to the Commission to say "ratchet up the penalty," it is important that the Commission explain that and provide that so that the appeals courts can see whether or not there is any rational reason for it other than simply what Congress decided.

We know, sadly, that with regard to crack, the way the penalties were decided was by a bidding war after the death of Len Bias; that there had to be grossly higher penalties for crack than powder based on a number of things that now have been debunked.

It wasn't based on empirical evidence, it wasn't based on any notion that people who sold crack should go to jail for ten or 20 years. It was based on raw politics of the worst kind. Perhaps with the best of intentions, but the result was disastrous.

When Congress says "increase the penalty" and doesn't explain why, it is important that the Commission make that clear so that the appellate courts can see, and the district courts can see, that there is a good reason for it, or there is no reason at all, and then they can choose whether or not that is something that they want to follow or not follow.

Congress always has the power to keep judges from giving a particular sentence. They can just create mandatory minimum. We don't want them too.

In fact, we want the Commission to send out a report asking the mandatory minimums be revealed for all the reasons we said.

But this process, I think, helps create more transparency about why we are sending people to jail when they are being sent to jail.

COMMISSIONER HOWELL: If Congress sees that when the guidance -- that courts are accepting the communication to disregard guidelines, because they are based on personal directive, don't you think that their reaction is going to be, "Well, if this is the only way we can have them pay attention to our policy decision, to get rid of mandatory minimums, they are going to pay attention to that?"

MR. NACHMANOFF: I think that we should do, all of us, as advocates in court, as judges on the bench and the Commission doing its job, is try and achieve fairness and justice, and one of the ways the Commission can do it is to exercise its independent, neutral, apolitical views on how punishment should be imposed, on how sentences should be imposed.

If Congress wants to take that

advice, then we will end up with a better system. If Congress reacts by saying, "Judges are ignoring us" or "The Commission is, you know, off its rocker for suggesting that penalties are too high," well, you know, I suppose that could happen, but I think we should all have the courage to be willing to say what we think is right and what we think is fair.

If we see that there are punishments that are too high and they have been too high for too long, those of us who do these cases should be willing to say it out loud and ask Congress to repeal mandatory minimums.

ACTING CHAIR HINOJOSA: Thank you all. We will take a short break.

(A recess was taken.)

ACTING CHAIR HINOJOSA: Next we have a “View from the Executive Branch.”

We have Mr. Dana J. Boente, who was named Acting United States Attorney in October 2008, and then the Interim U.S. Attorney in June of this year for the Eastern District of Virginia. Before serving as the U.S. Attorney, Mr. Boente prosecuted fraud cases as an AUSA and was selected as the first assistant U.S. attorney

in June of 2007. He has previously served as the principal deputy assistant attorney general and as a trial attorney for the U.S. Department of Justice's Tax Division. He is a graduate of the St. Louis University School of Law, and did clerk for a district judge prior to entering his practice as a federal district judge.

Mr. Benton Campbell was named Interim U.S. Attorney for the Eastern District of New York in October of 2007. Prior to that he served on detail to the Department of Justice as acting counselor to the assistant attorney general of the Criminal Division. He also served as an acting deputy assistant attorney general, and then as the acting chief of staff and principal deputy assistant attorney general for the Criminal Division, and he has also served as an ex officio member of the U.S. Sentencing Commission from October 2006 to June of 2007. He received his bachelors degree from Yale and his law degree from the University of Chicago.

Which one of you is going to go first?

MR. CAMBELL: Good afternoon, Chairman Hinojosa, Vice Chairmen Sessions, Castillo and Carr, Commissioners Howell and Friedrich, and Commissioner Wroblewski. It is a pleasure to be with you all again, and it is a pleasure to be back before the Commission. I had the honor to work with all of you except Vice Chairman Carr back in 2006, 2007.

I have the distinct pleasure of saying that was a very rewarding experience, and talking an awful lot about the sentencing process. It gave me a very profound respect for the process; the commitment [and] professionalism [] with which the Commission and its staff approach their important tasks.

Their approach is methodical, and it is a highly detailed process that takes you through the guidelines. In policy statement there is a lot of empirical research that goes into that, a lot of policy discussions.

I remember in many of our discussions about a number of issues, the rapport and great sense of how the Commission approaches a problem.

As you know, this is a time of

significant change in the sentencing arena, and my experience has given me a profound sense of the importance the Sentencing Commission has contributed.

I am very appreciative of the opportunity to come talk to you about this 25th anniversary year of the Sentencing Reform Act, and then you had *Booker*.

Before I get into that, I thought I would give you a little quick tour of the Eastern District of New York. For some of you, like Commissioner Howell, who actually served in our office, it will be familiar territory. For some of you it will be a little bit of an opportunity to take you to the outer boroughs on the other side of the Brooklyn Bridge. You are welcome to come view it at any time.

The Eastern District of New York covers the counties of Kings County, Queens and Richmond County, which are three of the five boroughs of New York; Brooklyn, Queens and Staten Island. We also cover all of Long Island, Nassau and Suffolk County. That is home to 8 million people. We are the fifth most populous district in the country.

Brooklyn, as you can well imagine, is incredibly diverse, and the Eastern District is incredibly diverse, both geographically and in terms of its population. If you take a walk down almost any street in Brooklyn or Queens on any given day, you will hear several different languages being spoken and have the chance to sample the food and culture of many different nations. You will have an opportunity to meet people from any part of the world. It is really an incredibly diverse population.

As a side line, my own experience in the office -- I have been with the office for 15 years -- my first three trials, only one of them was in English, and the others were in a variety of languages.

In fact, we have such a diverse practice that we are at the point where if we are doing Spanish language, we are well equipped to deal with translating that. It is a fabulous place to work and live.

Let me tell you a little bit about some of the issues we confront in our district. Of course, it is no surprise, terrorism is the top priority in our department and has been for

some time. It has been in our district for over 30 years.

Unfortunately, New York is becoming very accustomed to dealing with and familiar with the specter of terrorism.

In that area, we have a couple of cases that highlight the examples of some of the cases we do in our office. We recently secured the conviction of eight leaders of the Liberation Tigers of Tamil, a foreign terrorist organization from Sri Lanka, which recently resolved. We secured eight defendants in two separate cases for, among other things, conspiring to purchase SA 18 surface-to-air missiles, and for both fundraising activities and for contracting to purchase significant quantities of firearms and explosives. We also prosecuted and convicted two defendants for conspiring to place explosives at the 34th Street subway station.

Also, given the geographic proximity we have to Wall Street, we share with our colleagues in the Southern District of New York corporate securities cases, and these cases are very complicated. They involve hundreds of

millions, if not billions, of dollars in losses and thousands of victims and investors. Our work in this area has been particularly acute given the recent economic downturn. We have ongoing investigations and prosecutions in a wide variety of areas such as Ponzi schemes and securities fraud.

We also have a Mortgage Fraud Task Force. We created this about a year-and-a-half ago, and we work very closely with a number of state and local partners. The statistics bear this out, that this is not only a problem in our district, it is a burden, it is a significant expanded problem nationwide.

We have developed a number of investigations in that area to deal with things like both financial institutions involved in mortgage fraud activities as well as fraud in the secondary market as well as vertically integrated mortgage fraud conspiracies.

Organized crime force is a top priority in our district. We saw the prosecution and conviction of John Gotti. We have prosecuted dozens of leaders and members of organized crime from all five families in the

Eastern District of New York.

It is safe to say even though there are many folks that take the view organized crime is a shell of former self, in New York City it is alive and well, and there are a lot of activities they do in this city.

Another critically important component of our office's activity is gangs. This is an important component of our district, because it is state enforcement also. In many ways the state is not particularly well-equipped to deal with the sophisticated gangs so we have stepped into that void. It was created by my predecessor, Zach Carter, 15 years ago, even before I came into the office, to address this problem in our district.

Let me give you a couple of examples of cases we have worked on in this area. It focused on, among other things, very, very sophisticated gangs that operate nationwide: MS-13, the Bloods, the Latin Kings. Some of them also involve distribution of crack cocaine, which is a popular retail narcotic that is sold in the Eastern District of New York as well as the Southern District of New York.

There is a case we did in the Gowanus Housing Projects, which is located in Brooklyn between Park Slope and Brooklyn Heights.

This was a two-phase operation. The first phase was mainly narcotics distribution activities, persons who were distributing crack cocaine, and then we prosecuted multiple individuals. Several individuals agreed to cooperate, and when they did it they made clear the gang has been operating in this area for some time, almost a decade, and had distributed multiple kilogram quantities of crack cocaine (inaudible) to get into the historical information which allows us then to bring more sophisticated prosecution against the individuals who participated in these crimes.

The Gowanus Housing Projects for a period of time, from 1992 to 2003, saw a total of 38 murders and 46 fatal shootings. In the 18 months after the take-down, there were only two shootings and no homicides, which was the longest stretch in that project's history without a murder.

We did a similar investigation and yielded a similar result in the Wyckoff Houses. From January 2000 to our take-down in March 2006, in that one block area of Wyckoff Houses there were six murders and eight shootings. In the three years since the take-down, we only had three non-fatal shootings and one murder.

Anecdotally, the sentencing judge lived in the housing project for some time, and she said much of the time while she lived there, she would hear shots fired every night, and there was a playground right outside her apartment.

Since the take-down, she has heard no shots fired.

That gives you a little flavor of some of the neighborhood impact of some of our enforcement activity.

Some of our other priorities, our office prosecutes public corruption, civil rights violations cases, and wholesale narcotics trafficking and distribution.

Corruption is a priority for us along with the FBI, and then we also do a fair

amount of narcotics work. Narcotics is importation and distribution, and there is shipments of different types of narcotics.

Interestingly, narcotics prosecution in our district is for heroin, cocaine and crack cocaine. We have not seen a lot of methamphetamine, almost no methamphetamine in our district, which is somewhat unusual, because that has been a problem nationwide.

This was background. We turn now to the issue of sentencing and the impact of the Supreme Court's decisions in *Booker*, *Gall* and *Kimbrough*.

Please note I focus my testimony exclusively on the Eastern District of New York so what I say may not be representative of the Department as a whole or nation as a whole.

I think as I indicated in my written testimony, it is probably no surprise to any of you that prosecutors in our office like guidelines, although you may be surprised as to why they like the guidelines. The reason is not, as is commonly ascribed, because our prosecutors reflexively believe that the

guidelines result in lengthy sentences. Rather, it is because the guidelines provide a significant degree of predictability and certainty.

A common vocabulary and a common set of procedures that everyone involved understands, that has in my experience elevated the discussion so at sentencing so that all parties involved are aware walking into the courtroom what the possible outcome may be. In some way it also sets the expectations for the government and defense counsel and defendants, and promotes an understanding of the transparency to the process, so at the end of the day the parties are more accepting of the end result. That is not to say that everybody walks out the door happy, but it is anticipated you do have a sense of how the procedure should work and understand what are the issues that are going to be addressed at sentencing.

It has also made very clear the value of cooperation for reasons that I highlighted a few minutes ago. Cooperation is something we use in these corporate cases and the organized crime and gang context, as well as

cooperation is very important in white collar context, because it is essential in those cases to show the defendants the rewards of cooperation.

Now under the current post-*Booker* environment, cooperation is not as clear as it was before, given the fact there are a number of issues, a number of methods that are available for defense counsel to use prior to sentencing. That is not to say cooperation is not something that is valued. It is. Cooperation is something sought out by both the government and by the defense. It is used as a valuable aspect of the sentencing discussion, but guidelines certainly give a certain clarity.

In many ways within our district, *Booker* only accelerated trends that were preexisting, and our district has had among the lowest percentage of guidelines within -- sentences within the calculated guidelines range.

Historically it ranged from 1995 until *Booker* was decided, with the exception of 1996, which for some reason is a little bit of an outlier -- and I don't know exactly why --

our compliance ranged between 43 and 45 percent which is well below the national average.

Since *Booker* it is trending downward further, 41.6 percent in fiscal year 2007, 38.6 percent in fiscal year 2008, and for the first half of this year, about 34 percent.

Similarly, as you would expect, our variance departure rate has been relatively higher. From '95 through *Booker*, it is about anywhere from 20 to 30 percent. Since *Booker* it has climbed from about 30 percent in 2007 to about 32.1 percent this year.

At sentencing, one of our judges said -- a little bit of a sense of tongue in cheek -- the rest of the country is starting to catch up to New York, where variance and guidelines has been relatively modest.

There are a couple of non-statistical anecdotal observations that I have. We haven't done any statistical analysis, so this analysis doesn't necessarily bear out, but there are two things that I would note in that regard. Our sense is that the size of variances is increasing. When you think about it, that probably makes sense because the

Congress has told the Supreme Court to put more issues in front of the district court judges in terms of making a decision, but it is our sense that the size of variances is beginning to increase.

Additionally, we also have a sense that there are differences between judges in our courthouse, and remembering it is the 25th year of the Sentencing Reform Act, part of the objective of that Act was to eliminate unwarranted disparities between defendants sentenced in the same courthouse.

The greatest area of change has been in the procedural aspect of sentencing. Sentencing today looks much different than before we had *Booker*. They are much more robust. The parties have a wider variety of range starting with the guidelines calculations: enhancement, reductions, role in the events, loss calculation, departures, variances, and then on into the 3553(a) factors; and now after *Kimbrough*, the Second Circuit, further questions about policy disagreements the court may have with the guidelines and how they were framed.

I think that also it indicates

that the sentencing discussion and the sentencing debate, as I said, is more robust. In many ways more arguments are being presented to the district court, more fact finding is going on. Prosecutors have a much higher incentive and do spend a great deal of time doing more of an investigation of the facts of the case, of the background of the defendants, and are becoming more familiar with those issues than they did before.

Previously, say in 1998, '99, when I was doing a lot of sentencings myself, those procedures were relatively formulaic. That is not the case now.

In addition, I also get the sense that the victim's roles are increasing, particularly in white collar cases. I think this is due to a variety of factors. One of the reasons is the prosecutors are seeking out victims more often to come in and testify at sentencing, but I also say there are other factors that are external to that.

Number one is there is increasing representation [on] the victim’s part. Now more victims are represented by an elaborate set of

attorneys who are specialists in this area.

Second, we are also dealing with victims that are often financial institutions. They are represented by very sophisticated counsel in their own right.

We are also seeing some changes in the law; for example, passage of the Crime Victims' Rights Act, which have made those changes become much more prevalent in sentencing proceedings; in fact, in all aspects of the criminal prosecution.

I want to touch for a second on charging disparity in Queens. In this area I want to say there have not been substantial changes in our policy. It has always been our practice to charge defenses that match with the conduct of the defendant based on the law and facts so we have not done anything, for example increasing the minimums that we charge. Our charging policies look pretty much like they did before.

The greatest change, I think, aside from the procedural aspects, would be in the area of appellate litigation. I think you had a lot of testimony already today so I won't

belabor this point. Abuse of discretion standard, standard of review now, has really changed the appellate dynamic. Appellate courts used to play a much more elaborate role in reviewing district court sentences under the rubric of guidance was mandatory. That is not the case now.

The standard of review is much more deferential, and the amount of appellate review in this area is not what it was before.

I did want to talk about *Cavera* for a second, because it highlights an interesting issue that came out of our district.

The issue that *Cavera* highlighted, which was a rare en banc opinion by the Second Circuit -- the Second Circuit rarely grants en banc review, but in this case it did because the law shifted when the case came up on appeal, and then immediately afterwards the Supreme Court decided *Kimbrough*.

The issue presented by *Cavera* is whether or not the policy disagreement with the guidelines was an appropriate basis for departure. In this case an appropriate departure wasn't one the government sought, and

the court -- the case involved Mr. Cavera, a septuagenarian army veteran, who conspired to sell 16 handguns. Unfortunately, the co-conspirator sold those handguns to an undercover officer, and Mr. Cavera was convicted.

He was facing a guidelines sentence of 12 to 18 months. The district court upped it to 24 months, and it did so mainly because it had a policy disagreement with the way the guidelines treated firearms, particularly in urban areas.

On the first go-round on the appeal of the sentence, the government actually agreed that the departure was inappropriate and unreasonable because it was a policy disagreement.

The Second Circuit reversed the case on the first go-round, reversed the sentence and sent it back.

Then the Supreme Court decided *Kimbrough*, and the Second Circuit granted en banc.

In the interim, the court, upon review, shifted its position based upon

Kimbrough, and indicated that policy disagreements under guidelines were an appropriate basis for departure.

On review in the en banc opinion, Second Circuit agreed. The case was affirmed and sentence was affirmed.

Cavera serves as a guidepost for sentencing practices in our circuit. The district courts are now given much more deference in crafting the appropriate sentence, provided, of course, that they adhere to the procedural requirements as laid out by the Supreme Court and the Second Circuit.

Those sentence can be based not only on the particularized facts pertaining to the individual defendant, such as background or criminal history, but also on the broader concepts such as general deterrence or policy disagreements with the guidelines. District courts are required to state their reasons and to support their positions with facts and analysis. But as long as they do, chances are very high that their decisions will be affirmed on review.

As I said, there is little doubt

that these are interesting times in the sentencing arena. The last few years have seen many changes, and I suspect that we have not seen the last of those evolutions.

In the Eastern District of New York, we continue to successfully prosecute hundreds of cases involving over a thousand defendants per year in virtually every area of federal criminal law. Many of those cases are among the most sophisticated criminal case prosecutions in the country, involving extremely serious defendants who have committed egregious crimes.

In cases involving the most violent repeat offenders, we are obtaining lengthy sentences. But no matter what sentencing structure is in place, we remain committed to serving the citizens of the Eastern District of New York by prosecuting the most significant federal offenders in a wide spectrum of areas, many of which I have outlined: counter-terrorism, corporate and securities fraud, mortgage fraud, violent crime, racketeering, homicide, organized crime, gangs, civil rights, public corruption.

In doing so, we will continue to turn to the guidelines to frame the sentencing debate, and we are deeply appreciative of the work that the Commission and its staff continues to do in this important area.

To that end, we look forward to the Commission's continuing efforts to provide the statistical research and history that underlies the sentencing discussion, and, in particular, the policy analysis and data that support its advised guidelines ranges. Such analysis is an effective tool to persuade the courts that they should heed the advice that the guidelines provide.

Thank you for the opportunity to testify today.

I am happy to answer any questions you may have.

ACTING CHAIR HINOJOSA: Thank you, Mr. Campbell.

Mr. Boente?

MR. BOENTE: Thank you, Mr. Chairman, distinguished Commissioners. Thank you for inviting me here today to speak with you about *Booker* and its effect on our

district.

As many of you know, the District of Virginia was one of the original thirteen judicial districts created by the Judiciary Act of 1789. In 1871, Virginia was divided into two districts. The Eastern District has four offices: Alexandria, Newport News, Norfolk and Richmond.

As I was listening to Mr. Bunin, he talked about his personal background and how it affects what he has observed in sentencing, and I am going to tell you a little bit about mine and what I thought, anecdotally.

I have tried cases in ten different districts, and taken pleas and had sentencings in another five so that is 15 separate districts.

Unlike my friend Michael Nachmanoff, I, unfortunately, am old enough to have practiced law in the pre-guideline days.

I believe that sometimes some forget that there was a reason for the creation of the guidelines, and that is disparate sentences. There is no reason to believe human nature has changed since that time.

By these comments I don't mean to impugn the integrity of any judges. We have two judges here. I was a law clerk. I have seen the sentencing process. It is the most difficult thing that judges do, and they all work on it with intensity, from what I have seen, but there is a fact that most ignore, or maybe are unwilling to state, and that is for a huge portion of the judiciary -- again, we could anecdotally talk about what that percentage is; 75, 80, 85 percent. The guidelines may not be necessary, but there is also a statistically relevant portion that need guidelines with more teeth, and every prosecutor and every defense attorney knows that; that occasionally on the draw, you know that you have on one side or the other an uphill battle.

According to your statistics, we are one of the busiest districts in the Eastern District of Virginia, with more than 2,000 cases. We double the next busiest docket in our circuit. We also are more than twice as likely to go to trial. Drug cases make up one-third of our docket, followed by violent crime, white collar, and an increasing number of immigration

cases.

I might note that last week we had five trials proceeding at the same time.

Prior to *Booker*, 93 percent of our sentences were within the guideline range. Following *Booker*, that has dropped to approximately 77 percent, and we remain in that area.

I should note that one reason for our higher percentage may be the fact that we very rarely have 5Ks, and that is mandated by the courts, who want to move things along so we almost use a -- engage in cooperation using Rule 35.

As with every district, although we do have a high percentage of sentencing within the guidelines, we have exceptions, and I believe that those exceptions are sometimes masked by the statistics, because the majority of the courts do follow the guidelines.

The inconsistencies on both sides posed by these variances, above or below, can be viewed as unfair to the majority of defendants who are sentenced within the advisory guidelines. While we fully appreciate the need

for variances to meet unique circumstances, Congress sought to create the guidelines so that the least culpable would fit within a certain range.

As I noted, our largest caseload is drug trafficking. We have had a relatively large number of below variances in the months after *Booker*, but since then it has remained at or near the national level.

Our district, as you know, also has a very large number of crack cocaine cases. In fiscal 2008, nearly 54 percent of our drug cases involved crack, compared with 24 percent nationally.

In the crack cases, we use the stiff guidelines along with the gun penalties to attack violent crime.

In Richmond, we have been very successful with a nationally recognized program using this to target dangerous individuals, violent areas of that city, and remove them from the streets. We are also targeting individuals with previous drug histories who are caught selling drugs again.

These programs have seen

impressive results. Homicides in Richmond have decreased from 86 in 2005 to 32 in 2008. Aggravated assaults have also shown a decrease of almost one-third.

We have seen similar results in our Newport News division, and I could explain those to you, if you would like.

Our strategy with respect to crack cocaine cases has resulted in downward variances.

In one case, we had a sentencing range following the guidelines of 262 to 327 months, and the court sentenced to the mandatory minimum of 120 months.

We appealed to the Fourth Circuit, and on remand, the sentence was reversed, because it failed -- the court had failed to give an adequate explanation for the degree of variance.

The court reimposed the same sentence without further explanation.

While that is an egregious example, in more recent cases, there were also convictions with below guidelines variances.

A defendant convicted of

trafficking 500 grams of cocaine and using a firearm during his drug trade is a typical offense that would have generated a sentence of 121 months at the low end of the guideline, or a mandatory minimum of 60 months.

The judge in the case gave a sentence of 60 months for the drug conspiracy, largely because the handguns were used as part of the drug trade.

For practical purposes, we have chosen to investigate and bring cases that qualify for the mandatory minimums to avoid downward sentencing variances.

For example, as I outlined, we prosecuted a heroin ring in Northern Virginia that resulted in four deaths from overdoses of heroin. Three of the defendants in that operation were sentenced to the minimum mandatory of 20 years in prison for distributing heroin and the resultant death.

I might add there were also a dozen non-fatal overdoses. I don't believe any of the victims were over 25. That was a terribly heart-breaking case.

In fraud cases, the below

guidelines variances in the district tend to track national averages. I believe that our broader guidelines are only sentenced within 65 percent of the cases. That is largely, I believe, because minimum mandatory sentences are very rarely available in fraud cases.

A compelling example comes from a case we tried in Connecticut that involved AIG and General Reinsurance, who promoted a scheme to manipulate the AIG revenues resulting in a $544 million loss.

The defendant, the lead defendant, Ferguson, was convicted of securities fraud, making false statements to regulators and mail fraud.

The court sentenced him to two years in prison, and the others in prison from four years to twelve months and a day. That dramatic departure was mainly attributed to the fact they did not have direct financial gain.

When you compare that to the Eastern District cases we tried, where the loss was $9.7 million, and the defendant ended up with 108 months in prison, the vast discrepancy in those two sentences is difficult to reconcile

and understand.

Both involved manipulating financial documents to mask troubling revenues, but the amount lost and the applicable guideline ranges clearly showed two schemes in different scope, yet the sentences brought about opposite results.

I also outlined an example of where we had agreed in the Home Owners Association case -- it is a $3 million loss -- that there was 250 victims, but the court found there was only one victim.

The court said because all the money went into the defendant's escrow account, and that was his management company, that there was only one victim; not the 400 associations, but those 400 homeowners associations may very well need additional assessments to pay for taxes, upkeep that money was for.

If I can address the minimum mandatory sentence issue just very briefly, I would like to note that the prior panel, however, said that the mandatory -- minimum mandatory sentences, the guidelines and what I believe was good, aggressive law enforcement,

compelled cooperation.

Somehow there was a sense -- at least I get a sense. I don't want to mischaracterize the testimony -- that was a bad thing.

I would submit that was a very positive result of those cases.

It was also released an implication that because of the mandatory minimums, excellent defenses are not going to trial. That certainly has not been my experience in our district.

I would like to note, just again anecdotally, there has been some criticism of the 924(c) cases. We recently had a defendant who was arrested with 13 grams of crack, $1,500 in a car, and a loaded .45 caliber handgun. He also had a seven-month old and a six-year old in the car with him. His home had another 123 grams of crack and another loaded .45.

I am not hesitant to say that we charged him under 924(c).

As far as the appellate practice, the abuse of discretion standard to review the reasonableness of the sentence really doesn't

give us many options, and we have been -- I think I have one sentencing appeal now. It really has nothing to do with the guidelines. It is more, as I explained earlier, a case where the court refused to apply the 2008 book thinking it was an *ex post facto* problem, and he applied the 2004 book so I have no sympathy with appeals.

I just have a hard time believing that there is much value to the appellate standard we have right now.

In conclusion, I want to thank you for allowing me to speak today. I appreciate what you have done to help promote the uniform system, and I hope my comments along with my colleagues have been helpful, and I would be pleased to answer any questions.

ACTING CHAIR HINOJOSA: Thank you, Mr. Boente.

VICE CHAIR CARR: I think you said the lack of 5Ks and the use of Rule 35 is judge-driven. Occasionally -- not usually -- we have some judges in our court who just want to get a case off their docket. Is that what you --

MR. BOENTE: Yes. That is the speed at which the docket runs. They are going to schedule the sentencing, and you cannot -- a defendant will not have a chance to complete his cooperation within that time so it is just not possible to do it with 5Ks.

VICE CHAIR CARR: In terms of the impact of the cooperation of those defendants and the trials in which they testify or the ultimate sentences they get, do you see either an upside or downside to the fact the court --

MR. BOENTE: I don't. Maybe it is the culture I lived with for so long, but I just don't understand those systems.

COMMISSIONER FRIEDRICH: Mr. Campbell, I am just wondering whether the practice with regard to appeals has changed in your district as well. What we have heard at lunches and prior testimony, Mr. Boente said, is that U.S. attorney offices just aren't appealing many cases, if any, because with respect to substantive review, and with respect to even procedural review, what U.S. attorneys are finding is that the cases are coming back and the same sentence is being imposed so many are simply

not pursuing those cases. Is that a fair statement for your office as well?

MR. CAMPBELL: That is a very accurate assessment. We have had many two-sentence appeals. One involved a situation where we had a rubric of a new trial motion that a judge granted *sua sponte* after he polled the jury after the case was over, and told the jury there were mandatory minimums applied and asked them whether or not that would change their vote on guilt or innocence, and we took that case up, and we managed to get that overturned.

But then about -- that has nothing to do, as Dana said -- nothing to do with the guidelines or the substantive or procedural practice that the court brought.

As a practical matter, we almost never take any of those sentencing appeals.

COMMISSIONER FRIEDRICH: In light of the *Cavera* decision in your circuit and similar decisions across the country relating to variances based on policy disagreements with the guidelines, do you see any limits to the extension of *Kimbrough*? Does it apply across the board to all the guidelines?

MR. CAMBELL: I see some limits, but very few. What I see is *Cavera* did draw a distinction about disagreements with the Sentencing Commission and guidelines as opposed to policy decision with Congress. I don't think we addressed the question about policy decision with Congress that Commissioner Howell raised with a previous panel. I don't know the answer. I don't know how that is going to come out.

ACTING CHAIR HINOJOSA: We thank you all very much and appreciate your time and your patience.

(Whereupon, the above-entitled matter went off the record at 5:18 p.m. and resumed at 9:10 a.m. on July 10, 2009.)

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Friday, July 10, 2009

The public hearing convened in the United States Court of International Trade, One Federal Plaza, New York, New York, at 9:10 a.m., Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

RICARDO H. HINOJOSA, Acting Chair
WILLIAM B. CARR, JR., Vice Chair
RUBEN CASTILLO, Vice Chair
WILLIAM K. SESSIONS, III, Vice Chair
DABNEY L. FRIEDRICH, Commissioner
BERYL A. HOWELL, Commissioner
JONATHAN WROBLEWSKI, Commissioner

STAFF PRESENT:

JUDITH W. SHEON, Staff Director
BRENT NEWTON, Deputy Staff Director

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ACTING CHAIR HINOJOSA: Welcome, everyone, to the second day of the public hearing of the United States Sentencing Commission on the anniversary of the passage of the Sentencing Reform Act of 1984 we are having here in New York.

Again, thank you to Judge Restani and all the members of the Court of International Trade as well as staff, as well as the judges who have made this possible, Judge Loretta Preska and Judge Kimba Wood. Both are present and helped with the logistics and the location, and we appreciate all their help.

I also want to thank all the members of the panel who have appeared before us. Every single member of the panel has something else to be doing today, not necessarily to be in front of us, but they did take the time to be in front of us and share their thoughts with us with regards to their view of the Sentencing Reform Act.

We have a distinguished panel with a "View from the District Court Bench." It is the second panel that we had. We had one yesterday and now today. Federal district judges are the

judges who actually impose the sentences, and their side is always helpful for the Commission.

We have starting on my left the Honorable Donetta Ambrose, who has been chief judge for the U.S. District Court, Western District of Pennsylvania, since the year 2002, and she has been on the bench since 1993. She was engaged in private law practice, but also served as an assistant district attorney in the Westmoreland County District Attorney's Office. She was a state judge in the Court of Common Pleas in Westmoreland County in Pennsylvania.

Chief Judge Ambrose received her bachelor's degrees from Duquesne University and her law degree from Duquesne University School of Law.

She has some very interesting comments about her first year of law school, but I wouldn't repeat them on the record.

Next we have the Honorable Raymond Dearie, who has been chief judge of the U.S. District Court for the Eastern District of New York since the year 2007. He has served on the court since 1986. Prior to that he was engaged in the private practice of law in New York, and

he also served in the U.S. Attorney's Office, having several positions in the Eastern District of New York, including as chief of the Appeals Division, chief of the General Crimes Section, and chief of the Criminal Division. He was an executive assistant to the U.S. Attorney, and then actually became the U.S. Attorney for the Eastern District of New York, and he received a bachelors degree from Fairfield University and his law degree from St. Johns University School of Law.

Next we have the one that receives a claim for the furthest award, the Honorable Gustavo Gelpi, who has been a judge on the United States District [Court] for the District of Puerto Rico since the year 2006.

Prior to that he was a U.S. magistrate judge in the District of Puerto Rico from 2001 to 2006. He also served as an assistant federal public defender, actually had a stint at the Commission as an assistant public defender, and he was legal counsel to the Puerto Rico Department of Justice, having served as its solicitor general for the Commonwealth of Puerto Rico. He received his bachelor’s degree from

Brandeis and his law degree from Suffolk University Law School.

Next we have the Honorable Nancy Gertner, who has been a judge for the U.S. District Court for the District of Massachusetts since 1994. She did clerk for a judge on the Seventh Circuit and was engaged in the private practice of law in Boston, '72 through '94, as well as an instructor at Brandeis University School of Law, and she has been a visiting professor at the Harvard Law School. She received her bachelor’s degree from Barnard College, and her master’s from Yale and her law degree from Yale.

Yale has been overrepresented in the last two days, but, nevertheless, we have heard good comments from all the participants.

We do thank you for taking your time to be here. We realize you have busy trial dockets and busy schedules on the court, but it is extremely helpful for us to hear from U.S. district judges.

Judge Ambrose, Judge Dearie, which one of you is going to go first?

Judge Ambrose?

JUDGE AMBROSE: One thing I have learned is you don't want to follow Nancy. I don't want to follow Nancy.

While I am sure Yale has been overrepresented in the last two days, I am going to bet that Duquesne University in Pittsburgh has not so I want to thank you and the entire Commission for the opportunity to appear today, and to speak about the most important and the most difficult function a trial judge performs, and that is sentencing.

As Judge Hinojosa mentioned, I became a federal judge in 1993, so my entire federal sentencing experience prior to *Booker* was under the mandatory United States Sentencing guidelines.

Coming to federal court from my position as a state trial judge in the Commonwealth of Pennsylvania, where I had served for 12 years in that capacity, I was familiar with sentencing guidelines, but state sentencing guidelines under the law of Pennsylvania were very different from and bore little resemblance to the federal sentencing guidelines.

In fact, it was very difficult at first to believe that defendants would enter guilty pleas without knowing exactly what their sentences were going to be.

I was amazed to discover that more than 90 percent of all individuals facing federal criminal charges entered guilty pleas without fully understanding what their actual sentence is going to be.

Unlike some of my colleagues, I never felt completely hamstrung by the guidelines. I believe that the Sentencing Commission in implementing the guidelines had made great strides in achieving predictability, consistency and transparency in sentencing outcomes.

Quite frankly, the guidelines for the most part created a more just system yielding fairness along with consistency.

Furthermore, as the United States sentencing guidelines became exceeding[ly] detailed and complex, I believed that I still had a crucial role: making findings on disputed issues pertaining to important sentencing factors and applying the guideline provisions to

those facts.

Nevertheless, the rigidity of the sentencing guidelines did result in the imposition of some sentences that were too harsh and perceived as unfair and unjust, because they were based on a formulaic procedure that would sometimes result in sentences disproportionately severe to the harms suffered by society.

Fairness and consistency are often competing factors.

Post-*Booker*, the guidelines are now advisory. A judge's sentence is no longer driven and controlled by the rigidity of the sentencing guidelines; rather, a judge must now impose a sentence sufficient but not greater than necessary to comply with the purposes of sentencing set forth in federal law. This provision directs the judge to consider the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or

vocational training, medical care or other correctional treatment in the most effective manner.

A judge must also consider the nature and consequences of the offense, the history and characteristics of the defendant, the kinds of sentences available, the sentence recommended by the advisory guidelines, the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to victims of the offense.

We now know after *Gall* that extraordinary circumstances are no longer required to justify a sentence outside the guideline range, as long as the record demonstrates that the judge consider the 3553(a) factors in support of the sentence by facts of record applied to those factors.

In most ways, sentencing is now a more difficult task for a judge, because he must now exercise his own judgment to fulfill the ultimate responsibility for imposing a sentence sufficient but not greater than necessary to achieve the sentencing objectives.

As I sentence defendants post-*Booker*, I consistently engage in a framework of a three-step sentencing process.

Without exception, I begin with the consideration of the applicable advisory guidelines sentencing range, ruling on every objection to the probation officer's determination of what the advisory guideline range is filed by either the government and by the defendant, citing to the record evidence for my rulings.

I then move to request for departures under the guidelines, rule on those, and finally consider requests for variances which generally are based on arguments that the case is outside of the heartland, that the specific offense and/or the particular defendant's history and characteristics warrant a sentence different from that recommended by the guidelines, or that the guideline range is not based on any sound data or scientific research.

After determining the advisory guideline range that I find applies to the case, I hear evidence and argument on the sentence

which is appropriate and sufficient, but not greater than necessary, to satisfy the 3553(a) factors.

This is where the real work begins. If judges blindly follow the sentencing guidelines, or give them the presumption of reasonableness, and only sentence outside the guidelines in extraordinary cases, the judge is not doing her job.

In many important ways, the guidelines conflict with the directive of 3553(a).

For example, 3553(a) instructs judges to consider the history and characteristics of the defendant.

The guidelines instruct judges not to consider the defendant's age, educational and vocational skills, his mental and emotional condition, his physical condition including drug and alcohol dependence, his employment record, his family ties and responsibilities, his socio-economic status, his civic and military contributions, and his lack of guidance as a youth.

These prohibitions in the

guidelines conflict with 3553(a)'s requirement to consider the history and characteristics of the defendant.

The Supreme Court in *Gall* has resolved this conflict where the court upheld a non-guideline sentence of probation, which the judge imposed based in part on characteristics of the defendant, which the guidelines prohibited or deemed "ordinarily not relevant."

All of my colleagues on the District Court for the Western District of Pennsylvania believe that sentencing post-*Booker* is working well by providing a framework of advisory guidelines that acknowledges the goals of uniformity, transparency and predictability, but also by giving judges another framework that acknowledges sentencing as an individual exercise.

Former United States District Judge John Martin of the Southern District of New York, who was my colleague on the Criminal Law Committee for several years, wisely said that guidelines gave judges the means to sentence similar defendants similarly, but took away the opportunity to sentence different

defendants differently.

We now have that opportunity. In many situations, the guidelines represent sound sentencing policy. In others they do not.

Many judges, including myself, believe unquestionably that offense and offender characteristics should be taken into account in sentencing. We must look at the whole story of the offense and the whole story of the offender.

There are many facts concerned with the offender's history and characteristics that should instruct the judge on what sentence is sufficient but not greater than necessary to deter this defendant, to protect the public from this defendant, and to rehabilitate this defendant.

Even though defendants may commit similar crimes, considerations of individual factors may result in disparities, but disparities that are warranted.

All of my colleagues agree that a certain amount of discretion exercised by federal judges in the sentencing process is necessary to a just process.

Sentencing cannot and should not

be reduced to numbers predetermined by charging decisions made by prosecutors, mandatory guidelines, and calculations made by probation officers.

Post-*Booker* sentencing gives judges the right and the opportunity to impose sentences that are not only consistent but, more importantly, fair.

My colleagues have asked me to inform you about certain issues that they perceive as unfair and arbitrary. Number one is, of course, the crack/powder disparity.

While no empirical or scientific data supports this disparity, we do now know that it does negatively impact the poor and the African American population.

While Amendment 706 has alleviated this disparity to a degree, it has not solved the problem, as sentences for crack are still two to five times higher than those for powder.

The unfairness of this disparity is not lost on the community, and it affects those willing to serve on juries and those willing to testify in criminal cases.

The community will not support a

system which it believes supports one of the greatest sources of injustice in our criminal justice system.

The United States Sentencing Commission must continue to press Congress to adopt a one-to-one ratio. Five year penalties should be imposed on serious drug traffickers, and ten year sentences should be imposed on major drug traffickers.

We have all experienced low-level offenders who failed to pay for their addiction and who suffered the consequences of a sentence that will not be reduced because they do not have enough information to give to the prosecutor. This injustice must and should be corrected.

Number two concerns the implication of career offender status. A defendant can and often does face a sentence three times longer than he would normally face because he comes under the career offender provision.

One is designated a career offender if he was at least 18 years old at the time he committed the instant offense of

conviction, if the instant offense is a felony that is either a crime of violence or a controlled substance abuse offense, and the offender has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

The guidelines instruct that a prior felony conviction is, in part, a state or federal conviction for an offense punishable by imprisonment for a term exceeding one year. Because judges are instructed to look to the elements of the offense which resulted in the prior conviction rather than in the facts of that conviction, some defendants have been sentenced as repeat violent offenders when, in fact, they are not.

The Commission should narrow the statutory definition of crime of violence. For example, the Commission's definition includes in my state, in Pennsylvania, a state simple assault misdemeanor. The definition of career offender should be applied to a narrower class of offenders.

Thirdly, many judges in my district are concerned with sentencing in cases

involving possession and distribution, but not production of child pornography. These cases constitute the fastest growing segment of our docket in Western Pennsylvania.

Despite the fact that judges increasingly grant requests for downward departure and variance in these cases, the advisory guideline sentence range has continued to increase hundreds of percentages in the last decade.

The reason for the longer and more severe sentencing ranges is clear. There is a great deal of pressure put on the legislative branch to throw away the key for child pornography offenders.

None of us support the possession of child pornography, and while the judiciary as a whole I believe does not consider this to be a victimless crime, I do believe that we recognize our responsibility to act as a necessary check on political pressure concerning such a hot button topic.

Many of us have concluded that in many cases, especially those where the defendant has not been involved in production, and where

the defendant has never solicited or touched a child, and who frequently have no prior criminal record, strict application of the Sentencing guidelines would create an injustice.

The sentencing guidelines tend to treat even first time offenders with no history of abusing or exploiting children the same as they treat child molesters.

Furthermore, the enhancements in the guidelines, the imposition of two [levels] for use of a computer, which is probably the only way these crimes are committed, up to 5-level enhancements for the number of images, when we all know these images can be reproduced in the hundreds in minutes, distribution in exchange for a thing of value which involves bartering, exchanging the images, can quickly ratchet the sentence up to the statutory maximum of 20 years.

Now, these are things that I think the Commission has to turn their attention to.

This is not to say, however, that we, as federal judges, do not recognize the extreme physical, mental and emotional damage caused by child pornography, and by the market for the exploitation of children. Punishment is

due, but the extent of the increase in punishment is often unwarranted in these cases.

Finally, as to changes to the Federal Rules of Criminal Procedures, I and many of my colleagues are frequently faced with issues relating to the disclosure of Brady material, and we know that happened in Washington D.C. just recently. Judge Sullivan has been talking about that.

I support those who have proposed amendments to the Federal Rules of Criminal Procedure 11 and 16 that would codify the rule propounded in *Brady*, clarify the nature and scope of favorable information, require the government attorney to exercise due diligence in locating favorable information, and establish deadlines for disclosure of Brady material which provides sufficient time for the defendant to receive due process.

With respect to Rule 11 amendments, 90 percent of federal criminal cases are resolved by guilty pleas. Timely disclosure of information favorable to the defendant is vital to fair and open plea negotiations, and crucial to a fair sentencing process, because

information that diminishes the defendant's culpability can really affect the punishment, as we all know.

I want to thank you again for this opportunity. While we as trial judges understand the importance to the public of consistency and uniformity in sentencing, we must never lose sight of our ultimate goals: fairness and justice.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Ambrose.

Judge Dearie?

JUDGE DEARIE: Judge Hinojosa, Judge Sessions, members of the Commission, I appreciate the opportunity to offer these brief remarks to the members and staff of the Commission.

I speak for myself, of course, but although my remarks have not been vetted, much less cleared by my colleagues in the Eastern District, I can tell you with confidence the sentiments and inevitable frustrations expressed are shared by most and most likely all of my district court colleagues.

I will not devote my limited time to recitation of the usual gripes and criticisms you have heard so often: loss calculations, relevant conduct, offense characteristics, drug equivalency tables. The other seemingly endless litany of complaints and observations are not on my agenda this morning.

To be fair, in many respects the Commission has reacted over the years to many critical observations in a sensitive and measured way.

I come here as a former United States Attorney and assistant United States attorney, in all about almost 12 years as a federal prosecutor.

I came to the bench in the pre-guidelines era. Nothing was more daunting, more emotionally difficult to a young judge, or any judge at that time, than having to decide a particular sentence.

That was when we were all counseled by higher authorities that sentencing was to be an individualized judgment.

In the Eastern District, judges were guided in their sentencing judgments by

sentencing panels consisting of at least two randomly selected colleagues, who would review the relevant materials and confer with the sentencing judge in aid of his or her decision, in the most profound exercise of judicial power.

In this post-*Booker* year, we had begun to reinstate sentencing panels in the district.

Pre-guideline sentencing was in many ways more challenging, far more difficult.

Those who contend that guidelines critics want to return to the good old days of unbridled sentencing, like we have never imposed a sentence, are at least strangely misinformed.

With the guidelines, of course, came homogenized sentencing. In the sense X's and O's led the way under the banner of the truth in sentencing disparities warranted were not, were now hidden under the cloak of prosecutorial discretion.

The high stakes brought an unfortunate and precipitous increase in sentencing advocacy, fueled by the competitive juices of young prosecutors and the avalanche of issues triggered by the guidelines.

The profound act of passing judgment became a game of "gotcha."

Sadly, the guidelines very significantly undermined the role and mission of the Probation Department as they too were unavoidably swept into the role of third party advocate.

That said, I am in favor of guidelines, as was once so well-intended, but with wide, sensible ranges that truly reflect sentencing practices. Informed sentencing cannot be reduced to six months slivers. Informed sentencing cannot be driven by a litany of so-called offense characteristics, the resolution of which frustrate and belittle the process.

I am also in favor of limited appellate review of sentences that fall outside an informed empirically-based advisory range.

Let the sentencing judge explain his or her sentence, and let three or more appellate judges pass on the question of reasonableness in those relatively few cases that might make their way to the circuits.

The post-*Booker* era presents a

magnificent opportunity for the Commission and the Congress.

Criticisms alone serve little purpose except perhaps to vent the frustrations of judges who have imposed sentences constrained by the guidelines and rule of the law, sentences that tug and tear at our conscience in judgment long after the day of imposition.

Lessons have been learned. We must put them to good use.

We urge the Commission to take the lead on the many issues of genuine sentencing reform.

We have created, all of us, a culture of incarceration. We incarcerate more people for longer periods than any country in the world, civilized or not.

Almost two-and-a-half million people are in jail in this country at a price tag of over 50 billion dollars annually.

One out of nine black men between the ages of 20 and 34 in this land of the free is in jail.

In the mid-70s, Judge Frankel said, "We in this country send far too many people to

prison for terms that are far too long."

Since that time, the rate of incarceration has more than tripled. It takes your breath away.

There are other ways to address this problem, better ways.

It is not, I respectfully suggest, a time to cheer. We are not better off today than we were in 1987 despite the best efforts of the Commission.

I agree with Judge Newman and others, it is time for fundamental reform.

We have not achieved truth in sentencing. The irrational harsh impact of mandatory minimums as reflected in the guidelines must be rethought.

I do not agree that the Commission is powerless to do anything about mandatory sentencing, but, for certain, you are in a position to propose and aggregate empirically-based guidelines. The Commission's own view is expressed in the 2004 annual report. The decision to dovetail guidelines to the mandatory minimums was a mistake -- quoting -- "because no other decision has had such a

profound impact on the federal prison population."

Indeed, the number of drug offenders in prison since 1980 has increased by 1100 percent. The vast majority of them are non-violent, small time drug offenders.

It is time to correct that mistake. Simplify the guidelines. Any number of sensible, if not compelling, suggestions are before you. Give us broad empirically-based ranges with limited review if a sentence falls outside. Eliminate most offense characteristics that are often bought and sold under the table in the plea bargaining process and otherwise spawn endless litigation.

Find a way, or at least propose split sentences that address legitimate sentencing goals and yet provides strong incentives to offenders to address the issues that prompted their behavior in the first place.

Yes, I know Congress works. I am no Pollyanna, but we have a new Congress, a new administration, and an attorney general who, in my presence, told the chief district judges of this country, "I am no fan of the guidelines."

Informed people have begun to take note of alternatives to incarceration, which with modest resources have proven remarkably successful.

Give us more tools to fashion sentences that work for everyone.

No two first offenders are exactly alike. That is the realty.

If necessary, as Judge Newman put it, start all over.

So the opportunity presents itself: Inspired and determined leadership in keeping with the original concept of the prestigious Sentencing Commission, and as reflected in the experience and stature for each one of you.

The truth is, you may be our only hope for substantial progress. Please don't tinker. Get out and get under. Raise your voice or voices. I am not a belt waving kind of guy, but I do appreciate your difficult and delicate role; but you have a higher calling, and we must rely on each of you to think outside the box, to press for meaningful and lasting reform.

We thank all of you for your

efforts in that direction.

ACTING CHAIR HINOJOSA: Thank you, Judge Dearie.

Judge Gelpi?

JUDGE GELPI: Good morning, Judge Hinojosa, members of the Commission. I am honored to be here this morning.

Let me begin by noting that I have provided a written statement. That statement is my own, but I note that my colleagues in Puerto Rico have provided valuable input and review, and I have adopted some of their comments as part of my statement.

I agree with all my colleagues that sentencing is the hardest part of our jobs, district judges. I am a post-*Booker* judicial appointee. I have never sentenced under the mandatory guidelines system, but I do have experience with the pre-*Booker* system. I was an assistant federal public defender. For seven years I represented various clients under the mandatory sentencing regime, and also five years as a magistrate judge, I took hundreds of pre-*Booker* pleas so I am very familiar with the pre-*Booker* system.

From my perspective as a district judge, particularly to Puerto Rico, today's sentencing is much more fair in cases that make up a substantial part of the docket in my court.

For example, as I have noted in my statement, those are cases involving reentry of aliens, and in particular drug cases where there is minor or little participance. That is the bulk of our sentencing. Sentencing is much more fair today.

I have to highlight in this respect that my district does follow statistically the guidelines, 75.3 percent of all cases, at least last fiscal year, and if we were to include any substantial assistance and fast track occurred departures, that would raise the following the guidelines to 83 percent.

I also note that my colleagues and myself have a very high criminal caseload. It is not uncommon to see some of my colleagues -- I myself have sentenced over 100 defendants in drug and firearm cases.

Post-*Booker*, I have noted that sentencing guideline plea negotiations, particularly conspiracy cases we have in Puerto

Rico, I have noted that post-*Booker*, the sentencing guideline plea negotiations are much fairer than in my practice.

When I practiced, the guidelines were like a sword in the hands of the prosecutor. I believe now the scales are more evenly tipped, and the recommended sentence that we receive is that these plea agreements are much lower than those as a defense attorney I ever saw.

Again, in our district the guidelines statistically are followed most of the time. I believe this is the result of plea practice and the fact that we have these multi-defendant cases which are sort of unique to my district and also other districts.

This is not to say that *Booker* is not used in Puerto Rico in the district.

We use *Booker*. I think the statistics don't show how often it is used, because it is swallowed by larger -- we have hundred defendant cases. Perhaps *Booker* is used in two, three of these defendants, but statistically it is not going to show up, but, in fact, it is used when necessary.

District judges and at least myself don't shy away from invoking *Booker* whenever necessary.

One example that I have seen that *Booker* is used in these plea-negotiated cases, and I think it is very fair, is usually when there is a plea agreement and you have 100 defendants, and you see some of these defendants, the ones higher up in the echelon, will receive a stiff sentence, and then you start going down the ladder.

Sometimes you see somebody who is way at the bottom of the ladder, but, unfortunately, under the guidelines, that person ends up being a career offender, and at the time of the plea agreement, nobody expected that was going to be the case.

The guidelines are correct. Under the old regime there was nothing one could do.

In these cases, at least in my experience, the parties have negotiated the plea, and then using *Booker*, if it is a meritorious case, I have sentenced under *Booker*, and I have been able to follow the plea agreement.

Sometimes we have to keep in mind that pleas are not only reached because of the guidelines, but other times what the government has may not be the best evidence and there would be the risk of going to trial, or the government wants to conclude the case, and I think *Booker* has been very helpful in those cases, because I do recall I had clients that turned out to be guidelines career offenders, and it is a big drastic difference when someone is a guideline career offender. I think *Booker* in that respect has been very useful.

Again, I note that myself and I believe my colleagues -- and I have talked about that when preparing my statements -- we do not hesitate to invoke *Booker* when necessary.

Again, *Booker* is not the norm, but it is always there, and we use *Booker* when it has to be called upon.

I want to note also in regards to the appellate review of sentences in my district, there is not too much appellate case law, particularly after *Gall*. There is one recent case which I know the Commission is aware of, and that involved an upward variance which

doubled-and-a-half the sentence, and that is the only instance I have of any reversal by the circuit. I don't have any downward variances; at least in my court I haven't seen any.

Before *Gall* I believe there was some case law from the circuit involving one of Judge Gertner's cases. That is no longer the law after *Gall*.

Regarding any possible recommendations to Congress, I join most of my colleagues that minor -- mandatory minimums, at least for minor participants, should be reviewed, and my suggestion is perhaps like a safety valve. Even if Congress doesn't want to end the mandatory minimums, perhaps for certain minor minimum participants, they could be available if they meet certain requirements.

I also agree -- I have not thought about it, but I do have to agree with Judge Ambrose regarding possible recommendations regarding Rule 16, the Brady material.

In my district, it has happened a few times. Judge Gertner happens to be here, and she has had that scenario sitting in Puerto Rico by designation, and I have had it.

We have had cases where Brady is not provided to the defense, and the only reason the defense realizes Brady exists is because the federal defender has been extremely diligent and comes up with the Brady violation and brings up the evidence.

No longer is there a Brady violation because the defense obtains the Brady material, but it is very uncomfortable that sometimes that happens. It is not the norm, but it does happen sometimes.

I think perhaps that is a very good suggestion, and I second Judge Ambrose that Congress should look at it and the Commission should look at it.

Finally, I do have one other suggestion regarding the post-*Booker* era, and that is I think following *Booker*, there is going to be more instances, or more programs in district courts regarding offender reentry for drug court programs. I am not sure that those statistics are being kept nationwide at this time, because usually -- we are going to start a program in my court. I am going to be the one handling it, but I suppose if somebody is on

probation or supervised release and enjoys the benefit of this program and graduates, that is not going to appear in any sentencing statistic, because I am not going to revoke his supervised release for probation.

I would suggest that the Commission perhaps should start tracking these drug court offender reentry statistics, because at some point the Commission might be called before Congress to provide data.

Thank you for allowing me to testify here this morning. I am open to questions afterwards.

ACTING CHAIR HINOJOSA: Thank you, Judge Gelpi.

Judge Gertner?

JUDGE GERTNER: Chairman Hinojosa, Judge Sessions, Commissioners, and most importantly the Commission staff, who I have worked with for a long time, I want to thank you for the opportunity to speak today. I also will submit written remarks afterwards, because it is impossible for me to control myself to ten minutes so I will do my best to do that, but I will submit written remarks that will

undoubtedly be too long.

Let me say that I have great faith in the Commission and in a revised and revamped guidelines -- advisory guidelines system.

I have unquestionably been a critic, but, not withstanding that, I recognize the contribution the Commission and the staff has made to sentencing over the years.

My criticisms stem from my heartfelt desire to maximize that work, and to make it more relevant to what I do as a judge and to what I teach.

By the way, Judge Hinojosa, at Yale, not Harvard. This is a very important distinction.

ACTING CHAIR HINOJOSA: That is what I thought, but for some reason someone wrote Harvard for me. Maybe you have been promoted.

Just kidding.

JUDGE GERTNER: I want to make three general points, first a point about judging in the post-*Booker* era, then a point about the Commission, and then about Congress.

First about judges, I want to

address the fear which I have seen at the sentencing conference I attended in New Orleans a month ago and at presentations of commissioners that I have witnessed.

The fear is that with the guidelines being advisory, we will see an immediate return to the kinds of sentencing disparity that existed before the Sentencing Reform Act.

That fear in many of these presentations seems to define how the Commission sees its role, and to a degree how it anticipates Congress' response to post-*Booker* sentencing. I saw it, as I said, in New Orleans.

The panels were not about how to address this extraordinarily creative moment in sentencing; they were mainly about sounding the alarm that unless judicial discretion was controlled, all hell would break loose.

The fears of a return to pre-SRA sentencing are vastly, vastly overstated. There is every reason to believe that judicial discretion in the post-*Booker* era will be very different than discretion exercised before the

guidelines.

In fact, in my judgment, the greatest danger is not that judges will exercise their new discretion, but they will not when they should.

There are four reasons why I don't think the stories of the return to pre-SRA sentencing makes sense.

First is the existence of the guideline framework. Guidelines frame the sentencing debate, they gave us a common vocabulary about which to talk about sentencing.

Judges had not been trained in sentencing before the SRA, and then after the SRA they are only trained in guidelines so *Booker* or no *Booker*, guidelines are part of this discussion. Your work will always be part of this discussion.

The second reason we will not see a return to pre-*Booker* discretion is the data that the Sentencing Commission maintains. That had not existed pre-SRA.

With this tool, you can monitor trends and identify geographical or racial differences in sentencing in the same way a

police department uses racial profiling statistics to inform what they do.

If problematic patterns appear in regions or across the nation, they can be dealt with in ways other than mandatory guidelines.

Three, another reason why we will not see the same kind of willy-nilly discretion is that there is a growing body of literature, evidence-based practices, of what works. The challenge is how to make that body of work available to judges, defense attorneys and probation officers who can use it in individual cases.

Finally, unlike the period before the SRA, there is appellate review of sentencing, which is in a transition stage now, but I think will sort out; appellate review of sentencing that can deal with sentences at the margin, that deals with procedural reasonableness and substantive reasonableness.

I think that it doesn't advance this discussion for Commissioners to constantly be sounding the alarm about what will happen if the guidelines really become advisory. It will not be a return to pre-SRA patterns.

As a judge, what I do now, and to some degree I have actually always done this, a certain amount of satisfaction looking at the post-*Booker* era. First off I ask if the guidelines apply, but part of that analysis I think is traditional judicial critique of the guidelines that is essentially like an administrative procedure critique. What is the purpose the guidelines are fulfilling, what is the data on which it is based? Are these guidelines which in the language of *Kimbrough* were promulgated consistent with the Commission's characteristic institutional role? Were these guidelines set without a meaningful analysis of their relationship to the purposes of sentencing without empirical review?

Then if the guidelines don't apply, I ask the question, what should I do? What alternative frameworks, non-guideline frameworks about reentry, drug addiction, recidivism, that I should apply. What alternative framework should I apply, and what are the source of those standards?

If it is clear that punishment is the only alternative, that retribution trumps

all other purposes, then I will try to find out what sentencing links have been imposed by judges in like situations.

One more point about judicial discretion, and I think that this has framed our discussion for 20 years. It is time to recognize that judicial discretion in sentencing is not a spigot to be turned on or off. The alternatives are not binary; total discretion or none at all.

Again, like racial profil[ing] in arrests, the idea here is to monitor patterns, seek to identify the cause, to train officers, to minimize or eliminate.

Our goal here should be to help federal judges make better discretionary decisions, decisions that are more reasoned, more transparent, more persuasive, more effective and more just, and that's where the Commission, I think, comes in post-*Booker*.

Let me first say what the Commission shouldn't do, and this is reiterating this point. Hold a conference about sentencing guidelines and barely mention *Booker* except by reassuring judges that everyone is really

complying with the guidelines, not withstanding the Supreme Court's admonitions; constantly recite how lawless judges were before the guidelines and imply that the same thing will happen again. Stop seeing the Commission's role as the guideline police only monitoring judicial compliance.

I agree with those who have spoken before that this is a time of creativity and fundamental change, and here is what I would propose: Obviously there should be better guidelines. The Commission should focus on why judges have departed. We all know the stories: career offender, pornography, drugs, fraud, so this is a time to look at what judges are saying to you about the guidelines.

Two, better promulgated guidelines. Again, there is an emerging critique of the work of the Commission, not unlike any other administrative agency, which forces the Commission to justify what it has done, provide a more elaborate legislative history to judges, to provide data on which you are making a decision.

The time is passed when the

legitimacy of the guidelines is assumed. Judges will not follow that unless we know why.

Three, there ought to be non-guideline frameworks. The post-*Booker* area demands more than passive data collection. The Commission should actively participate in the search for alternative sentencing frameworks.

By that I mean studies on how best to deal with drug addicts or gang members or child pornographers.

If *Spears*, *Kimbrough* and *Nelson* have meaning, the guidelines cannot be the only sentencing framework the judges have, and if the Commission is really worried about the reemergence of unwarranted disparities, it will be no good to simply ignore the fact that judges are looking beyond the guidelines.

I want the Commission to give us help about the other places to look.

The Commission could use its website to cull reports that could inform about judicial discretion. It could function as a clearing house on a wide variety of topics like the effect of particular sentences on recidivism rates and reentry, on racial and gender

disparities in sentencing. It could give us the best information on evidence-based sentencing.

Although the Commission has not taken such an active role in the past, it has extraordinary experience and resources as a moderator on the debate on sentencing issues, just as it did in the conference on alternatives to incarceration.

You can capture this discretion by being the very best source of information on sentencing.

Four, the Commission should give us better information about sentencing practices and sentencing lengths. As I said, if there are no meaningful alternatives to incarceration, and I recognize there are times when the crime trumps everything, then give us help to determine what ranges are appropriate when the guideline ranges are not.

One judge described it as, "Give us a website. Put in the kind of case, the criminal record, guideline facts, see if other judges have departed in like cases and on what grounds, see what the ranges are so that we can then situate what we are doing in that range."

Probation in the District of Massachusetts has done something like that, and I use it all the time.

Give us better information about what other judges are doing.

There is a common law sentencing that is evolving now that is reflected in the opinions of the judges. The First Circuit has a First Circuit Sentencing Guide which now includes the district court. It didn't always include the district court, but if the district court is where the action is, we need to have access to each other's decisions in order to search, in order to enable me to follow what Judge Gelpi is doing in Puerto Rico, or Judge Ambrose, or Judge Dearie is doing; across the country.

Again, the way to shape what I do is to make what other judges have done readily accessible.

Again, with respect to the guidelines, I don't want to reiterate what others have said, but, again, I see a much more creative role for the Commission. I have been to conferences all around the world where

commissions talk about what you do with offenders, not compliance with the guidelines; how you effect -- how you do what works, how you effect meaningful change.

Specifically, in addition to what other judges have said, I think the Commission should take a look again at the acquitted conducts guideline.

There really was over and over again, in the past twenty years, the Commission has made decisions to eliminate judicial discretion when there was no need to. In other words, the decisions the Commission made narrowed judicial discretion without the courts having to say so.

I had a student who did a wonderful paper on acquitted conduct. I will make it available to the Commission.

Acquitted conduct had not been a regular part of sentencing before the guidelines. It was something considered on a case-by-case basis.

When the statutes change[d] in 1970, it was part of the racketeering statute, and there was suddenly a concern that there were

acquittals that were taking place because evidence had been suppressed. I mean, these were acquittals that were problematic to the sentencing judge because they were about a particular piece of evidence being suppressed, and that led to the Commission amending 1B1.3 to suggest that acquitted conduct had to be considered.

The practice before the guidelines was a sort of "it depends" practice. You considered it when it bore on the sentencing. You did not when it didn't so this changed in the acquitted conduct perspective to mechanistic rules, and it was really a product of a very different statute and a very different concern.

The Commission should look at first offender provisions. The Sentencing Reform Act directed the Commission to deal with first offenders, to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or other serious offense.

The Commission changed the

definition of serious offense so as to sweep within the imprisonment range more and more first offenders. The result was a profound increase in the imprisonment rate; part of the reason that Judge Dearie was talking about.

We know from work that this Commission has done that real first offenders in fact have a different recidivism rate than others, and yet the guidelines sweep broader than they need to sweep.

Aberrant conduct, again, the Commission weighed in to narrow what had been a judge-carved out departure for aberrant conduct. The First Circuit had had a totality of circumstances approach, others have had a more narrow approach. The Commission tried to do something in between, but there is no need to do anything in between. There was an evolving body, a common law of aberrant conduct which judges were carving out.

Obviously the quantity guidelines need to be changed, the guidelines that privilege quantity above role. Judges and the public can understand the difference between someone dealing drugs out of their car and someone dealing the

same quantity of drugs out of a McMansion.

Judges and the public understand between someone who is contributing to the school that they teach in in after-school programs and the Enron executive who is buying his way out of jail by contributing to the symptom.

We can make those distinctions if the quantity guidelines and the role guidelines enable us to.

With respect to Congress, which was my third point, I want the Commission to be a real expert vis-a-vis Congress. In other words, you are the people who knew what you were talking about.

Candidly, in some of the statutes we have been obliged to follow, Congress did not.

Again, it is more than just the mandatory minimums. I concur with my colleagues who talk about the safety valve has to be changed; to just sentence someone to a mandatory minimum of ten years because of a driving under offense in which he failed to pay the fine, and for a variety of reasons he wound up a criminal history II, makes absolutely no sense.

Congress should change the safety

valve, or the Commission should change the definition of criminal history I.

Substantial assistance departures enables someone to go below the mandatory minimum. The case law in the First Circuit and elsewhere suggests that a judge can only go below the mandatory minimum to the extent of substantial assistance.

I can say it here. This is a completely incoherent standard. It essentially means that I say to the prosecutor, "What do you think? I will do whatever you can do." I can't evaluate a substantial assistance if that frames how far I can depart. It is, as I said, incoherent and largely ceding my function as a judge.

The armed career criminal statute needs to change. The definition of violent felony is way too broadly enforced.

The First Circuit has dealt with, and I think the Supreme Court is going to deal with, one of my cases, a question of whether resisting arrest is a violent felony.

Let me go back to my first point. This is really a time of maximum creativity. The

period is created because the Supreme Court, by declaring the guidelines advisory, has unleashed a broad discussion of that since, what works, what is fair, what makes a difference in terms of crime control, what is cost effective.

Mandatory guidelines, aside from everything else, drowned out all other voices in the sentencing debate. They focused only on one purpose of sentencing, which was disparity -- two purposes: disparity and retribution to the exclusion of everything else. It is as if, as one judge told me, all that matters is we are doing the same thing even if nothing that we were doing makes any sense.

In retrospect, many of our sentences, the sentences for crack cocaine, did not make sense.

The Supreme Court has made it clear in as many ways as it can that it really meant it when it said the sentencing guidelines were advisory, and unless the Commission and the courts work to create sentencing frameworks -- drug studies, addiction studies, recidivism studies -- drug frameworks apart from the guidelines, there will be no meaningful change in

federal sentencing practicing. Judges will intone *Booker*, "Guidelines are advisory," but, in fact, apply them.

So the question is not about compliance with flawed guidelines, but more about being the sentencing police. It is about what the Commission can do, as I said before, to have federal judges make better discretionary decisions; decisions that are more reasoned, more transparent, more persuasive, more effective and ultimately more just.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Gertner.

Any questions?

COMMISSIONER WROBLEWSKI: Thank you, Judge. Thank you for all coming. I am Jonathan Wroblewski for the Justice Department in Washington.

First of all, let me say to Judge Gertner, let me say that I am free, and I enjoyed your article.

I have two questions. First of all, I am very intrigued by, Judge Gertner, your vision of information sharing, information

sharing about -- among the judges, monitoring what is going on in the federal system. Right now I, and I think we at the Justice Department, am a little frustrated because we don't really have the information that we would like about what is going on in the system.

I wonder if you support the kind of open information sharing that includes identifying what individual judges are doing in specific cases, if you support information about what individual offenders are doing after their release, whether particular programs that have been used in prison or alternatives to incarceration that have been handed out have been effective or not effective in really having five or ten years of let's get all the information out, all of it, and let's honestly and clearly look at what is working and be prepared to say when something is not working? So that is one question.

Also, to Judge Dearie, you talked about -- and Judge Newman talked yesterday -- about the possibility of fundamental reform, something very large.

In the discussion we had

yesterday, it seemed to me there were five fundamental issues that were out there. One is whether the guidelines should be advisory or mandatory; what the degree of precision of those guidelines should be, severity levels, whether those guidelines should take into account offense characteristics or offense and defender characteristics, and also whether there should be incentives to promote effective reentry.

I think there is a way for all of the parties, including Congress, to get together. We have been spending the last 25 years, it seems to me, sort of fighting with one another and not really talking to one another, and the Justice Department has been as big an offender as anyone, and the PROTECT Act was one particular example, where there was no discussion amongst all the parties.

Is there a way to get all the parties together, with everyone actually willing to compromise a little bit, that it won't be exactly the way anybody wants? How do we go about doing that?

JUDGE GERTNER: I will start.

Per judge data on sentencing is

available in Massachusetts. Statements of reasons, not through the Commission -- I don't know if there are statements of reasons for the public, and there is at least one scholar who has evaluated the statements of reasons and determined individual judge's patterns.

Actually, I stand alone on this, from what I understand. I think it is a good thing, because I think if we can't justify what we do to the public, then we should re-examine it.

Of course, the concern that the conference had was that the Department of Justice was less than responsible in the way it dealt with that data, that there were judges that were pilloried for reasons that were not appropriate, but I think it should be open, but that may be a tall order. As I say, it is available in Massachusetts.

I do agree with the data about recidivism, what defendants do after release is terribly important. That data teaches us stuff. That is the most significant -- one of the most significant contributions of the Commission, is that there was no data before the SRA. We do

have the ability now to actually figure out what we are doing, not just in terms of who is complying or not complying with the guidelines, but what is happening to offenders.

I might add that reentry programs and drug programs on revocation were all we could do given the mandatory guidelines system. There is no question that those programs should now be pushed up at the front of sentencing, and there ought to be more diversion programs, and we should monitor a person. If it doesn't work, we stop and do something different, but to pick numbers out of the air doesn't make any sense.

JUDGE DEARIE: First of all, I am very encouraged to hear your optimistic tone, and the suggestion that, in effect, why can't we all get along, which I think is really very much needed in this debate.

I certainly think that there is room for compromise.

As I said before, as critical as I have been of the guidelines, and despite my prosecutorial stripe, having sentenced under the pre-guideline system, I appreciate the availability of guidance, if you will. I don't

think it should be so precise as to point me in a specific direction, because the variables with respect to each sentence and each defendant and each crime, are so seemingly infinite that one has to be open to an imaginative, creative, just sentence.

Being too precise in the guidelines somehow undermines that effort.

Severity I think is a question of who you ask, but certainly the statistics would suggest we have taken a serious turn towards too severe.

In my early guidelines days, before the -- departure jurisprudence developed, I don't know that a sentencing day would go by where I didn't feel that I imposed a sentence that was far too severe.

The sentence -- advising a client about a sentence, a plea of five years or possible trial exposure of ten years may have some significance in that context, but beyond that, I would have to be sold as a former prosecutor that in terms of the legitimate goals of sentencing, the difference between five years and ten years -- I choose those numbers

arbitrarily -- means anything.

Swift, certain punishment, I think, is far more effective.

Offense characteristics, I didn't by my remarks suggest to you that we should eliminate them entirely, but as Judge Gertner said, we are big boys and girls. Some obvious characteristics that would make a given offense more serious, we get that, but to use this long litany of offense characteristics -- they are used as bargaining chips essentially by the United States attorneys, and they try to use them for pleas. We don't know anything about that if you want to talk about transparency, and it has spawned all sorts of litigation through no real end, and I think it is a mistake.

There is a perfect avenue for simplification; for us obvious factors that would weigh, in a way so obvious they really don't need to be enumerated, but I am not suggesting all sentencing offense characteristics should be eliminated, particularly in the advisory system.

The question of whether it is advisory or mandatory, I think we have heard

from the high court on that.

I would welcome serious, serious debate on these questions.

I go home some days, and I think I speak for every judge in the country, wondering was I too severe, was I too lenient? I welcome the view.

Sentencing panels in the district, there is no reason why as a vehicle in the Sentencing Commission we couldn't create the same sentencing panels nationally.

Dearie to Gertner or Dearie to X judge, you pick them randomly. "This is what I've got. This is the case. This is the nature of the sort of milquetoast watered down 5K1. What do you think? This is a first offender. This is a technical first offender but clearly no first offender. What do you think?"

I get feedback all the time.

I have a sentence this afternoon. I have heard from three of the judges on my court.

What an opportunity through the Commission to share that sort of information.

It was the hardest thing,

pre-guidelines sentencing.

That's why I always laugh when people say, "Oh, I want the good old days." The good old days were hard. You suffered through them. You suffered emotionally from them.

VICE CHAIR SESSIONS: I would like to follow up with Judge Dearie and ask you -- for me it is very personal. I know all four of you personally and respect you all, and we are faced with a unique period.

As Commissioner Wroblewski said, there are discussions going on among the various branches of government regarding the sentencing policy, and we, the Commissioners, decided to take a very broad view of what we should be doing at this point.

In fact, we are viewing many things, including policy involving mandatory minimums as well as the guidelines itself.

There are discussions going on, and I appreciate greatly that you don't think that you are a Beltway kind of guy, but I think you should probably anticipate that in response to *Booker*, if by chance the statistics begin to change and the level of departures begin to

increase dramatically, you can expect those things to increase.

The question is whether the Commission takes a proactive role involved in these discussions or does not.

We have taken a very strong view that mandatory minimums are to be discouraged or, in fact, eliminated in the past. We have reports from 1991.

I happen to think the mandatory minimums are perhaps the most difficult things for judges to follow.

When you start talking about putting things on the table, there are various things that have to be put on the table. Just one of the things that we talked about with Judge Newman was perhaps going down the line of compromising mandatory minimums as opposed to broad-based, wide-range, mandatory guidelines.

Putting that on the table, what I heard from all four of you is should they be off the table?

The question is whether we as a commission, and I am asking for advice -- we as a commission, do we go down that road, we start

entering into discussions, because of course once you start walking down the road and Congress is involved, and the Justice Department is involved, it is sort of difficult to turn around and say, "I don't like this, and I am going to walk out."

Does the Commission take a proactive role in all branches of government in discussing the broad-based issues, or do we basically not get involved in that and essentially rely upon the system that we have at this point?

JUDGE DEARIE: With the greatest respect, if not the Commission, who?

I mean, the idea was, back in the 70s, put a prestigious group of people together who have no axe to grind, who know what they are talking about; lawyers, judges, members of the community, offenders, penologists, scientists. Put them all together. Give them a mandate, and let's be guided by their product.

I am ready to sign on. I don't think we have had that, with the greatest respect; I don't think we have had that.

And who else to lead that

discussion?

JUDGE GERTNER: Let me second what Judge Dearie said. I believe what the Sentencing Reform Act said about the Commission, it really would be an expert body, as you described.

I am skeptical of a deal, a discussion that says no mandatory minimums in exchange for broad-based guidelines, broad-based mandatory guidelines, only because the culture that I have described will mean broad-based mandatory guidelines will wind up with guideline adherence as we have had in the past.

The reason is, we have had 20 years of this culture so once you put "mandatory" before "guidelines," I really worry that judges are going to wind up going back to where we were.

I think the Commission should use its voice as I said commissions around the world have about mandatory minimums and focus only on mandatory minimums, and not try to bargain with -- in other words, the guidelines system is evolving now in an interesting, creative way. I worry that you stop that by putting that on the

table in exchange for the withdrawal of mandatory minimums.

And I think that there is enough of a movement about mandatory minimums now wholly independent of guidelines that we can do something about it.

JUDGE DEARIE: If I said anything that seemed at odds with what Judge Gertner said, I endorse 1,000 percent what she just said.

VICE CHAIR CARR: Judge Gertner, can you describe, you mentioned that when you want to know what other judges in your district have done on a similar basis, that the Probation Department somehow has information for you. What do they have and what do they provide?

JUDGE GERTNER: It is not a very good system, but they have a thing called -- I forget what it is called exactly, but there is a chart, and it would say nature of the offense, departure up or down, criminal history; a very, very rough measure. I would indicate what it is I have, and I would get a list of cases, child pornography cases, for example, where judges have departed, and then I have to take steps to

try to get access to present to the courts that are involved or the statements of reasons that are on the docket, as I said, so I can find out from the statement of reasons so I can get a sense of what the universe is.

It is a very gross measure, but it is enormously helpful.

VICE CHAIR CARR: Are they all within your district?

JUDGE GERTNER: All within my district, right. It gives me an opportunity to frame the discussion that I am having with my staff.

You know, Judge Woodlock had this kind of case; he did this. Judge Young had this kind of case.

I may think they are both wrong, but I also understand that I have to justify that within a single district.

What happens is, frankly, it drives my sentences higher because I am different, and if I am going to pay attention to what they are doing, it drives my sentences higher.

COMMISSIONER HOWELL: I want to

follow up on something you said in your remarks.

You talked about what happens if we continue five years down the road with the same advisory system we have now, Congress hasn't acted, so for whatever reason we are still under the same system we have now.

You know, we are seeing widening disparities between districts, as you know, from our presentations and the standard table lunch sheet where we are trying to have a baseline of statistics of what is going on nationally.

You made the comment, and I was very intrigued by it, that if disparities continue to be reflected in the statistics, they can be dealt with without mandatory guidelines.

I am interested in, you know, what your ideas are for how those -- not just those within-circuit -- disparities are brought to the attention of sentencing judges, and I think the District of Massachusetts has the system you described, which was very interesting just to inform judges about what is going on, to help not ameliorate any disparities within judges, within-district disparities, but I guess somewhat to help guide judges as to what the

ranges are.

Now we are talking about on a national level where it gets a lot more cumbersome, although that is what the guidelines make an effort to provide judges on a national basis, what the guideline ranges should be, but what are some of your ideas for how those kinds of national disparities would be dealt with about mandatory guidelines? The little statement that you made, that is what we are struggling with. That is the question.

JUDGE GERTNER: I think the statistics you have are starting points. For example, when Judge Cassell was speaking before Congress many years ago, there was a difference between departure rates, a judicial departure rate in Massachusetts and the judicial departure rate in a similar-sized city, which was Buffalo.

You know, we were all concerned, why was that so?

We began to analyze it, and you have the ability to analyze it so it is a great starting point for discussion. What is different about Buffalo and Boston that made sentencing disparities?

Well, one was the charging practices of the prosecutor. Substantial assistance departures were by far much more substantial in Buffalo; judicial departures were more narrow. In Boston we had a U.S. attorney who did not believe in bargaining except in very small numbers of cases so judges were, to some degree, making up for his rigidity in the departures.

We can discuss whether that was appropriate or inappropriate, but what I was trying to say is that in other areas where there is discretion, prosecutorial discretion, police discretion, you bring to us what the issues are. We talk about why, and in this national conversation we then try to say, "Well, these distinctions make a difference. Are there prosecutorial patterns that determine that, are there -- is our docket different, are there different kinds of cases? What is the reason for it?"

It may be that we will say, "Well, maybe we are doing something wrong."

I think that is the step as opposed to saying everybody has to do the same

thing.

COMMISSIONER HOWELL: I think we do. We distinguish between which circuits have fast tracks, which don't, what the immigration offense types that make up, may explain some of the differences. We do all that.

I mean, you know, once you get beyond those situations, what prompted the Sentencing Reform Act were a number of studies, some done by the federal judicial circuit, some done by the Second Circuit, that showed exactly identical cases being sentenced with vast differences between circuits and also within circuits.

Once we get beyond all that analysis that we already do in terms of trying to explain some of the disparities, both between prosecutorial practices like the Eastern District of Virginia, which doesn't rely on 5K1.1 but Rule 35 so that -- you know, there are all these differences that we are all very well aware of, and take account of.

There are still, given the vast significant and growing differences in guideline sentences between regions, there are still

clearly cases that are very similarly situated defendants, very similar crimes where they are getting different sentences in different districts. What do we do about that kind of disparity? And should we be concerned about it?

JUDGE GERTNER: I suppose to a degree yes, and particularly if it is race-based if there is any concern about that, but the Criminal Law Committee has a sentencing institute. I would love to see a presentation of the hypothetical case from the Eastern District of Virginia and from Massachusetts that you are describing, take it from a real case file, don't tell us what the case name is, and talk it out as a court, talk it out as a body, and highlight that, and the Commission can then talk about the differences.

You know, what is amazing about the culture of the judiciary over the past two decades is it has really come together on sentencing because of the guidelines, and now we take the guidelines away, that culture is still there. Nobody wants to be an outlier, but I think these conversations make a difference.

ACTING CHAIR HINOJOSA: Judge

Gertner, what do you base that on? I mean, that is almost common knowledge in the judiciary as a whole, that somehow Judge Dearie's statement -- I am also someone that stands for the guidelines, and I echo what he says; that feeling that one has before mandatory guidelines or after mandatory guidelines isn't the same for us as judges, and somehow we just grab a guideline manual and don't individually pay attention to every single case no matter what the system is.

JUDGE GERTNER: I don't have a national perspective, except my course, we try to bring in my course people from different parts of the country and often from different sentencing perspectives.

Judge Cassell, for example, is a participant in the EL sentencing court. You talk about a case. By the end of the day, I would be saying, "Well, boy, that is an interesting point. I hadn't considered that."

A student would be saying, "That is an interesting point."

It is not an assurance here, but that is how we come together as judges in the

rest of what we do.

You know, there are differences in negligence cases and patent cases, and the way we address it is talk about it and try to persuade the other person their approach is wrong.

That is the judicial way of doing it as opposed to sentencing where there have been paradigms imposed on high.

In any event, I think that this is the time to at least try that before we consider a return to a mandatory system of any kind.

ACTING CHAIR HINOJOSA: The point is, the implication is left that people, judges who sentence within the Guidelines don't give this the same kind of thought as somebody who doesn't.

JUDGE GERTNER: You said that last night, and I appreciate that comment.

The issue sometimes is not that they don't know the guidelines are advisory. The issue is what alternatives they have been presented with and what alternatives they know about.

ACTING CHAIR HINOJOSA: I think

most judges have read *Booker*, and most judges have good defenders and good prosecutors in front of them to make their arguments, it seems like to me, at least in my courtroom.

The other point you mentioned was the acquitted conduct guideline. Which is the acquitted conduct guideline?

JUDGE GERTNER: 1B1.3 says acquitted conduct has to be considered.

ACTING CHAIR HINOJOSA: Is there a particular application of it you are talking about?

JUDGE GERTNER: Yes. And it is the case law that also --

ACTING CHAIR HINOJOSA: Case law, but I just wonder where in the manual it would mention under 1B1.3? Is there a commentary someplace you see that, other than a reference to the case?

JUDGE GERTNER: I can provide it, Judge.

ACTING CHAIR HINOJOSA: That would be helpful, because that is something people have raised, acquitted conduct. I am not familiar with the guideline.

We are all familiar with Watts and the Supreme Court saying you can consider acquitted conduct. I am just not familiar with what you referred to on the acquitted conduct guideline.

The other issue I have for all the judges is just an issue that recently has come to me about what to do with data, for example.

This year there were 1,300 judges who sentenced individuals across the country, and we have statement of reasons from 1,300 different judges.

Then you dig further into it, and there are 30 judges that do almost 25 percent of caseload.

If you were to dig deep into it even more, from my personal standpoint, there are two judges on the calendar that do about 2 percent of all the federal sentences we have statistics for, and we represent less than .0001 or 2 of all the percent of judges that sentence people.

What do we do with data that is brought in where a small number of judges represent a very large number of the data that

we collect?

JUDGE AMBROSE: I am not sure what your question is.

ACTING CHAIR HINOJOSA: The question is, if you are a statistician, you have a representative sample of judges when a small portion of the judges are doing a large portion of the sentencing.

JUDGE GELPI: Just for the record, I mentioned it when I was speaking, for example we are the type of district that because we have so many multi defenders --

ACTING CHAIR HINOJOSA: I am not saying there is a particular answer.

JUDGE GELPI: In a district like ours, for example I mentioned to you, we use *Booker*, but the statistics sometimes will escape the general statistics because of the number of cases.

I think that perhaps the way to do it is perhaps to have surveys, send surveys to particular districts or, you know, at conferences or hearings like this, because if it is information from statistics, you are not going to be able to get it.

You just came up with another example in your district. I guess you sentence conservatively, and I guess Arizona or San Diego, those areas, it is a big bulk of sentencing, and sometimes the statistics can swallow what is actually going on.

As I said, in my district, I think the statistics don't reflect that *Booker* is actually used that much because of all the plea bargaining, but perhaps in your district as well you have a lot of plea bargaining, for example for illegal reentry cases, and that would be --

ACTING CHAIR HINOJOSA: Fast track.

JUDGE GELPI: I mean fast track, yes.

JUDGE DEARIE: I was an English literature major, and I am not even going to attempt to comment on the point.

JUDGE AMBROSE: I am not sure what you do with the few judges that have this disproportionate, you know, effect on statistics.

I want to go back for a minute to what Commissioner Howell was talking about. I

know there is this great fear we are going to have this disparity because judges are now going to follow their own idealogical agendas, particularly post-*Kimbrough*, but I really don't think that that is going to happen.

I know it is happening to a slight extent, but I believe it is leveling off, and I believe history will take care of that.

The very fact that most of us do start with the framework of the advisory guidelines, that is our first consideration for a lot of us. We look at them. We see whether or not they are the appropriate way to sentence. We rule on departures, we rule on variances, and then we do what we are supposed to do. We look at the factors and we see what the appropriate sentence should be in the case.

I think all of that is different from what happened before mandatory guidelines, and I think that history, even for new people, that history is there.

I will tell you, the most interesting thing I heard today is Judge Dearie's discussion of sentencing panels, which is not something we do in the Western District

of Pennsylvania, but I am certainly going to bring it up the next time we convene. I think it is a great sounding board.

Again, I agree with Judge Gertner. It doesn't mean I am going to agree with someone.

That is why it is so important, I believe, to have such an explicit record on sentencing.

I work on this now more than ever, and I hope that my colleagues do too, because I really believe that when your reasons are out there in the light of day, if they are sound, if they represent sound sentencing policy, people will understand.

Maybe I have too much faith, but I really do believe people will understand if you are really diligent about plugging in the facts that you find to the factors that you have considered.

COMMISSIONER HOWELL: Let me just respond, because I really appreciate your comments.

One of the things that I think is really exciting for the Commission right now, as

Judge Dearie said, we view this as an incredible opportunity, which is why we are doing these hearings, and we are keeping track of our Table 1 statistics. We, in some way, use those also as a starting point.

To us, that is part of our statutory mandate; to keep track of what is going on across the country with sentencings, and for us it is a starting point, and we dig down in these statistics all the time when we are seeing, you know, big differences between government-sponsored motions, between within guideline sentences, outside guideline sentences, upper departures, downward departures.

What exactly is going on to explain what we are seeing in those statistics?

At the same time, very important, our mandate is to develop guidelines, sentencing policies, that produce unwarranted disparities so part of our starting point in Table 1 is to see are those disparities warranted or unwarranted? So we always ask that question.

Now, it may come across to Judge Gertner in some of our panel discussions that we

are the sentencing police. I don't think that is our intention, and perhaps -- I have been on panels where I am given five minutes so I am not able to elaborate on some of the digging drill-down in the statute, the statistics we have done, so we may appear to be sentencing police because I am just able to touch the tip of the iceberg, but part of what we are doing now at these regional hearings is trying to simultaneously, parallel with all the work that we are doing, drilling down in these statutes, figuring out what is going on, and things are changing, and why -- you know, what -- why there are apparent differences in some of these statistics that we are seeing, both within districts and across -- with regional differences.

We are also taking a broad open-minded look at the guidelines to see how we can best elaborate on certain factors that some judges and some districts are using for either variances or departures. We are really trying to take a look at how the guidelines can best accommodate and provide this new guidance to the judges that they need.

It is very helpful to hear what judges would find helpful if there is a new system.

That is part of what we are doing also, is hearing what would be most helpful to judges also if there was a new system.

I guess my bottom line is we are not statistic-driven. We use the statistics as a tool, and we haven't completed and continued to do analysis on what those statistics are telling us about what is going on.

We may find that there is disparity that is maybe unwarranted. We haven't reached any conclusions yet about whether the statistics are telling us that the disparities we are seeing are warranted or unwarranted, and I hope that at the end of these regional hearings, part of our report is going to have a statistical part that all of our reports do, because that is an important part of what people depend on in reports, that empirical review, empirical analysis.

Part of what we are going to hear from the judges is, "What are you doing about unwarranted disparity?" We are trying to make

those evaluations and drill down.

There is no question, it is just part of the conversation we are having.

JUDGE GERTNER: One other question is whether or not -- how sophisticated your statistics are. For example, there may be an urban-rural problem. There may be more sentencing alternatives for incarceration programs in Boston than there [are] in the middle of the country.

So if I have alternative frameworks, it is because I am in a different place, and if that is the reason, then that is a warranted disparity so maybe you need some more sophistication to try to get to the bottom of it but I do think that that is part of the legitimacy of the system.

Thank you.

ACTING CHAIR HINOJOSA: Thank you all very much.

We will take a short break.

(A recess was taken.)

ACTING CHAIR HINOJOSA: We will start with our next panel. We appreciate your presence here.

We have Rachel Barkow, who is a professor of law and director of the Center on the Administration of Criminal Law at NYU Law School. Her scholarship focused on administrative and criminal law issues. She was a visiting professor at Harvard and Georgetown Law Center, and she served as a clerk to Judge Silberman on the D.C. Circuit Court, as well as Judge Scalia on the Supreme Court. Her BA is from Northwestern University, and her JD from Harvard Law School.

We also have Christopher Stone, who is a Daniel and Florence Guggenheim Professor of the Practice of Criminal Justice at the JFK School of Criminal Justice at Harvard, and he is the director of the Hauser Center, a Nonprofit Organization Program in Criminal Justice Policy and Management. He also serves as the founding chair of Altus, an alliance of nongovernmental organizations and academic centers in Russia, India, Nigeria, Chile, Brazil and the United States that are jointly pursuing justice sector reform, and he received his bachelor’s degree from Harvard, and his law degree from Yale and master’s degree in

criminology from the University of Cambridge.

We also have Professor James Byrne, who is a professor of criminal justice and criminology in the Department of Criminal Justice at the University of Massachusetts, Lowell. He has taught at the University of Massachusetts since 1984. His primary concentration is in the area of evidence-based corrections practice with a particular focus on community corrections and offender reentry.

Dr. Byrne received his bachelor's degree from the University of Massachusetts at Amherst and his master's and doctoral degrees in criminal justice from Rutgers in New Jersey.

We do appreciate you taking your time to be here today.

Professor Barkow, we will start with you.

PROFESSOR BARKOW: Thank you, Judge Hinojosa and members of the Commission. Thank you so much for inviting me [to] share my thoughts with you today.

I would like to start with what I think is the most fundamental question facing the Commission after *Booker*, and that's whether

the Commission should endorse the current advisory guideline regime or endorse reform and seek a return of the guidelines to something more like a pre-*Booker* mandatory status.

After *Blakely* was decided in 2004, I testified before the Senate Judiciary Committee that I thought the guidelines were unconstitutional, and at the time I thought voluntary guidelines, advisory guidelines, were likely only an interim solution, because I was worried they would lead to too much unwarranted disparity so for the longer term, I told Congress that I thought Congress should direct the Sentencing Commission to help it to identify those guideline factors that were sufficiently important that they should trigger as a matter of federal law a sentence enhancement, and that those factors should be treated as elements of the offense, and that they should go to the jury.

I didn't think that if the Sentencing Commission did that, that they would single out very many factors for this purpose, because I don't think, frankly, that many guideline factors are sufficiently important

that they would be offense elements, and it would be unmanageable if you apply those factors in that way, because trials would be too cumbersome.

So what I had expected with that proposal was that the Commission would identify some small number of fundamental areas that could be left to judicial discretion in a way they would be under an advisory guidelines scheme, and the jury would just treat those as an offense element, and everything else would be part of an advisory guideline scheme.

I find that was the right way to balance the control of unwarranted disparity and leaving room for individual decision.

When I testified, I reserved as a possibility it might not be necessary if it turned out that advisory guidelines had a high enough rate of compliance, but I confess at that point I was skeptical.

Five years later, I think the Commission's data is proving me wrong, and I think that judges are continuing to comply with the guidelines in most cases, or to depart with a government-sponsored motion in numbers that

are comparable to guidelines compliance rates in states that have mandatory advisory guidelines throughout the country.

These are just the numbers you see pretty much everywhere and probably most likely just reflect variations in human behavior.

I know some representatives from the administration have highlighted for you that compliance with the guidelines has fallen since *Booker* was decided, but often what is not highlighted so much is that the overwhelming driver of these below-guideline sentences are government-sponsored motions for substantial assistance, and the government's fast track policy are the main reasons why the guidelines aren't followed, and we know that departure in that context is often significant.

Judges on their own are accounting for very little outside the guideline sentences.

I am not saying it is not happening, but I think the numbers are reasonable, and where departures and variances are current without government motion, in the overwhelming number of cases that I am reading coming out of the course, it seems to be

happening in situations where the guidelines themselves are in need of reform, because the punishments that they are dictating seem to be disproportionate to the offense.

That coupled with appellate oversight to keep judges from going too far in one direction or another, and the Commission keeping track of any area that might need reform, I think this system is actually striking the right balance between proportionality and uniformity.

I don't think there is sufficient evidence to change the regime at this point. I think the Commission should continue to monitor this closely. If compliance rates start to diverge dramatically from the rates in other systems, if there is evidence of racial or other inappropriate disparities entering into judicial decisions, if you are finding there is a problem with deterrence and crime rates as a result, then I think you need to reconsider the current framework and maybe something along the lines of what I had thought was appropriate in 2004 might make sense.

But even if that were to happen,

and you were to start thinking about fundamental reform along those lines, I think you couldn't do anything until you conducted a wholesale review of how prosecutors are making their departure motion decisions in each district, and how those decisions affect everything else that is happening.

I think the discretion of prosecutors and judges is intertwined in a way that you just can't separate. If you try to just fix the judicial part of the puzzle without understanding what prosecutors are doing, I think there is a potential to create a system that might be unwise.

So if you were thinking of fundamental reform, I think it would be a necessary precursor to get the data from the Department of Justice about what is going on in each district.

I recognize saying that is a lot easier than getting the data, but I think that is a necessary step.

In that regard, I would point out even when we had mandatory guidelines, we had stark disparities based on factors like

substantial assistance and fast track.

Those disparities just weren't garnering the same kind of political attention because the Justice Department wasn't complaining about them, and no one in Congress seemed to mind those as much as they were minding the judicial departures.

From a policy perspective, from the Sentencing Commission's perspective on what is an unwarranted disparity and what isn't, I think those disparities are just as questionable and require immediate review as any other.

Frankly, perhaps more so because they are based often on just administrative needs and not the culpability of the offender.

Just to kind of sum up my thoughts on this first main point, I think at this point it is best to keep the advisory guidelines in place, to keep monitoring them, and then at the same time take a close look at the relationship between what is happening with judges, but also what is happening with prosecutors.

Now, I think that is the most fundamental question, but I would also like to just briefly highlight four other areas of

discussion for today.

First, as I know others have, I would like to urge the Commission to reconsider the use of acquitted conduct to increase sentences, and I appreciate the question of where does the Commission say that's okay. I think what needs to be done is the Commission just needs to say it is not okay. I think that would be the best way to deal with the fact that I think judges are under the impression it is okay, and I think some actually think they are required to do it if they are to be true to the guidelines treatment on relevant conduct.

In this regard, even though I think it is important to know Congress never required it, and what happened was the Commission just made a decision at the outset that the guidelines sentences would be increased on the basis of relevant conduct, and didn't discuss whether it mattered, whether it was charged or whether it was charged and somebody was acquitted. I think clarity is what is important here.

Every other jurisdiction that has adopted sentencing guidelines since the birth of

the federal guidelines has looked at this approach to acquitted conduct and rejected it outright.

I think this uniform rejection happens a lot, and I think it has been for good reason. I think increasing sentences on the basis of acquitted conduct disrespects the jury system and transfers undue power to prosecutors, and it undermines faith in the criminal justice system.

I don't think if it is looked at closely you can find any justification for using it, and I think it has, frankly, an unnecessarily dark shadow on the overall guidelines regime and what people think about it so if the Commission is taking a fresh look at things, I put this on the list of things to consider and look at closely.

Second, I think the Commission should reevaluate the decision to set drug trafficking guideline ranges around the mandatory minimums set by Congress.

This is one of those areas where there are a fair number of departures and variances, and from judges I would like to just

note from across the etiological spectrum.

The Commission in its 15 year report cited a survey, and it is almost 74 percent of district court judges, 83 percent of circuit court judges think that these drug punishments are greater than appropriate to reflect the seriousness of offense.

This is from a diverse bench, that, if anything, frankly, is more heavily-weighted toward Republican appointees so I think those numbers are saying a lot about the wisdom of these sentences, and I can hear the feedback from judges reflects a flaw with the guidelines and not with the judges themselves.

Just to talk about that briefly, I think -- I can understand why the Commission would set the guidelines to mandatory minimums to avoid cliffs in sentencing, but I think that you can't do that without conflicting with the goals of sentencing set out in 3553.

There is no evidence Congress thought that all sentences would be keyed to that, that there would be anything other than the mandatory minimum quantities that Congress specified under statute, and Congress did

consider it, but it obviously didn't consider the Commission's empirical evidence or expertise.

If the Commission then uses that to set sentences for everything else, that means that none of those will be set on the basis of the Commission's expertise or empirical evidence.

As a result of that, I think there is a significant risk that they are disproportionate and an inefficient use of our prison resources.

I would say the best advice is in the absence of a congressional directive to you that the guidelines should be built around mandatory minimums, I think the Commission should reconsider those sentences and look to see whether empirical evidence supports them.

I am pretty confident if Congress disagrees with that, they will let you know they will put things back to the way they were before, but I think it is not the Commission's responsibility to try to read the tea leaves of the mandatory minimums that way, because I don't actually think that was the intent of those

acts.

My third point is not about the guidelines in and of themselves, but actually about the Commission's function, and here I would just ask as the Commission moves forward, I think that it is important for the Commission to prioritize empirical research and data analysis.

The Commission's research reports and data analysis are the finest in the country of any sentencing commission, and now, I would argue, is the time for the Commission to take that research to the next level and start to provide Congress, courts, other interested actors, with additional information other than the kinds of things you compile right now about sentencing conformance rate.

I talk about this in the written statement, and I want to keep things relatively brief.

So the three things that I think the Commission should pay a bit more attention to would be the fiscal and racial impact of any proposed sentencing launching by either the Commission or Congress, to evidence-based

research about what works and what doesn't in fighting crime and curbing recidivism so judges can consider that in looking at alternatives to incarceration.

Finally, again, to this idea of what prosecutors are doing. I know the data is hard to get, but I would make as much of an effort as possible to get it.

I am not saying the Commission hasn't looked at these issues, because it has, but I think it needs to become a central priority, and at the end of the day I think this is what is your most powerful persuasive tool to Congress.

I think this has been true for state sentencing commissions with their state legislatures, and I think Congress is likely to find at least some of this information valuable as well.

I think that is absent from the debates over loss of sentencing policies at the federal level, and I think the Commission is really well placed to put it front and center.

Fourth and my last point, I just want to respond to the Commission's request to

provide statutory changes to recommend to Congress, and here I just want to agree with the work the Commission has already done, and that is to recommend, as the commissioners said, and as just about every sentencing expert you talk to would say, that Congress should eliminate mandatory minimums and allow the Commission to set sentencing on the basis of what it finds in the empirical evidence support.

Second, and again, to eliminate the disparity between crack and powder cocaine.

I would imagine it is frustrating for the Commission to keep making these recommendations and not having them be acted on immediately, but I know the idea is gaining traction now, and whenever anybody discusses them, the first place people point to is the Commission's research on it so it has been hugely valuable, and I think it is a battle that is worth fighting continuously, and I think ultimately the soundness of the arguments will prevail.

So thank you very much for inviting me to participate in this discussion. I applaud the Commission for holding these

hearings, and it is a real honor to be part of them.

So thanks, and I am happy to answer any questions.

ACTING CHAIR HINOJOSA: Thanks, Professor Barkow.

Professor Stone.

PROFESSOR STONE: Thanks very much, Judge Hinojosa and members of the Commission. It is a pleasure to be here with you today.

I really would like to use these ten minutes just to talk about one thing, and that is the racial disparities in incarceration in our country, including in the federal system, and in particular the effect of criminal arrests, minor offenses, on those.

The Commission through some of its recent work on the impact of minor offenses on sentencing has actually put its toe in these waters in a really important way. This work and research and understanding of these trends is happening. It is beginning to happen both in state systems and the federal system, and my one point, if I am going to encourage that work of

the Commission, encourage you to do that jointly with research going on in the states and think broadly about the intersection of the sentencing system in the federal courts with state and local practice.

This is an area where by confining ourselves to the judicial system, the federal judicial system, we miss a lot of the action.

Through the impact of prior offense record, you are bringing in all the policy and actions of state and local law enforcement every day in the federal system so when local law enforcement decides to double the number of minor offenses, the people arrested for a ten-year period, that has a huge impact on the number of prior records that are showing up in your sentencing.

The same guidelines applied when the guideline system was adopted and today will produce very different sentences because of the huge increase in the use of arrests as a law enforcement technique in minor offending.

What I want to focus on is very, very -- what I call trivial offenses, very minor offenses. I will confine the quick statistics I

want to share with you to disorderly conduct; about as trivial as you can get.

There are more disorderly conduct arrests every year in the United States than there are for all violent offenses combined.

The United States in general has about 90 percent of the arrests in this country are for, essentially, non -- not only non-part 1, non-part 1, non-drug, non-weapon; very, very minor offenses.

It is what distinguishes the use of the arrest power in the United States from almost every other country.

The arrest rates, for example, overall arrest rates in this country versus Britain are about twice what they are in Britain, and yet for any offense you mention, they are actually a little higher in Britain so the arrest rate for burglary, arrest rate for robbery, arrest rate for almost anything is higher in England, but the overall arrest rate here is about twice as high, and all of that difference is in three offenses: It is driving under the influence, possession of marijuana, and disorderly conduct.

So these minor offenses are both the distinguishing feature of the American system of justice and have a disproportionate impact on the records that offenders bring with them when they appear for sentencing, and they have huge racial biases in them.

Just to very quickly take you through the five charts that I passed out, this is a reminder of what you already know, but we can see it particularly vividly in the state systems.

The first two charts are exactly the same data. This is the rate of white incarceration and rate of black incarceration in the United States in different state systems.

Now, the point here is simply that the incarceration rate for whites and blacks is hugely different.

More importantly, it doesn't follow the same pattern. That is states with high white incarceration rates are not the states with high black incarceration rates, and if you thought the rate of incarceration in different states was varying because of the severity of the sentencing scheme, you would

think these things would at least vary together, but they don't vary at all together, and the first two charts show that.

The first one also just reminds us that the whole world -- the incarceration rate for every other country -- over 200 countries in the world where we have data fall below that horizontal line, it is a reminder of how extraordinary the rates of black and white incarceration are.

Professor Barkow's paper talks about [what] some of the statistics are. You may have seen in the *New York Times* I think just a week ago, for the birth cohort in 1990 now in the United States for white children born in 1990, 3.6 percent of white children born in 1990 had a father go to prison in the first 14 years of their life; 25 percent of black children born in 1990 had a father go to prison in the first 14 years of their life.

You can cut these statistics any [] number of ways. Professor Barkow does also in her written presentation.

This is, in my view, the glaring injustice in sentencing in the United States.

The whole world knows this is the issue, and I think given the breadth of your review of the framework, this is an important issue to take a little time on, particularly because I think you have something you can do about it.

Let me just go through this very quickly.

These rates of black/white incarceration can be stated ratio. The third chart here just describes those ratios and takes advantage of the fact we have a huge variance -- this is what statisticians like. You can't do anything without variance, and we have a lot of variance in the ratios of black to white incarceration rate by state. It is all pretty high.

Except for Idaho, every state has at least twice the incarceration rate for blacks that it does for whites, but you see way up at the top, New Jersey, New Mexico, Wisconsin, Iowa, not necessarily the states you would guess would have the widest disparity rates in black/white incarceration rates in the country.

Why is this?

This is really what I want to get

to. The next chart, the final chart, is a way of trying to get at that.

When you do individual racial disparity studies of sentencing decisions in the federal system or in the state systems, almost all of the disparity goes away as explained through legitimate factors, and it is the hypothesis of this research we are conducting now at my program in Harvard is a lot of the reason the racial disparity disappears is because it is buried in prior record; that because a lot of those prior records begin with very minor offenses, and because very minor offenses are largely distributed not based on conduct but based on police deployment decisions and arrest decisions, that the disparities in those minor offenses translate in to differences in records.

So while the guidelines say you are supposed to be treating like with like by treating people with the same prior records the same, in fact a black person with a prior record and a white person with a prior record are not the same, because the patterns of enforcement, the patterns of arrest in their respective communities, on average, are so different.

But, again, here the variety across the United States gives us a handle on that.

The racial disparity in these trivial arrest also varies tremendously by state to state.

What is interesting is that the variance in these trivial arrests explains more than a quarter of the variance in the racial disparities in sentencing.

Nobody is going to prison for these trivial arrests. It is not that. It is not that differences in arrests are explaining what people go to prison for. It is changing the imprisonment decision when they get accumulated in prior records.

We can talk more about that in the discussion.

I have been -- I am a long standing interested observer in the federal guidelines.

For the 17 years that I was Deputy Director and then Director of the Bureau of Institute of Justice, it was my pleasure to act as midwife to the birth of the *Federal Sentencing*

Reporter and to serve as occasional editor for some of the most important scholarship on sentencing that came out. I am a huge fan of that.

I am not an expert in that.

I study policing systems, I study state and national systems of justice both in this country and others, but this issue of racial disparity seems to me to be one in which the work of the Commission not only can -- the review you are doing now cannot only make corrections to what is currently happening in the system, but you can play a leadership role nationally in the better understanding of how prior record arrest patterns affect sentencing and affect sentencing disparities we see.

As I said, your early work on that is important and has already broken ground, and I hope we can pursue some of that work together.

ACTING CHAIR HINOJOSA: Thank you, Professor Stone.

Professor Byrne?

PROFESSOR BYRNE: Judge Hinojosa, members of the Commission, thanks for asking me to come.

My background is very different from the other two people you heard here. I have done a lot of the work in the area of violation research, and that is what I will focus on, particularly in the area of alternative sanctions.

In my written testimony I have gone through the various types of alternative sanctions that are available in the federal system, but also looked at the existing empirical research and the evidence-based reviews of various types of alternative sanctions you might want to consider as the Commission moves along.

What I would like to do in my ten minutes of fame here is to summarize the written testimony, focusing specifically on alternative sanctions, and within that group, focusing specifically on the U.S. citizens subgroup that the federal sentencing commission probably can do the most for.

That doesn't mean I don't think non-citizens in this system are important; it is just some of the recommendations I will make go beyond anything you can do as a Commission with

that group of non-citizens, at least at this point. I could be wrong.

Let me begin by just talking about the various types of alternative sanctions that are available and trying to make some sense of why they are underutilized today, and then make some recommendations, three specific recommendations for some reforms in that area.

It is pretty clear as I review it, review your own report, Sentencing Commission reports, that alternative sentences are being underutilized, sanctions are being underutilized for federal offenders who fall into the zones A, B and C of the sentencing guidelines tables grid.

That is pretty clear, and the trend has been a decrease in utilization between 1997 and 2007. You see a decreased use of alternatives going down from 24 percent in '97 to 14 percent in 2007. That is at least partially attributed in your own reports to the increased proportion of non-citizens in particular being held for immigration violations in the system. That is certainly part of it.

However, when you break out the

subgroup of U.S. citizens, you still see that pattern there.

Looking specifically at what is happening in terms of sentencing within each zone, what you see is that prison is still the sanction of choice within each of these zones overall: 48 percent of zone A offenders receive a prison sentence, 58 percent of zone B offenders, 66 percent of zone C, and 94 percent of zone D offenders. Clearly we don't see much disparity at the other end, 94 percent in zone D. We are seeing a lot of variation across A, B and C.

Within that variation, looking specifically at U.S. citizens, you see 18 percent of U.S. citizens that are sentenced receive -- if they are zone A receive prison sentences, 32 percent of U.S. citizens are receiving prison sentences, and 37 percent of zone Cs are receiving prison sentences.

Clearly there is a subgroup of U.S. citizens that are still not receiving alternative sanctions, and again the question is why?

Ninety-two percent of U.S. citizens fall

into zone C, we are sentencing them to prison.

My view is, and my conclusion from looking at the data is that alternative sanctions can be expanded to include current zone A, B and C offenders that are receiving prison terms, without undermining the original intent of the sentencing guidelines. Specifically, I think it will increase uniformity in sentencing, because that was your recommended sentence, presumptive sentence for offenders in each of those zones so that should be an improvement.

In terms of public safety, there is no evidence from the evidence-based reviews I have seen that you get an improvement in public safety, a specific deterrent effect, by incarcerating this group of people in zone A, B or C.

In that instance I think it is a very specific example for subgroup offenders in zone A, B, C, the U.S. citizen offenders. Clearly there is something to be done.

Now, the third point I will make is that when you look at the sentencing guideline grid, specifically when you look at

the many, many categories, the 43 categories of offense seriousness levels across the six categories of criminal history -- I think Chris Stone's points about criminal history certainly come to bear here -- there are too many cells, and when you look at the cells where somebody is -- can be considered for at least alternative sanctions, there are too few of those.

One thing you can say, and other people have told this to this Commission -- I know I have read that testimony -- keep it simple. Reduce the number of criminal history categories and reduce the number of offense seriousness levels.

Certainly the rule of thumb ten, I don't know why everybody picks ten. Ten makes sense. Going across, you can have six, you can certainly go down to five no problem, truncating the top two, but certainly Chris' comments make you wonder if you should expand that first level as well, so talking about going from six to three or six to four in criminal history, I think that is something that should be considered with the purpose of increasing the zone that would be the alternative sanction

zone. I would say, my recommendation would be between 20 to 40 percent so I would like to see a doubling of the zone myself, and, again, I think that is something that could be done, and I think research that directly compares prison, longer and shorter terms, and directly compares prison to alternative sanctions suggests you can do that without any threat to public safety.

So then what comes back to the commissioners is would we have more proportionate punishments as a result of this new system, and that is something, again, I think certainly the Commission should consider.

I think you can do that, again, without affecting public safety.

Utilizing existing alternative sanctions, now, you could improve public safety, however -- and this is my fourth point -- by looking closely at the alternative sanctions you currently allow judges to choose from and improving those alternative sanctions.

Specifically, the types of alternative sanctions we have in the system now still rely on, at least the top tier for zone C, a period of incarceration followed by a period

of home confinement or placement in a residential treatment center or halfway house.

We have zone B offenders getting probation plus home confinement, and you have zone A offenders, at least the presumptive term, would be about 39 months of federal probation.

In each of those cases, in particular for the zone B presumptive and zone C presumptive, we are utilizing sanctions that I think emphasize too much the surveillance control components of alternative sanctioning and not enough offender treatment to change the component of that, and I think if you look at the evidence-based research reviews that have been done over the last 10, 15 years, they are very consistent on saying one thing: Surveillance-oriented alternative sanctions do not work in the sense that they do not provide any improvement in public safety.

That doesn't mean that those alternative sanctions are not advantageous over prison, even in their current form, but if you are looking for a specific deterrent effect you, won't find it in the current alternative sanctions we have, at least looking at the

research as I did.

One of the frustrations I had to writing this testimony up was realizing that there is very little out there in terms of independent external evaluations of federal probation, of probation plus confinement or of split sentencing.

You would think that if we have had these for 25 years in place, that there would be a subgroup of evaluations that I would be able to look at.

We have moved much quicker in the area of hot spots, policing, evaluations in that area than we have here, so we have 25 years of alternative sanctions in place, but we don't have a body of research that I can review and summarize to you and say, "This is what the evidence shows." That is frustrating from my perspective.

That means when you read my testimony, the reviews you are reading are based on state level programs, state-level initiatives so that is important to keep in mind.

With that, still with that I would say we need to expand utilization of alternative

sanctions, and I think there's a justification for doing that, but within that I think we need to look more closely at perhaps expanding the array of sanctions available.

Let me be specific in terms of what I think the evidence shows, which is that a combination of surveillance and treatment or a balance between the two needs to be in these programs.

Intensive supervision programs, if you read the evidence-based reviews, for example, they say the early 90s programs that were developed didn't work, didn't reduce recidivism.

In fact, if you look closely at those evaluations in the subgroup, what I would call quality evaluations, they did show that intensive supervision, this notion of intensely getting into a case and having an impact, can make a difference if what you are focusing on is not tail them, nail them and jail them, but what you are focusing on is trying to change behavior, lifestyle change, which is treatment.

That is certainly one type of alternative sanction that I think we need to

consider.

The second point I would make is that we moved away from boot camps in the early 90s because we said the research didn't work. But you know what? Take a close look at the boot camp research. What you will see is this notion that we can replace longer sentences with shorter sentences, and if we could provide some type of intensive program for offenders, that is something to consider, but maybe what the intensive program should be is not marching in place or work programs, but maybe it should be intensive treatment.

If you think of the boot camp model, the new boot camp model being intensive residential treatment for six months, you know what? That might have an impact on public safety that you wouldn't have seen in a boot camp.

Third would be split sentencing. This is something certainly I think is worthy of further research, and that is right now when offenders come out from their average nine-month prison term and go into a community program, nine out of ten times -- I'm sorry -- three out

of four times, they are going into home confinement. Maybe we should be considering moving them into -- from intensive treatment within a prison setting to intensive treatment in either an out-patient or residential setting, and somehow doing that prison to community transition that everybody talks about with reentry within that subgroup of offenders.

The point is maybe you need to rethink split sentencing and not focusing on when they come out the confinement aspect of it or the control monitoring aspect of it, but really the offender change part.

Now, that said, three basic recommendations that I make: First recommendation, and I will try to put some numbers to it to see what impact it has, and I go into more detail about it in my presentation, the first recommendation would simply be to think about restructuring federal sentencing guidelines, and here a mandatory component might not be a bad idea for this subgroup; to limit the use of prison-only sentences for zone A, B and C offenders. I think you could do that without any impact on public safety, and I think the research

demonstrates that.

If you just did that for U.S. citizens, you would see about a three percent decrease in the 2007 prison population so about three percent drop. Not big, but a drop.

Again, you are going to be able to do that with no change and effect on public safety, as I read the research there.

Second point that I would make is redesigning existing alternative sanctions, and there specifically I am talking about the zone B presumptives and zone C presumptive sanctions based on a review of what works with specific subgroups of federal offenders, and there we are talking about white collar offenders, drug defenders, sex offenders, et cetera.

These new generation sanctions, like the ones I described, I think you will find more reduced recidivism. If you believe the evidence-based reviews, the recidivism reduction effects you should expect are modest, about a 10 percent overall reduction in recidivism among these groups, even utilizing these new strategies.

Again, rate of return to prison

would go down among these federal offenders.

Again, just focusing on the U.S. citizens that you would put in these programs, I think you would see on the order of another 3 percent decrease in the federal prison population. That is a modest recommendation and I think a very modest estimate.

Others have made statements that suggest a 50 percent reduction with these programs. I just don't think it is supported by looking at the subgroup that I am here.

The third point and probably the most controversial to this group is to look specifically at the offenders in offense levels 12 to 14 currently, because when you break out the offense levels in the most current data that I looked at in those groups, you have a lot of offenders falling in those three offense level categories.

I think you need to truncate the 43 down to 10, but I think you need to look specifically at the impact on the number of offenders falling in those categories.

You have about 5,400 U.S. citizens eligible for alternative sanctions that would

fall in that zone if you moved that zone into an alternative sanction zone, and that would reduce the overall federal prison population by about 8.5 percent; again, with no impact on public safety, moving them to that area, as I see it, at least as I review the research.

This overall suggests that without doing anything fancy here, utilizing existing sanctions with some improvements in the area of the alternative sanctions in terms of emphasizing treatment as well as surveillance control, you could reduce the federal prison population by about 15 percent, again extrapolating from 2007 numbers. That is a start, and that is what I would recommend the Sentencing Commission consider beginning in terms of reforming in the area of alternative sanctions.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Dr. Byrne.

Questions?

VICE CHAIR CARR: First of all, I would like to compliment you on being one of the fastest talking trilogies of panels we have had.

Professor Stone, your research is

enlightening and disturbing. I am curious to know what you would have us do with it. Obviously if we were to reduce the number of criminal history categories and expand within each one the number of criminal history points, it might do something to ameliorate the impact on federal criminal history categories, of what you described as the disparate, unwarranted and perhaps prejudicial nature of arrest records around the country. What would you suggest?

PROFESSOR STONE: I think -- as a first matter, I think there are certain prior offenses that should simply be taken out of the calculation. I think that is in some sense the most dramatic, and that is what would make the biggest difference.

I don't think you would be acting alone. I think what this body of research and the patterns of arrests and convictions that we are seeing for these minor offenses is going -- this is alarming to police officials, this is alarming to state legistlators, this is alarming to many people.

I think what we are going to see in the next ten years is a more understanding

treatment of what these minor arrests and convictions actually indicate.

I am not an advocate that the police should, when they see a disorderly group on the street, drive on by and not get involved with that, but their involvement leads to arrests and conviction of minor offenses in some neighborhoods and not in others.

We are not going to change all of that overnight, but we can change how it is treated.

In Massachusetts, where I am currently working and living, there is a lot of focus on criminal offender -- criminal history used by employers and their records.

One set of recommendations around that kind of thing is, "We will seal them earlier." That doesn't help.

On the other hand, taking the most minor offenses completely out of those criminal records that employers see can make a big difference in employment and reentry patterns.

So I think we are going to see in a number of policy areas in the justice system, I hope, in an effort to try and ameliorate some

of the racial disparities that are caused here, the stopping using these most minor convictions and arrests in the way we do now, and I think you could take more steps in that direction, both on the research side and how you direct judges to use these prior records.

VICE CHAIR SESSIONS: Professor Stone, your concern, we just dealt with minor offenses just over the past couple of years. What we based our decision upon was not necessarily racial impact, the studies you relied upon or engaged in, but we relied upon the impact in terms of recidivism so I am reminded particularly about driving without a license, or suspended license offenses, and there seemed to be based upon our recidivism studies some consistency, that there is some increased recidivism rates as a result of persons who were convicted of those particular offenses, and therefore when you are talking about criminal history, you are basically talking about black people who reoffended. As a result, that was kept in.

I am interested to know whether you know of any recidivism studies out there,

not in the federal system because I don't think we have any, regarding disorderly conduct offenses. That was my first question.

Dr. Byrne, I have another question. You cite statistics about incarceration rates. One of the difficulties in our statistics is, frankly, that we do not delineate sentences which are time served; that is, persons that spent one day or less in prison, and then we use supervised release as opposed to probation.

Frankly, I will tell you in Vermont, the federal court in Vermont, that is exactly what I do. I impose time served, despite the fact the time was five minutes, and I think that is fairly consistently done in various parts of the country.

My question is, would that, would a study be helpful to delineate what percentage of those people who go to prison in fact are in prison for time served, if they are really probationary sentences, so those are the two questions I have.

I have an opportunity to ask questions so that is why I asked them both at

the same time.

Professor Stone?

PROFESSOR STONE: Under the second question, the answer is yes, and good sentencing analysis, at least at the state level, does distinguish precisely the kinds of sentences you were talking about.

There is a lot of gross statistics. You could take very broad statistics of sentencing decisions or incarceration rates, but the data I am using here, and increasingly the data people study on these matters, would distinguish the circumstances that you are describing, and I think it is important to do so.

The more important point here from my point of view, from the first point, the offenses that we are talking about here -- and I used disorderly conduct because it is the common one across the country. It is the third most common offense category, you know, arrest across the country -- it is not about conduct. We call it conduct, but you can't study its recidivism, because what triggers an arrest for disorderly conduct is much more about a deployment of a

police officer, an engagement between a police officer and a civilian, and that is going to happen. It is going to result in arrests by neighborhood and by the kind of conduct over and over again.

Studies of this -- for example, my colleague in the sociology department, Rob Sampson at Harvard, has done films of disorderly youth, white and black. He shows the same film, same conduct. Depending on the race of the person, people describe what they see in the film as disorderly more so when the same conduct is being engaged in by African Americans. This is true for both black and white observers.

VICE CHAIR SESSIONS: I appreciate that distinction, but maybe we have a difference in the term "recidivism." My understanding of recidivism is that people who have disorderly conduct convictions are more likely to reoffend into the future, not in regard to disorderly conduct, but in other offenses, and as a result, when you see someone with a disorderly conduct on their record, you know that they are more likely, theoretically, to reoffend than a person who doesn't have a disorderly conduct, and I

wonder if that kind of study has been done.

PROFESSOR STONE: Those studies have been done in the state and local systems. They are not completely consistent, but, by and large, in terms of trying to predict from minor offenses to more serious offending, it doesn't play out.

These are essentially studies of what is known as "broken window hypothesis."

That is different than policing those things can reduce the major offenses. There is evidence that you can do that.

So police departments that increase their use of minor arrests do in some cases see successes at reducing major offending in those areas, but that is different than saying the people we arrest for the disorderly are more likely to then themselves commit the later offenses. That there is very little, if any, empirical support for.

PROFESSOR BYRNE: I think you are right about the research problems in some of the state level research and how they factor in time served, but within the federal system, 70 percent of your offenders at some point are

going to do pretrial time in institutions. I had to write a piece on the federal pretrial system for the 25th anniversary of the Federal Pretrial Services Act last year, and that's one thing that I certainly noticed, is the increased use of pretrial incarceration. It probably ties into this disproportionate minority confinement issue as well.

Certainly that has to be factored into any research that you do looking at these sanctions so from my perspective, I would still like to see the research done, and we have to figure out how to deal with the time served aspect of it in terms of the zone B and C offenders that I assume you were talking about.

COMMISSIONER HOWELL: Just a follow-up, and I also have a question for Professor Barkow, but to follow up on some of the questions my colleagues have asked Professor Stone.

We didn't just look at criminal history; and we also looked specifically at disorderly conduct, because we were also concerned about these racial impact issues.

Disorderly conduct is only counted

as a prior if your incarceration results for more than three days.

Part of what I am interested in is, have you been able to look at incarceration rates and look at how this is affected by -- I would like to see this chart for how many people are arrested for, say, disorderly conduct and are sentenced to more than 30 days, so how much is that affecting -- because if it is just disorderly conduct arrests, that is also not counted under the sentencing guidelines in our criminal history calculations.

Also, for driving under the influence, that was also a debate that we had within the Commission about how to deal with that, and similarly, in order for that to even be -- it is careless or reckless driving, you have to be sentenced for more than 30 days, and ultimately, that is something that basically is a statistic.

I would sort of like to see these charts broken down. I don't know whether that is possible or whether you could give us a citation to where this is broken down by disorderly conduct, by DWI and also by pot

possession so that we can -- and also by length
of incarceration so we can see really how much
this is affecting sort of the peculiarities
of our criminal history guidelines. So that
would be helpful and sort of more of a request,
because I think this is something that we were
very sensitive to when we rewrote -- amended the
criminal history guidelines, and it may require
additional attention from us with a little bit
more statistical assistance from you, if that
would be possible.

I hesitate to bring up acquitted
conduct since we had a very lengthy discussion
about acquitted conduct yesterday, and I know
you were in the audience so you heard, but one
of the issues of acquitted conduct, at the same
time the judges want more discretion, including
discretion to consider everything they have
heard during a trial that might include
acquitted conduct, and the concerns that you
have articulated that I share about not
completely barring consideration of acquitted
conduct, I just wanted to get your reaction, and
it may be unfair so ask your reaction right off
the bat, but I am going to do it anyway, which

is to rather than having a complete bar, a complete restriction on the sentencing judge's discretion to consider acquitted conduct when that judge may consider it relevant to sentencing, but to cabin the weight given to acquitted conduct so that a judge could only consider acquitted conduct in determining where within an otherwise applicable guideline range a sentence should fall.

So rather than including it as part of the relevant conduct calculation for an adjusted offense level, using acquitted conduct to increase offense level, but just allowing judges to use acquitted conduct to decide where within a guideline, otherwise applicable guideline -- is that something that would sort of balance the ability of judges to exercise their discretion to consider it if they wanted to, but cabin it to an otherwise applicable guideline range?

PROFESSOR BARKOW: My own view on this may be something that others don't share, but I don't think it should be used at all. I recognize historically, though, that in some cases it was something that was on an

individualized basis of judges, and they could
either talk about the fact they were doing it or
not. We had no sentencing feedback prior to the
[] guideline era so you wouldn't really know
what they were doing, but I think once you bring
something like that out into the open and judges
are doing it -- I mean, at most I would say
something like in extraordinary circumstance,
because I just think it shows complete disregard
for the fact that we have a jury system, because
even if you only use it a little bit, however
amount you use it for is still saying to the
jury, "Thanks for your time, ladies and
gentlemen of the jury. Because of your time I
am just going to use it a little bit."

I just think it is
fundamentally at odds -- I understand this
desire to try and find a middle ground, and I am
sympathetic to that, but I can't conceptually
think of a way to do it in the open, making it
transparent, that does anything other than
disrespect the jury.

The prior system, the way that it
could work without people knowing about it is
[judges] didn't give any kind of reasons for

anything they were doing so it could be that, could be something else.

Once you have to make it explicit, I think it is just, frankly, an explicit rejection of what the jury spent all their time doing.

So my own answer to that would be I would just say it is not relevant conduct and leave it at that, and then, frankly, you could have a system where judges are still doing it, and the Commission itself has not condoned it, but let judges decide for themselves within the guideline range where they want to put somebody, and if that is one of the factors they can do it, and they don't have to say more about it.

ACTING CHAIR HINOJOSA: Professor Barkow, do you feel the same way about uncharged and dismissed conduct as opposed to acquitted conduct?

PROFESSOR BARKOW: I think the analysis there is different, actually. I am not a big fan of that either, but I understand why the Commission would include that, and I understand there was a rationale for that based on the way the federal code was written; that it

was very hard to create a guideline system because of the complexity of the federal code and the worry that prosecutors would not charge certain things and would take over the system.

I tend to think the solution to that would be more severity in one direction, more severity, so there is problems for that, but that one I think is more complicated because it is trying to check our prosecution practice, but there is no justification in the context of acquitted conduct, because there the prosecutor hasn't given anything. They put it out in the open, jurors decided it, and they rejected it.

I would say I think that in order to take the single approach to uncharged conduct, you would have to do some of the things that judges and others have urged you to do in terms of simplifying the guidelines so that would require a much more massive overhaul of the system, frankly. I think that is a stroke of a pen. I think that is actually easier, and because there is no justification for it, I think, you don't even have to have that much of a debate over it.

The uncharged conduct requirement

would fundamentally require you to rethink your grid, your table. Your approach to relevant conduct is at the heart of a lot of things in the guidelines and their complexity, so the uncharged part of the conduct, I think that is different so I don't think at this point down the road the Commission has gone down to require other fundamental changes too.

ACTING CHAIR HINOJOSA: One last question, Professor Stone. One of the things I noticed, some states will have a sentence where you either pay a fine or you serve 30 days. Are there studies that show people that don't have the financial means to [pay] end up spending the 30 days in custody as opposed to paying the fine and how that may affect charging?

PROFESSOR STONE: I don't know specifically the answer to that study on that particular issue.

Maybe Professor Byrne does, but I think it will go to the same point we were talking about a minute ago, which is the 30-day threshold.

I think that the minor offenses that result in 30 days incarceration or more,

again, is too low a threshold. These things multiply themselves. People end up with three, four, five disorderly conducts, they get 30 days. It doesn't mean anything more than it did when they got one, but I wish I had a more direct answer to your question. I am afraid I don't.

VICE CHAIR CASTILLO: I just want to add to Professor Barkow, I appreciate the testimony we received from Professor Stone and Professor Byrne. It is very helpful.

First of all, on acquitted conduct, I totally agree with you, but I have an issue here at the Commission. My problem with acquitted conduct is it leads to disparity, because even among the judges here, we would not agree as to when it would be used, when it would not be, and I am concerned about disparity, which gets me to my fundamental point with your testimony.

You say we should continue with the advisory system, and one of the things you pointed out is appellate oversight, yet yesterday we had a bunch of appellate court judges here, and if I had all the judges in my

circuit, they would all be tossing up their hands saying, "After the Supreme Court's jurisprudence, we are throwing up our hands on appellate oversight."

Literally, district court judges throughout the country are getting to the view that as long as they justify their sentence one way or the other, it is going to be upheld on appellate review.

Looking at all the case law, and really, every single sentencing opinion that comes down, either at the court of appeals level or the district court level, I cannot argue with them.

You said as long as the compliance rate doesn't vary dramatically, we are okay, so that kind of begs the question, what do you define as "very dramatically"?

Because I could tell you that even among the group of judges we had here right before you testified, there is varying rates within circuits, there is varying rates within my circuit. If you look at the Southern District of Illinois versus the Northern District of Illinois, there is a lot of

different things going on there, and I agree with Judge Gertner that we shouldn't just accept those facts and statistics generally and jump on them; I think we need to dig at them.

At what point would you as an academic throw out the red flag and say, "This is a compliance rate that varies very dramatically"? Is there a number you have in mind?

PROFESSOR BARKOW: It would require more sophisticated -- I think if we are talking chance, that is bad, and I would agree with you there.

I guess one thing I would say about the regional disparities, and this goes back to the point about the jury -- a big part of what prosecutors do in a district -- and what [it] does is operate against the shadow of a jury trial, and what a jury in a region might do.

I think it is normal and appropriate in a system that respects federalism that different districts are going to have different practices, because they should be operating, I think, in the shadow of their juries so I wouldn't want a Boston -- a Boston

jury is not going to think the same way as a Texas jury will, and everyone in that system is going to be operating against that baseline.

In a system of pleas and people trying to figure out what would happen if we went to trial, I think you are going to get disparities, but I don't think those are unwarranted. I think those are entirely warranted and, frankly, part of the United States' great commitment to federalism.

Part of it is just my view of the regional disparity not being as problematic.

I think within a district, judge disparities, that is much more alarming to me, because that would be a little -- then you couldn't just say we are operating in the shadow of a jury, but just judges departing from one another, and maybe the solution to that would be something like the judge panels or something that could deal with within a district.

So part of it is those numbers don't worry me because to the extent I think they are mostly already against their --

VICE CHAIR CASTILLO: What if we got to a national number, compliance number -- I

don't even like to call it a compliance number -- what if we got to a national number of within guideline sentences of less than 50 percent? Would that throw up a red flag to you?

PROFESSOR BARKOW: It depends on how much the government -- I view it as government motion. I put that in the same category of the guidelines, as I believe it has been --

VICE CHAIR CASTILLO: I agree with you.

PROFESSOR BARKOW -- so that number together within guidelines plus the government's monitored motions, I think if you got to the point where that starts to get to 50 percent, something is wrong.

The numbers of the states, it is right around 70 percent, which strikes me with the consistency is probably about right, but it requires much more sophistication than just throwing up a number. I do think you need to look at why that is.

I think if every single judge finds this one guideline to be the one they have

to depart, I just think the instinctive reaction shouldn't automatically be, "What is wrong with the judges; are there that many of them that are departing?" Let's look at the guideline.

Part of it depends on are you seeing consistency in terms of this one guideline problem, or is it actually not this one guideline; they are just starting to go crazy all over the place. That is where the system unravels to the point that you do have to act.

Part of it would just be is it regional versus within a district. The next would be is it consistent within a certain type of guideline that is leading to the departures.

Let's look closely at the guideline. If we have to do it because Congress told us we have to, that seems to be an ideal candidate to become mandatory in some way and go to the jury.

But if it is not and judges are not complying with it, then I view that as a fire alarm for the field that there is something wrong with the guideline.

ACTING CHAIR HINOJOSA: Thank you

all very much. We appreciate your patience and certainly appreciate all the information you have given us.

Rather than take a break before the next panel, we are going to go on.

We did have one other panelist who had an emergency and is not being able to here, and that is Commander Garry McCarthy from Newark, New Jersey, and he did call and say there was an emergency and he will not be able to be here.

We do appreciate your presence here, and we are honored that you are here and willing to share your thoughts.

This has a deep law enforcement community impact, any decisions involving sentencing practices.

Just like all the other panelists have given us insight into different components of the federal court justice system, we are happy to have Police Commissioner Raymond W. Kelly. He has been the Police Commissioner and has been so since 2002 in New York City.

He has previously served as the Commissioner of the U.S. Customs Service. He

has also served as Under Secretary for
Enforcement at the U.S. Treasury Department
where he supervised the Department's enforcement
bureaus including the U.S. Customs Service,
Secret Service, and the Bureau of Alcohol,
Tobacco and Firearms and the Federal Law
Enforcement Training Center, Financial Crimes
Enforcement Network, and the Office of Foreign
Assets Control. He has been spent 31 years in
the New York City Police Department. He holds
his bachelor's degree from Manhattan College, his
JD from St. Johns, and his LLM from New York
University, and an MPA from the Kennedy School
of Government.

Are you still attending school,
Commissioner Kelly?

COMMISSIONER KELLY: I wish I was.

ACTING CHAIR HINOJOSA: We are
also very honored to have Susan Smith Howley,
who has been with the National Center for
Victims of Crime since 1991, and she presently
serves as director of public policy where she
manages and coordinates public policies and
advocacy efforts of the NCVC. She provides
assistance to legislators and advocacy groups

working at the federal and state legislation, [at] the federal and state levels, obviously, tracking legislative trends and providing analysis of loss relating to the rights and interest of crime victims. She has received a bachelor’s in international affairs from Texas University and her law degree from Georgetown.

We will start with Commissioner Kelly.

COMMISSIONER KELLY: Chairman Hinojosa, members of the Commission. Thank you for your invitation to appear before you here today.

I want to begin by congratulating you on the 25th anniversary of the Commission, which I believe has significantly strengthened America's criminal justice system. It has done so by fostering transparency, predictability and fairness in federal sentencing across the nation. That is a legacy worth reflecting upon as we consider the future of sentencing guidelines and policy alternatives that could have the unintentional effect of halting the progress we have made to reduce violent crime in the United States.

I have been asked to discuss the

core policing strategies that have enabled New York City to drive crime rates down dramatically, while also helping to reduce the state's prison population.

First I would like to give you some historical perspective.

Since 1989, UCR index crime in New York City has fallen each and every year by 72 percent overall. This has taken place even as the city's current population has grown by 1 million since 1990 to 8.4 million.

That year, New York recorded an all time high of 2,245 murders.

In 2002, for the first time, the city experienced fewer than 600 homicides, something we have accomplished every year since.

In 2007, we had fewer than 500 murders. The actual number was 496.

It was the first time the murder rate fell below 500 since at least 1961, the earliest year to which valid comparisons can be made.

This year we are on track to break our record with homicides down 19 percent this year, by 11 percent from two years ago.

That is all the more significant given the fact that New York has about 5,000 fewer police officers today than we did in 2001 when staffing was at its peak.

Despite this decline in resources and the dedication of 1,000 police officers to the mission of counterterrorism, major felony crime is down by 36 percent from eight years ago.

We have been able to do more with less thanks largely to an initiative called Operation Impact.

Since 2003, we have taken at least two-thirds of every graduating police academy class, teamed them with experienced supervisors, and assigned them to areas of the city where we have registered an increase in serious crime. These areas can be as large as an entire precinct or as small as one city block.

To give you some idea, we have seen double-digit reductions in crime of up to 30 percent in impact zones throughout the life of the program.

This year, major felony crime is down by 24 percent in impact zones, rapes are

down 46 percent, robberies are down by
34 percent, and grand larcenies are down by
28 percent.

We have adopted a similar intensely targeted application of resources to other areas of our mission such as school safety. The NYPD is charged with the safety of more than 1 million public school students. Through our School Safety Division, we have assigned more than 5,300 sworn and unsworn personnel to New York City's public schools. Since 2001, major crime in that system is down 44 percent, and it shows the Police Department's Impact for Schools initiative.

We have also been extremely active in our enforcement of quality of life violations such as aggressive panhandling, illegal peddling, graffiti and many others. Since 2002 we have issued more than 635,000 summonses for quality of life violations. In 2007 and 2008, police officers issued more criminal summonses than any time in the Department's history.

We find again and again, when we go after low level offenses, when we write the summonses and make the arrests, we catch career

criminals, many of them with outstanding warrants. In this way, quality of life enforcement yields broader crime fighting benefits.

This approach is one of the reason subway crime is at an all time low in a system that is one of the world's largest; in fact, the world's second largest.

Nineteen years ago, an average of 48 crimes were committed in the subways each day. In 2000 that number was 12. Today it is down to five crimes a day, even as ridership is the highest it has been in 44 years at more than 5 million people a day.

It turns out that in some cases, the people jumping turnstiles and moving between cars are the same people committing armed robberies and dealing drugs.

Another way we have been able to realize greater efficiencies is through technology. Four years ago we opened our Real Time Crime Center, a state-of-the-art crime fighting computer facility. Its core is a massive database with billions of public and law enforcement records. Crime center detectives

take calls around the clock from investigators in the field looking to follow up on leads.

Our detectives conduct instant search using data-mining software that make it easier to identify criminal patterns and the relationships between those connected to a crime. This has dramatically reduced investigation times and led to faster arrests.

We have also benefited substantially from our close collaboration with federal law enforcement agencies. In the wake of September 11th, we placed an even greater emphasis on these relationships, which have yielded important gains for counterterrorism and crime fighting alike.

We work closely with our federal partners through a variety of task forces. These include the Joint Terrorism Task Force, the Joint Organized Crime Task Force, the Drug Enforcement Task force, the Joint Firearms Task Force, and the Joint Bank Robbery Task Force, among others.

Whether through these entities or in close cooperation with the various U.S. district attorneys, we seek to refer as many

cases as possible to the federal court system. That is especially true of our efforts to get illegal guns off the street.

We are active participants in Operation Triggerlock, in which we partner with the U.S. attorneys for the Eastern and Southern Districts of New York to obtain federal prosecutions of gun cases. We pay relentless attention to the details of post-arrest follow-up to ensure the best prosecutions available. We created a special Gun Enforcement Unit to improve the collection of evidence and intelligence.

We let anyone arrested for a gun crime know that if they have a prior felony conviction, we will do everything we can to have them tried in federal court, where the penalties are tougher.

For example, the federal mandatory minimum sentence for a first offense while carrying a firearm during a crime of violence or drug trafficking crime is five years, compared to three for the state. The prospect of a stricter sentence has convinced a number of suspects to give up information.

This illustrates the deterrent role of federal sentencing. Even though the vast majority of our cases are prosecuted in the state and city courts, we view it as an additional, powerful tool to support our 36,000 police officers.

Their outstanding work on every front has enabled New York City to drive crime down to historic lows, even in the face of diminishing resources and a persistent terrorist threat. And with far fewer city residents committing serious crimes, admissions from New York City into the state prison system have declined by 50 percent since 1990, proof that success in crime fighting can lead to smaller, not larger, prison populations.

It follows the best way to reduce the prison population is to reduce crime, not the length of sentences. That is why I would caution against new approaches that circumvent the well-defined guidelines already in place.

One such experiment taking place at the state level is New York's recent Drug Law Reform Bill, which repealed the so-called Rockefeller Laws. Our concern is that drug

traffickers will make unsupported claims for treatment to avoid sentencing and invite the kind of revolving door justice that produced so many victims of addiction and violent crime in the not too distant past.

Advocates of alternative sentencing often cite the rising costs of incarceration as evidence of the need for change, but what about the costs of policies that allow convicted criminals to evade jail time and increase their likelihood of committing more crimes against society?

We must refuse to go back to the past. Over the last two decades, New York City's economy has been transformed because of the enormous gains made in public safety. To provide just one perspective from the real estate market, from 1990 to 2007, as crime plummeted, the price of an average apartment, Manhattan apartment, skyrocketed by more than five times. You will find similar trends in home prices across the five boroughs.

There are many reasons people seek to live and own a residence in New York City. The most important one is that it is safe. We

intend to keep it that way. We'll ensure New York remains the safest big city in America with effective policing strategies backed by strong sentencing. We hope the Commission will continue to support this goal for many years to come.

Thank you again for the opportunity to testify.

ACTING CHAIR HINOJOSA: Thank you, Commissioner Kelly.

Ms. Howley?

MS. HOWLEY: Good afternoon. Let me start by saying we appreciate the invitation to appear before this panel, to offer our suggestions regarding changes to the federal sentencing system.

Our focus on the federal sentencing guidelines is most pertinent to work with the Sentencing Commission; however, some of our recommendations may be enhanced by or even require changes to the Federal Rules of Criminal Procedure or to statutes, and those are addressed in my written testimony.

We start by addressing the role of the federal sentencing guidelines in federal

sentencing.

From the perspective of the nation's crime victims, the federal sentencing guidelines are important for their ability to promote predictability and consistency in the sentencing process. In so doing, the guidelines help to instill public confidence in the fairness of the federal criminal justice system.

The guidelines also have the ability to further the implementation of the rights of crime victims to be informed, present and heard throughout the sentencing process; to receive restitution from the convicted offenders; and to be treated with fairness, dignity and respect.

Those rights have been adopted and expanded upon for more than two decades, through legislation such as the Victim and Witness Protection Act of 1982 up through the Crime Victims Rights Act of 2004, as well as numerous specific legislation addressing the rights of specific victims of crime such as child victims, victims of human trafficking, domestic violence victims, victims of sexual acts.

In order to more fully recognize

the legal rights of victims, we recommend certain changes to the sentencing guidelines.

We first encourage the Commission to consider changes to the federal sentencing guidelines that promote the ordering and collection of victim restitution to the fullest extent possible.

Restitution is an appropriate part of a sentence as it both provides direct recompense for the harm caused through the criminal act, and benefits the criminal justice system by holding the offender directly accountable for that harm.

One factor that currently limits the collection of federal restitution is the relatively short duration of probation or supervised release.

The payment of victim restitution is a mandatory condition of supervised release under guideline 5D1.3, and of probation under 5B1.3 -- []. Unfortunately, the term [of] supervised release as set up in guideline 5D1.2 or probation under [5B1.2] is often insufficient to permit the full payment of restitution; therefore, we recommend that those

guidelines be changed to permit courts to extend the term of supervised release or probation for the purpose of collecting restitution.

The payment of restitution is not only a condition designed to promote successful reintegration of defendants into society, but is an integral part of the criminal sentence; therefore, the courts should not relinquish authority over the defendant until that sentence has been fulfilled.

As the Sentencing Commission and others examine alternatives to incarceration, it is especially important to ensure that any sentence that includes the payment of restitution to the victim be meaningful.

We recognize this recommendation may require statutory change and urge the Commission to pursue such a change.

We also recommend the Commission extend its commentary to guideline 5E1.1 on restitution.

There remains confusion regarding when restitution is mandatory and when it is discretionary.

Victims, too, are often unclear

about whether restitution can be ordered and how they are to request restitution. The Sentencing Commission should extend the commentary to this section to promote the ordering of restitution.

Next, we urge the Sentencing Commission to consider changes relating to the victim's right to be heard at the entry of a plea agreement.

Guideline 6B1.1 regarding Plea Agreement Procedure and its commentary should be amended to specifically incorporate the victim's right to be heard. The Crime Victims' Rights Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving the victim's right to be meaningful, and it must be heard before the court has made a final decision whether to accept or reject the proposed plea agreement."

Victim input at this stage serves the interest of the court, as well as the interests of victims. A victim's statement of the harm caused by the criminal offense is clearly relevant to the court's decision whether to approve the agreement, and it may also be relevant to the extent to which the court may

rely on the parties' stipulation of facts under guideline 6B1.4. Similarly, the victim's opinion regarding the appropriateness of the agreement should be relevant to the court's consideration of whether the agreement serves the interests of justice. The statement of the victim may also include information regarding safety concerns on the need for restitution, both of which are important considerations for the court.

The guideline should also ensure that the victim's right to input is honored in each case. If the right is violated, the Crime Victims’ Rights Act does provide for redress, stating that under limited circumstances a victim "may make a motion to reopen a plea or sentence" when the right to be heard was denied; however, [] preventing such a violation in the first place is far preferable than trying to create a remedy.

To prevent violation of the right to input, the guideline or commentary could require the court to explore whether the victim was informed of the proceeding and the nature of the plea agreement, whether the victim is

present and wishes to make a statement, or whether the victim has submitted a written or electronic statement. In the event the victim has not been afforded his or her rights to be informed, the court should reschedule the proceeding.

The commentary should also provide guidance regarding the form [that] victim input can take. In many federal cases, particularly those involving fraud or the use of technology, victims can be located at quite a physical difference from the court. Commentary should encourage flexibility in the form of victim input to allow the fullest opportunity for crime victims to exercise their right to be heard. This could include written input, oral in-person testimony, closed circuit testimony from a remote site, videotaped testimony, or other forms of input, and we recommend the Commission seek a similar change to Rule 11, Federal Rules of Criminal Procedure.

We next recommend that this Commission extend its commentary to guideline 6A1.5 regarding the rights of crime victims. This guideline includes a general statement that

"in any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. 3771, and in any other provision of federal law pertaining to the treatment of crime victims," but the commentary is more.

The Commission should expand the commentary of this provision to this provision to provide additional guidance regarding the implementation of the victim’s rights.

It has been five years since the passage of the Crime Victims’ Rights Act. We have five years of court experience with its implementation. The development of commentary guiding judges as they incorporate victims rights in the sentencing process would promote uniformity and adaptation of those rights and avoid violation of those rights.

Studies indicate that victim satisfaction with the criminal justice system is influenced more strongly by their sense that they were heard and treated fairly than by the sentence.

Finally, we encourage the

Commission to revisit the guidelines in their entirety to ensure that victims' rights are incorporated wherever appropriate and ensure that courts can consider any harm caused to victims, emotional physical or financial.

The National Center, again, commends the Commission for holding this series of hearings and for its desire to strengthen the sentencing guidelines.

We appreciate the opportunity to appear before you and stand ready to provide any additional assistance or answer any questions you may have of me here today.

ACTING CHAIR HINOJOSA: Thank you very much.

VICE CHAIR CARR: Commissioner Kelly, I think most of what you talked about in terms of the use you were making of harsher penalties had to do with firearms. With the change in the state drug laws, do you expect you will be looking to the federal government more in terms of drug prosecutions?

COMMISSIONER KELLY: It is very possible.

Again, the state is in unchartered water. We don't know what the ramifications of

the change in the law will mean. We have to do everything we can to protect the city, keep crime going down, and that may be an approach we will look to take.

VICE CHAIR CARR: I assume from a little bit of law enforcement perspective, in terms of your partnership with the federal government, you find the mandatory minimums that we have to be useful?

COMMISSIONER KELLY: Again, yes, sir.

COMMISSIONER WROBLEWSKI: Thank you both for coming in and testifying.

My name is Jonathan Wroblewski. I am the Attorney General's representative on the Commission.

Commissioner Kelly, your testimony laying out the dramatic crime reductions is stunning. The achievement that has taken place here in the city is phenomenal. What is most interesting to me is that in the last five to ten years when the national crime rates have not declined, the crime rates in this city have continued to decline.

As you mentioned also the fact you have been able to do it at the same time the

number of people in prison has actually gone down. It is an incredible, stunning achievement of government.

We have heard a lot of testimony about the federal criminal justice system over the last couple of days, and there are two really unique aspects to the federal sentencing system that we heard over and over again. One is certainty, and that comes in both mandatory minimum sentencing statutes, mandatory guidelines, and also severity, that the severity of sentences in the federal system tend to be very, very long.

In your mind, is the certainty the more important thing rather than the severity? Is the severity equally important?

For example, in what you talked about about gun crimes and people coming to the federal system, and I think you said you are trying to refer as many cases as possible to the federal system, if that system was somewhat different, say instead of five years mandatory minimum for use of a gun used in the commission of a violent crime, it is a three-year sentence, but it was just as certain by statute or

guideline, do you think that would have an appreciable impact on your enforcement?

COMMISSIONER KELLY: I think certainty and severity go hand in hand, but practical application of the fact that it may go to federal court helps us, as I said in my prepared remarks, to get information.

We kind of like both certainty and severity that has an impact, no question about it, on the day-to-day.

In terms of guns, we still have way too many guns on the streets of the city, and the Triggerlock Program is a good program.

The numbers of cases that we are able to take on Triggerlock is relatively small, but the fact that an individual may have to go into the federal system is clearly a motivator to cooperate.

COMMISSIONER WROBLEWSKI: Thank you very much.

VICE CHAIR CARR: I guess related to that, is there a perceived greater likelihood of conviction in federal court than your local courts? That would be true where I came from as well.

COMMISSIONER KELLY: Yes, sir.

VICE CHAIR CARR: So the certainty part of it also factors into the federal --

COMMISSIONER KELLY: Yes.

ACTING CHAIR HINOJOSA: We do appreciate your presence in the hearing, and Ms. Howley from the advisory group, and Commissioner Kelly, you have a very busy schedule like Ms. Howley does, and we appreciate you coming before the Commission and sharing your thoughts.

(Whereupon, the above-entitled matter went off the record at 12:25 p.m.)

S. HRG. 109–435

CONFIRMATION HEARING ON THE NOMINATION OF BRETT KAVANAUGH TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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NOMINATION OF BRETT KAVANAUGH, OF MARYLAND, TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

TUESDAY, MAY 9, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:01 p.m., in room 226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Kyl, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Feinstein, Feingold, Schumer, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good afternoon, ladies and gentlemen. It is two o'clock and the Judiciary Committee will proceed with the nomination of Brett Kavanaugh to be a judge for the Court of Appeals for the District of Columbia Circuit.

At the outset, we welcome Judge Walter Stapleton, Court of Appeals for the Third Circuit, and Judge Alex Kozinski, Court of Appeals for the Ninth Circuit. We appreciate your coming in today.

Mr. Kavanaugh is in an unusual circumstance of not having Senators to introduce him. He is a D.C.-Marylander, and as of this moment the Senators from his home State of Maryland are not available to make the introductions, and the Committee has asked Judge Stapleton and Judge Kozinski to do that since they have special knowledge of the nominee because he clerked for them. They have special insights into his background.

Just a few words by way of introduction. Mr. Kavanaugh will take the witness stand and will be sworn, and will speak for himself, but I think it appropriate to make a few comments about his record and about my analysis of these proceedings.

I have been surprised to see Mr. Kavanaugh characterized as not up to the job of judge for the Court of Appeals for the District of Columbia Circuit. I have taken a look at his record in some detail, and I had a long session with Mr. Kavanaugh, and have asked him all of the questions which have been posed on his nomination. The issue of the NSA surveillance program, a program that I have raised serious questions about, asked him about what, if anything, he had to do with it, and he will speak for himself in responding to that.

I asked him about the issue of allegations of mistreatment of people on interrogation on the overlay of torture or rendition, and again, he will have an opportunity to speak for himself on that subject.

At our Executive Committee session last week, the question was raised about Mr. Abramoff. He will have an opportunity to speak for himself about that question.

In reviewing his record, I note that he was Yale College for his bachelor's degree, cum laude, and he was Yale Law School, where he was on the Yale Law Journal. Now, that takes some substantial academic qualification, something I know about, because I was there. And the only difference between Mr. Kavanaugh's tenure on the Yale Law Journal and being a high academic graduate from Yale Law School from my record is that when he was there, the competition was tougher. He is slightly younger than I am, and as the years have passed, Yale Law School has been more difficult to attain academic achievement, but that is something I know of first-hand.

Then his record beyond law school was to clerk for Judge Stapleton, to clerk for Judge Kozinski, and they will speak for themselves.

Then he was in the Office of Solicitor General, where he argued one case before the Supreme Court of the United States, and if he were on the Judiciary Committee, it would put him in second place, not too bad a place to be on the Judiciary Committee on Supreme Court arguments. Then he has had a number of arguments on the Court of Appeals and a number of arguments before District Courts on legal issues.

Then he served in the Office of Independent Counsel, and that was a highly controversial office, beyond any question. And Mr. Kavanaugh will describe his activities there, but he was not counsel, he was not deputy counsel. He was one of a tier below, where there were 10 associate or assistant counsels there. I know he will be asked about what his participation was there, and we will hear from Mr. Kavanaugh himself of that.

He has written two distinguished legal pieces published in the journals, one on the Independent Counsel and suggesting changes, hardly the mark of an ideologue who works as Independent Counsel that has tunnel vision as to what they did, but has expressed ways to improve the operation of Independent Counsel, by showing an open mind and showing some progressive thinking as to utilizing his experience.

Then he wrote an article on the issue of peremptory challenges for African Americans and has a—very difficult to use the words "liberal" or "conservative" or "progressive" around here—but he is on the right side of that issue, an issue that I understand well. When I became District Attorney of Philadelphia, I did not need to have the Federal Courts tell me not to have peremptory challenge for blacks. I issued an instruction to my assistants that they could not ask for it, and finally the courts caught up with it. And Mr. Kavanaugh will speak to his views on that subject, but hardly the views of a cramped conservative, but he will describe his views on all of these matters.

Then he went to Kirkland and Ellis, which is a very distinguished law firm. I do not how many people from the Judiciary Committee could be employed by Kirkland and Ellis today, let alone out of law school. Tough row to hoe. And he was taken in as a partner, not an equity partner—it is all complicated now with law firms—a non-equity partner, but that is an unusual call for a firm like Kirkland and Ellis or for any big firm of their nature because of how they evaluated his background and his experience.

He has been Associate Counsel to the President, and now he is Staff Secretary to the President. And if he reflects the views consistent with the President, that is entirely consistent with having the President nominate judges. That is our system. That is decided by an election. But he will speak for himself as to where he stands in the spectrum as to being in the mainstream.

Just a word about the American Bar Association rating. Early he was rated well qualified in the majority, and qualified with the minority camp. And then they reevaluated him 2 years later, and they took some additional interviews, and not surprisingly, the interviews varied. And now he has been rated in the majority, qualified and the minority, well qualified. So you have him moving from well qualified to qualified, qualified to well qualified, and not a tinker's bit of difference really in terms of our evaluation, because at minimal he is qualified, and a great many people think he is well qualified.

Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. First let me thank you for holding this hearing, which many of us had requested, and we very much appreciate it.

And second, I want to thank Mr. Kavanaugh for being back here. When we had our private meeting I asked him if he had any objections to come back to, what you good-naturedly referred to as the arena at our last hearing, and you said no, and very much appreciate that. I realize while this is not always the most pleasant exercise for a nominee, I think we can all agree it is a very important one, because we are talking about nothing less momentous than a lifetime appointment to what is generally regarded as the second-most important court in the land, a court of great importance to those of us who sit in the Senate or the House, because it has such jurisdiction over governmental issues, and years after this nomination, this court is going to influence a great deal what this Congress and future Congresses have done.

Now, Mr. Chairman, you know how many of us have deep concerns about this nominee. Just yesterday they were given further voice in the form of the American Bar Association's followup report, which was made public yesterday, which explained why six members of the ABA Committee felt compelled to downgrade their rating.

My concerns are twofold. First, although Mr. Kavanaugh has held several important and influential positions in Government, they have been almost exclusively political. There is no doubt that, Mr. Kavanaugh, you are a highly successful young attorney and

your academic credentials, as certainly outlined by the Chairman, are top notch. But your experience has been most notable, not so much for your blue chip credentials, but for the undeniably political nature of so many of your assignments. For much of your career your considerable talents have been enlisted in partisan and polarizing issues. In short, you have been the "go to" guy among young Republican lawyers appearing at the epicenter of so many high-profile controversial issues in your short career, and it is only natural that such a record would give many Senators pause, particularly those of us on this side of the aisle.

From the notorious Starr report, to the Florida recount, to the President's secrecy and privilege claims to post-9/11 legislative battles including the Victims Compensation Fund, to ideological judicial nomination fights, if there has been a partisan political fight that needed a very bright legal foot soldier in the last decade, Brett Kavanaugh was probably there. That kind of record is not dispositive, to be sure, but it feeds an impression of partisanship that is, to put it mildly, not ideal for a nominee to a critically important lifetime post as a neutral judge.

Now, for those who question the good faith of these concerns, who suggest that some of us are reflexively or unalterably opposed to any Republican involved in the impeachment of President Clinton or other political causes, let me mention two names, Tom Griffith and Paul McNulty. Mr. Griffith, whom I voted to confirm to a seat on the very court to which Mr. Kavanaugh aspires, was Senate legal counsel during impeachment; and Paul McNulty, who I voted to confirm—many of us, I think all of us—voted to confirm to be the No. 2 official at the Department of Justice, was Chief Counsel and spokesman for the House Judiciary Committee Republicans during impeachment.

Despite their blue-chip Republican credentials and participation in hot-button political issues, I was convinced that both of these men had substantial experience in professional and nonpartisan work, so that any concerns about inexperience, cronyism, and partisanship was, for me at least—and I think for most of us on this side of the aisle—laid to rest.

So, Mr. Chairman, we are all operating in good faith here, and we have demonstrated ourselves to be open-minded on the President's nominees to top judicial and executive posts. At last count, we have confirmed 240 of President Bush's nominees, and Democrats have voted for the vast majority of them.

Then there is a second and related concern. Although Mr. Kavanaugh is extremely well credentialed, he is younger than and has had less relevant experience than almost everyone who has joined the D.C. Circuit in modern times. We would have fewer concerns if the President had nominated a mainstream conservative with a record of independence from partisan politics, who has demonstrated a history of nonpartisan service with a proven record of commitment to the rule of law, and who we could reasonably trust will serve justice, not political patrons or ideology if confirmed to this powerful lifetime post. Both Stephen Breyer and Ruth Bader Ginsberg, whose biographies are often cited at these proceedings, had substantial nonpolitical experience before they were nominated to appellate courts. Mr. Kavanaugh, if confirmed, I believe would

be the youngest person on the D.C. Circuit since his mentor, Ken Starr. And if you go through the preconfirmation accomplishments of the active judges who currently sit on the D.C. Circuit, Mr. Kavanaugh's achievements, though impressive, are not on the same scale.

Judge Sentelle, for example, had extensive practice as a prosecutor and trial lawyer, and experience as a State judge and as a Federal district court judge. Judge Randolph spent 22 years with Federal and State Attorneys General offices, including service as Deputy Solicitor General of the United States and a law firm partnership. Judge Rogers had 30 years of service in both Federal and State Governments, including a stint as the Corporation Counsel for the District of Columbia, and several years on D.C.'s equivalent of a State supreme court.

Like Mr. Kavanaugh, many of the 9 active judges on this court held prestigious clerkships, including clerkships on the Supreme Court and involvement at the high levels of Government, that no doubt involved some partisan work. But they all had significant additional experience, nonpartisan experience, to help persuade this Committee that they merited confirmation.

Now, of course, these concerns are echoed in a new report from the American Bar Association. They cannot be dismissed, as some of my colleagues suggest, as merely intemperate rants by Democrats on the Committee, and predictably, of course, some are already launching a campaign to denigrate the ABA, despite boasting of Mr. Kavanaugh's original rating 2 years ago, and attack the character of one of the ABA Committee members, and I hope we would refrain from doing that.

According to the ABA report released yesterday, one judge who saw your oral presentation in court, Mr. Kavanaugh, said, "You were less than adequate," that you had been sanctimonious, and that you had demonstrated experience on the level of an associate. A lawyer in a different proceeding had this to say: "Mr. Kavanaugh did not handle the case well as an advocate and dissembled." That is a pretty serious statement. According to the report, other lawyers—and note the plural—expressed similar concerns, repeating in substance that the nominee was young and inexperienced in the practice of law. Still others—again note the plural—characterized Mr. Kavanaugh as, "insulated," and one in particular questioned Mr. Kavanaugh's ability "to be balanced and fair should he assume a Federal judgeship." And yet another individual said this. He said that Mr. Kavanaugh is "immovable and very stubborn and frustrating to deal with on some issues."

These new concerns, apparently based on some 36 additional interviews, were so serious that six members of the ABA Committee changed their vote. On the phone call yesterday I asked Mr. Tober, the head of the Committee, was it rare for people to change their vote? And he said no. And I said, was it usual? And he said no. So it happens, but it does not happen all that often.

We have other reasons for concern. I must say that I was disturbed by some of the answers I got from you, Mr. Kavanaugh, the first time around. On the issue of the role of ideology and judicial philosophy in the picking of judges by this administration, for example, you repeatedly insisted, totally implausibly, that such con-

siderations played no role. That was simply not believable, and, frankly, put your credibility at issue. You began to clarify your statements in our meeting last week—and I hope we can have further dialog—but to say that an ideology had no effect, well, show me some nominees to high offices, high judicial offices who were Democrats, who were moderates, who were maybe strongly prochoice—

Chairman SPECTER. Senator Schumer, you are past 10 minutes. How much longer will you be?

Senator SCHUMER. I just have another minute and a half, Mr. Chairman. Thank you.

It was not believable, that is the bottom line. And in addition, Senators will want to ask you, among other things, about your role in setting of policy relating to executive power and the separation of powers. You admitted to me, for example, that in your job as Staff Secretary, you had input on the controversial issue of Presidential signing statements. There will be questions about that. I expect you will also get questions about your involvement, if any, in this administration's detention policies, torture policies and rendition policies. These issues, among many others, deserve further scrutiny, and given the scant record we have, I hope no one will question the good faith we have in asking them.

So, Mr. Chairman, I would say that many of my colleagues and I have a sincere and good faith concern about this nominee. We feel that the nominee is not apolitical enough, not seasoned enough, not independent enough, and has not been forthcoming enough. Maybe this hearing will remove those concerns, but it is certainly necessary.

Last week, Mr. Kavanaugh, I asked you to think of ways to alleviate these concerns, and I look forward to hearing your testimony.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Senator SCHUMER. I just want to say Ranking Member Leahy could not be here at the beginning of this hearing, but will be here in about an hour.

Chairman SPECTER. Thank you, Senator Schumer.

One addendum to my comments. Mr. Kavanaugh also clerked for Supreme Court Justice Anthony Kennedy.

Judge Stapleton and Judge Kozinski, it is our practice to ask our witnesses to be sworn at nomination proceedings, as we had a number of circuit judges sworn during the confirmation of Justice Alito. So with your consent, would you rise and take the oath?

Do you solemnly swear that the testimony you will give before the Judiciary Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge Stapleton. I do.

Judge Kozinski. I do.

Chairman SPECTER. Let the record show both witnesses answered in the affirmative.

Judge Stapleton, you are the first circuit judge for whom Mr. Kavanaugh clerked, so we will begin with you.

PRESENTATION OF BRETT KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY WALTER K. STAPLETON, JUDGE, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, WILMINGTON, DELAWARE

Judge STAPLETON. Thank you. Mr. Chairman and members of the Committee, I appreciate the invitation to introduce Brett Kavanaugh. That is not because I think he needs any introduction to this Committee, but rather because I believe I am in a position to share information that is quite probative with respect to the important issue that is before you.

I have been a Federal judge for over 35 years, the last 20 of those years as a member of the Court of Appeals for the Third Circuit, and based on that experience, I believe I understand well what it takes to be able to serve well as a United States Circuit Judge.

I have known Mr. Kavanaugh well for over 15 years. I first met him in March 1989 when I interviewed him for a clerkship. He had one of the most impressive resumes I have ever seen, and believe me, I have seen a lot of resumes. Among other things, as you noted, Mr. Chairman, he was editor of the Yale Law Journal, and at the point in time I met him, he had received an honors grade in every course he had taken at Yale Law School save one. Best of all, the professors who knew him well, assured me that—and I quote—"His work is uniformly of very high quality, thoughtful, independent-minded, yet very balanced, and always clearly written."

I have recently resurrected the notes I made after our lengthy personal interview, and they say, "extremely talented, mature, confident yet modest, good sense of humor." Now, in other words, a judge's dream of a law clerk, and I didn't have to ponder the decision about hiring him for very long. And he certainly did not disappoint, and I will always treasure the time that we shared.

We worked very hard and we were asked to resolve many intractable controversies. Facing challenges like that together promotes a bonding process in which the participants get to know each other awfully well, and we talked at length, not only about the law, and about the challenges we faced, but about his hopes and aspirations for the future.

Toward the end of the clerkship I urged him to consider the judiciary as a career if he should ever have that opportunity, and I did that because I believed he had the makings of my kind of judge. There was no trace of arrogance and no agenda. He applied his legal acuity and common sense judgment with equal diligence to every case, large or small, undertaking his evaluation of each without predilection. His ultimate recommendations were based on careful case-by-case analyses of the facts of each case, and objective application of the relevant precedents. It was clear to me that he understood the crucial role of precedent in a society that's committed to the rule of law.

Brett thanked me for my advice, but in characteristically modest fashion, said he doubted that he would get the opportunity to so serve.

Now, Mr. Kavanaugh, of course, has had a variety of opportunities since that time, as I knew he would. Anyone with his talents

would have many opportunities. As a result, in addition to his impressive legal skills, I believe Mr. Kavanaugh has the sophistication, the insight and maturity that comes from having served in a variety of professional positions, noteworthy not only because of their variety but also because of the awesome responsibilities that each carried.

While I believe all of his professional experience would serve him well as a judge, a substantial portion of that experience renders Mr. Kavanaugh, I believe, exceptionally well qualified in terms of experience. I refer, of course, to the fact that in addition to his exposure to private practice and his service to the President, Mr. Kavanaugh has had substantial litigation experience on both sides of the bench. As you're aware, and as the Chairman has mentioned, he's worked with a one-and-one relationship not only with the two Court of Appeals Judges that are here this afternoon, but also with a Justice of the United States of the Supreme Court and a Solicitor General of the United States. As you are also aware, Mr. Kavanaugh's litigation experience has included appearance before all levels of our Federal courts.

Now, I have stayed in touch with Mr. Kavanaugh, and have followed his career with interest since he left my chambers. I have heard nothing from, and I've heard nothing about Mr. Kavanaugh in the intervening years that has caused me to question in any way my original judgment about the kind of judge he would be if he could have that opportunity. His responsibilities, it's true, from time to time, have called upon him to make—to take positions on issues which reasonable minds could differ about. That's part of being a lawyer. But I believe he has consistently served his client well, and in a thoroughly professional manner.

In sum, members of the Committee, I believe Mr. Kavanaugh's intelligence, his common sense judgment, his temperament, and his dedication to the rule of law, make him a superb candidate for the position of United States Circuit Judge, and I can commend him to you without reservation.

Thank you for this opportunity to address the Committee.

Chairman SPECTER. Thank you very much, Judge Stapleton.

Judge Kozinski.

PRESENTATION OF BRETT KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY ALEX KOZINSKI, JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, PASADENA, CALIFORNIA

Judge KOZINSKI. Good afternoon, Mr. Chairman, members of the Committee. It's a great pleasure and honor for me to be back. Thank you for inviting me to introduce my good friend, my former law clerk, Brett Kavanaugh.

I probably do not need to take my full 5 minutes, because I can just say "me too" to everything that Judge Stapleton said, but let me just take a few minutes, a couple minutes, if I can, to give my own personal view.

I'm glad, Mr. Chairman, that you mentioned that Brett Kavanaugh went to Yale and you and he had that in common. We have that in common too. He went to Yale and I have a son named Yale.

[Laughter.]

Judge KOZINSKI. I tried to get in, but I wasn't as fortunate. I got rejected.

But I have had a number of clerks from Yale and Harvard and many other fine law schools, and among them, Brett Kavanaugh was one of the finest. I met him about the same time that Judge Stapleton met him, in March '89. We both interviewed him for a job for clerkship right out of law school, but Judge Stapleton was just faster making an offer. So I had to pick him up the following year, because he accepted a clerkship with Judge Stapleton first.

I must tell you that in the time that I had Brett clerk for me, I found him to be a positive delight to have in the office. He's really bright and he's really accomplished and he's really an excellent lawyer. But most, virtually all, folks who qualify for a clerkship with a circuit judge these days have those qualities.

But Brett brought something more to the table. He first of all brought what I thought was a breadth of mind and a breadth of vision. He didn't look at a case from just one perspective. Like a good lawyer, like—Mr. Chairman, you were a prosecutor, you know this very well—you have to look at a case from different perspectives, not just one, and not early in the case take one perspective and then stick with it. Brett was very good in changing perspectives. Sometimes I'd take one position and he'd take the opposite, and sometimes we'd switch places. He was very good and very flexible that way.

I never sensed any ideology or any agenda. His job was to serve me and to serve the court and serve the people of the United States in achieving the correct result at the court. And he always did it with a sense of humor and a sense of sort of gentle self-deprecation. He was always—my staff, my secretaries, his co-clerks all enjoyed having him and all enjoyed particularly the fact that he was not in any way pompous or in any way stuck on himself, but was always ready to help others or was ready to be friendly with others.

And I think that's a very important quality in a judge. This may seem trivial and maybe seem like I'm mentioning things here that ought not to be mentioned in a committee, but part of what makes the job of judging different from other jobs is that it is not a mechanical process. It is ultimately a human process. You have to understand something about how people think, something about how people live, something about how people feel. And what I think Brett Kavanaugh brings to the table, what he brought to the table when he was my law clerk, is a sense of humanity and a sense of understanding.

I will not speak to the question of confirmation or nonconfirmation. This obviously is something that is up to the committee. I can only say that I give Brett Kavanaugh my highest recommendation. I gave him my high recommendation when he applied to Justice Kennedy, my own mentor, and I continue to give him the highest recommendations.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Judge Kozinski.

I have just one question for each of you. Judge Kozinski, how old were you when you were appointed to the Ninth Circuit?

Judge KOZINSKI. I was 35 years old, Mr. Chairman.

Chairman SPECTER. Judge Stapleton, how old were you when you were appointed to the Federal bench, first to the district court?

Judge STAPLETON. Thirty-five years old.

Chairman SPECTER. And may the record show that Justice Kennedy was appointed to the Ninth Circuit when he was 38 years old.

Anybody have any questions for the judges? Senator Schumer?

Senator SCHUMER. Just one question for both. Since Mr. Kavanaugh clerked for each of you right after, a year after law school, have either of you had occasion to have him appear before you in your court as a lawyer.

Judge STAPLETON. I have not.

Judge KOZINSKI. Nor have I.

Chairman SPECTER. Thank you very much, Judge Stapleton. Thank you very much, Judge Kozinski. Appreciate your being here.

Judge KOZINSKI. My pleasure.

Judge STAPLETON. Thank you.

Chairman SPECTER. Mr. Kavanaugh, would you step forward for the oath?

If you would raise your right hand. Do you swear that the testimony you will give before the Judiciary Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KAVANAUGH. I do.

Chairman SPECTER. Before beginning your testimony, Mr. Kavanaugh, I note an infant in the audience and what appears to be a mother, and both appear to be wife and child, and perhaps other family. Would you introduce them, please?

STATEMENT OF BRETT KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. KAVANAUGH. Yes.

Thank you very much, Mr. Chairman, for the opportunity to appear here before the Committee. I'm grateful to the President for nominating me to this important—

Chairman SPECTER. Mr. Kavanaugh, there is a question pending, and the question was would you introduce your family.

Mr. KAVANAUGH. Yes.

[Laughter.]

Mr. KAVANAUGH. And I thank my family for being here. Since I last appeared before the Committee, there have been two major changes in my record, and they're both sitting behind me. My wife, Ashley Estes Kavanaugh, and my 8-month-old daughter, Margaret Murphy Kavanaugh. She's watched a little C–SPAN in her day. This is her first live Senate hearing, however. I'm not sure—as you've probably already noticed, Mr. Chairman, I'm not sure she's going to make it very long, but she wanted to be here for the start.

My uncle, Mark Murphy, is here. And my brother-in-law, J.D. Estes, is here. My mom and dad are here, Martha and Ed Kavanaugh. They are, and have been, an inspiration to me. They've been married for 43 years, and I am their only child. I'm just very proud that they're behind me today.

My mom in particular, in terms of career path, has had a profound influence on my career choices. Throughout her life she's been dedicated to public service. When she was in her 20's, she taught public high school in the District of Columbia, at McKinley

and H.D. Woodson high schools. She then decided to go back to law school in the 1970's and became a State prosecutor out in Rockville, Maryland. She was later appointed to the State trial bench by Governor Schaefer and then by Governor Glendening, in Maryland. She's instilled in me a commitment to public service and a respect for the rule of law that I've tried to follow throughout my career.

Mr. Chairman, I'm a product of my parents; I'm also a product of my experiences, and I'd like to take a few minutes to share a few of those experiences and how I think they might shape how I would come to the bench as a judge.

I attended Yale Law School in the late 1980's. It was a challenging yet collegial environment. It was a place that instilled a desire to make a difference. It was a place that encouraged public service. And while I was at Yale Law School I decided, as you know, to seek a judicial clerkship after my time there.

I clerked for Judge Walter Stapleton on the Third Circuit. Judge Stapleton is a gentleman and a scholar. He's an experienced judge, and he's a great friend. If I am confirmed to be a judge, I will do everything in my power to bring to the bench the decency and the good judgment and the collegial manner of Walter Stapleton. And I thank him for being here today.

After I clerked for Judge Stapleton, I clerked for Judge Alex Kozinski on the Ninth Circuit. Judge Kozinski, as many of you know, has a passion for the law. When we started as law clerks, he told us we work for the people and we should consider ourselves on the job 24 hours a day, 7 days a week, 365 days a year. And I can say from personal experience that Judge Kozinski lived up to that promise. We worked very hard, he was very thorough. I thank him for all he's done for me in my career and for coming here today from California. If I am confirmed to be a judge, I would seek to bring to the bench the thoroughness and the thoughtfulness and the dedication to the rule of law that Judge Kozinski has demonstrated on the bench for more than 2 decades.

After I finished those two clerkships, I worked in the Solicitor General's Office at the Department of Justice. I experienced the ethic of that office, that the United States wins its point when justice is done. In that office I had the opportunity for the first time to argue a case in court before the Fifth Circuit Court of Appeals. I was able to stand up for the first time and say Brett Kavanaugh for the United States, a moment that was very proud for me and remains so.

In the October 1993 term of the Supreme Court, I clerked for Justice Anthony Kennedy. Justice Kennedy is a student of history, he's a student of the Supreme Court. He talks often about the compact between generations that the Constitution represents. And he conveyed to his clerks, and certainly conveyed to me—to use one of his favorite phrases—the essential neutrality of the law. I'm forever grateful to Justice Kennedy for the opportunity to clerk for him.

After I finished that clerkship, I worked for Judge Starr in the Independent Counsel's Office. It was a difficult, it was a tough job, it was an often thankless job. In that capacity, I had the opportunity to argue cases before the Supreme Court of the United States and the D.C. Circuit Court of Appeals. I learned some les-

sons in that office. I had some thoughts about how it all operated and, as the Chairman has noted, I tried to make a contribution, the improvement of the public legal system, by writing an article in the Georgetown Law Journal that identified better ways, in my judgment, to conduct investigations of high-level executive branch officials.

I then went to Kirkland & Ellis, where I became a partner, represented institutional clients of the firm, and also did pro bono work for several years.

In 2001, I joined the White House Counsel's Office under Judge Al Gonzales. In that office I did some of the standard work of the office—ethics issues, separation of powers issues. I also worked with many members of the staff of this Committee and other Members of Congress on civil justice issues, such as class action reform, medical liability reform, and the very important terrorism insurance legislation in 2002.

I also worked on judges, on the nomination of judges, and I had the opportunity to help recommend judges to the President of the United States for him to nominate to the Federal courts. In that capacity, on the district court level I worked closely with many members of the Senate and their staffs in the States that I was assigned, including some members of this Committee.

In July of 2003, I became staff secretary to President Bush. This is what I call an honest broker for the President, someone who tries to ensure that the range of policy views on various subjects in the administration are presented to the President in a fair and even-handed way.

I've worked closely with the President and with the senior staff at the White House and other members of the administration for nearly 3 years. I think I've earned the trust of the President, I've earned the trust of the senior staff, that I'm fair and even-handed. This kind of high-level experience in the executive branch has been common for past judicial nominees, especially on the D.C. Circuit, which handles so many important and complicated administrative and constitutional issues.

Mr. Chairman, I have dedicated my career to public service. I revere the rule of law. I know first-hand the central role of the courts in protecting the rights and liberties of the people. And I pledge to each member of this Committee, and I pledge to each member of the Senate, that, if confirmed, I will interpret the law as written and not impose personal policy preferences; that I will exercise judicial power prudently and with restraint; that I will follow precedent in all cases fully and fairly; and above all, that I will at all times maintain the absolute independence of the judiciary, which in my judgment is the crown jewel of our constitutional democracy.

Mr. Chairman, I will be happy to answer any questions. Thank you.

[The biographical information can be found in Senate Hearing No. 108–878, Serial No. 108–69, hearing date: April 14, 2004.]

[The updated biographical information of Mr. Kavanaugh follows:]

February 17, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter:

I have reviewed the Senate questionnaire I completed in connection with my July 2003 nomination to the U.S. Court of Appeals for the D.C. Circuit. I have no updates to any of my answers except to the net worth form. I am updating it to reflect my marriage in July 2004 to Ashley Jean Estes (now Ashley Estes Kavanaugh) and our current net worth.

Sincerely,

Brett M. Kavanaugh

Brett M. Kavanaugh

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	10k			Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-add schedule				Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property	40K			Credit Cards	25K		
Cash value-life insurance							
Other assets itemize:							
TSP account	70K						
Wife's retirement plan	1K						
				Total liabilities	25K		
				Net Worth	96K		
Total Assets	121K			Total liabilities and net worth			
CONTINGENT LIABILITIES	No			GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No		

...leases or contracts				Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

AO-10 (WP)
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2004

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
KAVANAUGH, BRETT M.	NOMINEE TO U.S. COURT OF APPEALS FOR D.C. CIRCUIT	2-17-05
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)* CIRCUIT JUDGE-NOMINEE	5. Report Type (check appropriate type) ✓ Nomination, Date 2-14-05 ___ Initial ___ Annual ___ Final	6. Reporting Period 1-1-2004
7. Chambers or Office Address STAFF SECRETARY THE WHITE HOUSE WASHINGTON, DC 20502	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer ________ Date ________	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1	ALUMNI BOARD OF GOVERNORS	GEORGETOWN PREPARATORY SCHOOL ALUMNI ASSOCIATION
2		
3		

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

☒ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		
2		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

A. Filer's Non-Investment Income

☒ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME
1			$
2			$
3			$

B. Spouse's Non-Investment Income - If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)

☒ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1		
2		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

☐ NONE (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

☐ NONE (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	EXEMPT		$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

☐ NONE (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE*
1	FIRST USA/BANK ONE VISA	CREDIT CARD	K
2			
3			
4			
5			

*Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=25,000,001-50,000,000 P4=50,000,001 or more

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure	Amt. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income,									
1 Wife's retirement fund	A		J						
2 from state employment in Texas									
3									
4 Bank of America Savings	A	Int.	J						
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1. Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; F=$50,001-$100,000; G=$100,001-$1,000,000; H1=$1,000,001-$5,000,000; H2=More than $5,000,000
2. Value Codes: (See Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=More than $50,000,000
3. Value Method Codes: (See Col. C2) Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market; U=Book value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Brett M. Kavanaugh   Date 2-17-05

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Chairman SPECTER. Thank you very much, Mr. Kavanaugh.

We now turn to 5-minute rounds for each Senator.

Mr. Kavanaugh, I begin with the question as to what assurances can you give this Committee and the Senate and the American people about your independence from the President and the White House. I look at a long list of nominees who have voted against their Presidential nominator on many, many celebrated matters. Just a few: Justice Douglas dissented on the *Korematsu* case, the Japanese internment case, against President Roosevelt's policy. Famous decision by Justice Tom Clark turning against Truman on the Steel Seizure case not long after he was nominated. Justice Kennedy, Justice O'Connor disagreeing on a woman's right to choose from President Reagan. Justice Souter disagreeing with President Bush the elder. Famous disagreements that President Eisenhower expressed about Chief Justice Warren. Perhaps the most famous case, Salmon Chase had advocated policies as the Secretary of the Treasury, and then, after being appointed to the Supreme Court, declared unconstitutional the monetary policy he had implemented as President Lincoln's treasurer.

What positive assurances can you give of your independence?

Mr. KAVANAUGH. Mr. Chairman, if confirmed to be a D.C. Circuit judge, I will call them as I see them, regardless of who the litigants may be. I know that independence of the judiciary, as I said in my opening, is a key part of our constitutional system. I would not hesitate in any case to rule the way I saw the case, regardless of who the parties were, regardless of whether the President was involved.

Chairman SPECTER. Would you consider yourself independent in the tradition of the judges, justices whom I've just named?

Mr. KAVANAUGH. Absolutely, Mr. Chairman. I know that there's a long history in our constitutional system of judges being drawn from the executive branch, and I would—

Chairman SPECTER. Mr. Kavanaugh, let me interrupt you. There's a great deal to cover and I only have 5 minutes.

Did you have anything to do with the issues of interrogation of prisoners relating to the allegations of torture in the so-called Bybee memorandum?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Did you have anything to do with the questions of rendition?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Did you have anything to do with the questions relating to detention of inmates at Guantanamo?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Did you have anything to do with Mr. Abramoff and the many visits which he apparently made to the White House?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Do you have anything to do with the President's policy on so-called signing statements?

Mr. KAVANAUGH. Mr. Chairman, signing statements come through the Staff Secretary's Office, and I help ensure that relevant members of the administration have provided input on the signing statements. In the first instance they're drafted in the Jus-

tice Department, but I do help clear those before the President sees them.

Chairman SPECTER. That poses a very difficult and contentious issue which this Committee is going to have hearings on. And I can understand that in your role as coordinator you would have the responsibility for coalescing materials. Did you take any position as to the constitutional authority for the President to limit the substance of legislation by expressing limitations in the signing statements?

Mr. KAVANAUGH. Mr. Chairman, it is common for signing statements, this President and previous Presidents, to identify potential constitutional issues like Appointments Clause issues, Presentment Clause issues, or issues relating to *INS* v. *Chaddha*, for example, the line item veto case. On those matters, I make sure that they have been properly staffed to other members of the White House staff. They come up in the first instance from the Justice Department and the Office of Management and Budget.

Chairman SPECTER. Were you called upon to give the President any advice as to the constitutional implications of the signing statements?

Mr. KAVANAUGH. Well, Mr. Chairman, I think, without discussing internal matters, I think it's common to explain the general parameters of signing statements, for example, that there's been a history of them, and identifying potential constitutional issues in legislation, particularly Appointments Clause, Presentment Clause, and the other issues identified.

Chairman SPECTER. Mr. Kavanaugh, you wrote an article on peremptory challenges, where there had been a practice among prosecutors to issue what are called peremptory challenges—which, for those who do not know, means that a prospective juror can be disqualified without stating any reason, where blacks were eliminated. My time is up and I will quit, but you can answer.

Mr. KAVANAUGH. Mr. Chairman, I think one of the great Supreme Court decisions ever decided was *Batson* v. *Kentucky*. It overruled *Swain* v. *Alabama*, and held that a prosecutor's use of race in striking potential jurors from the jury box was unconstitutional under the Equal Protection Clause of the 14th Amendment.

One of the concerns I had—that was decided in 1986; I was in law school from 1987 to 1990—one of the concerns I had was what procedures will be used to help guarantee that right to be free of racial discrimination in the jury selection procedure. And I wrote a note that advocated certain procedures that help ferret out potential racial bias in the jury selection process.

Chairman SPECTER. Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman.

Just when Senator Specter went over all of the issues, he mentioned torture in connection with the Bybee memo. Were you involved in any way in the Counsel's Office in opining about the proper use of torture?

Mr. KAVANAUGH. No, Senator. The first time I learned of that memo, I believe, was—

Senator SCHUMER. I did not ask about the memo. I asked just in general.

Mr. KAVANAUGH. No, Senator.

Senator SCHUMER. Thank you. OK, I would like to ask you a few questions that you did not answer. These were submitted in writing or orally at the last hearing. I will tell you all of them.

First, Senator Leahy asked you whether Karl Rove was involved in the judicial selection process at any point while you were there. I asked you how you would have voted on the impeachment of President Clinton. Senator Kennedy asked you whether you agreed with Judge Pryor, who called *Roe* v. *Wade* an abomination. And Senator Durbin asked you if you consider yourself in the mold of Scalia and Thomas, which is the mold that the President has said he is going to choose judges in.

First, Rove. Was Karl Rove involved in any of the selection of judges while you were there?

Mr. KAVANAUGH. Mr. Chairman, I think that is a question that the Counsel to the President should answer in the first instance. I don't think as a judicial nominee here I should talk about who was involved. The Counsel to the President chairs the judicial selection committee, and if there is a question about who is involved in recommending judges—

Senator SCHUMER. What we are trying to determine, in the previous time you were here, you said that no ideology was involved in the selection of judges. I do not see why you cannot answer that question. What is improper about answering that question?

Mr. KAVANAUGH. Senator, I will check whether I can answer that question. And if I can, I will provide the answer.

Senator SCHUMER. What would come to mind which would prevent you from answering that question?

Mr. KAVANAUGH. Senator, I just want to be careful that I check with the Counsel on something like that and be sure that there is not an issue before I disclose something in the context—

Mr. KAVANAUGH. Is there any privilege that would prevent you that you can see, that would come to mind right now?

Mr. KAVANAUGH. I can check with the Counsel on that, Senator.

Senator SCHUMER. Do you have knowledge of the answer?

Mr. KAVANAUGH. Well, I was involved in the judicial selection process.

Senator SCHUMER. So you would know yes or no, you just choose not to answer?

Mr. KAVANAUGH. And I would be happy to provide the answer. I just want to check first.

Senator SCHUMER. OK.

Next, how would you have voted—I know you were involved in the impeachment of President Clinton—how would you have voted if you were a Senator?

Mr. KAVANAUGH. Senator, I don't think it's appropriate for the office that submitted the report to comment on whether the House made the proper decision to impeach or whether the Senate made the proper decision not to—

Senator SCHUMER. When lawyers argue cases, all the time they say they are disappointed in the verdict, they are happy with the verdict. That is not a violation of anything, as far as I know, except your desire not to answer the question.

Mr. KAVANAUGH. I guess this gets to an ethic I've learned about prosecutors offices when I worked in the Solicitor General's Office,

that it's not appropriate to comment on a jury verdict. And I don't think it's appropriate in this instance for me, as a member of the Independent Counsel's Office, to comment on whether the House decision was correct or whether the Senate decision was correct.

Senator SCHUMER. In an op-ed in the Washington Post in 1999, you wrote a defense of Ken Starr, where you said "Starr uncovered a massive effort by the President to lie under oath and obstruct justice." You also wrote that, "The word that ordinarily describes such behavior is not 'trapped' but 'guilty.'" You were pretty clear to state your views in 1999, but you do not want to state them now?

Mr. KAVANAUGH. I think that was based on Judge Wright's finding of contempt, and there was also a censure resolution introduced in the Senate that used some more language. So I think the language there, it was a joint op-ed.

Chairman SPECTER. But you just said you did not think it was appropriate to answer. And you felt it very appropriate, in a similar role, to answer, to make some very strong statements then.

Mr. KAVANAUGH. I think this goes to a key point, Senator, which is impeachment and then conviction take into account more than just the facts. As you know from participating on the House side at the time and the Senators know from participating on the Senate side, there were—

Senator SCHUMER. I participated in votes.

Chairman SPECTER. Now, let him finish his answer, please.

Senator SCHUMER [continuing]. On both sides.

Mr. KAVANAUGH. On both sides, that's right, Senator. And I think, as many of the Senators and House members discussed at the time, it wasn't just a simple question of whether there was a violation of law committed, but there were broader considerations for the country. And that's where it really gets, really gets, I think, improper for someone in the Independent Counsel's Office to say whether they think the President should have been impeached.

Senator SCHUMER. I fail to see the distinction. Let me ask you to answer, since my time is ending here, the two other questions. Do you consider *Roe* v. *Wade* to be an abomination? And do you consider yourself to be a judicial nominee, like the President said he was going to nominate people, in the mold of Scalia and Thomas?

Mr. KAVANAUGH. Senator, on the question of *Roe* v. *Wade*, if confirmed to the D.C. Circuit, I would follow *Roe* v. *Wade* faithfully and fully. That would be binding precedent of the Court. It's been decided by the Supreme Court—

Senator SCHUMER. I asked you your own opinion.

Mr. KAVANAUGH. And I'm saying if I were confirmed to the D.C. Circuit, Senator, I would follow it. It's been reaffirmed many times, including in *Planned Parenthood* v. *Casey*.

Senator SCHUMER. I understand. But what is your opinion? You're not on the bench yet. You've talked about these issues in the past to other people, I'm sure.

Mr. KAVANAUGH. The Supreme Court has held repeatedly, Senator, and I don't think it would be appropriate for me to give a personal view of that case.

Senator SCHUMER. OK, you are not going to answer the question. How about being in the mold of Scalia and Thomas?

Mr. KAVANAUGH. I don't want to talk about current members of the Court, but I do think I can describe some of the justices or judges in the past that I think I would try, that have been role models to me, including Justice White, Justice Jackson, and for a couple of reasons. They were people who took an active part in our Government system, which is some—

Senator SCHUMER. I understand. Just explain to me why it is appropriate for the President to say that he will appoint nominees in a particular mold, but you cannot answer whether you would be part of that.

Mr. KAVANAUGH. As a potential inferior court judge, Senator, on the D.C. Circuit if confirmed, I just don't want to talk about currently sitting members of the Supreme Court. I'm happy to talk about Justice Jackson and Justice White, if you'd like.

Senator SCHUMER. OK. I wish I could say it, but I do not think you have clarified any of these answers that we asked you the first time.

Thank you, Mr. Chairman.

Chairman SPECTER. Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman.

Welcome again to the Committee. You are one of the few who have had this great experience of being brought back here twice. Let me just take a—

Mr. Chairman, I would like to take most of my time to make just a few comments rather than to ask questions at this time.

I think that during his first hearing 2 years ago in 2004 and his written submissions afterwards, Mr. Kavanaugh more than adequately answered all the questions that had been posed to him. The Committee already has a 159-page hearing record before it on this nominee. And I am confident in Mr. Kavanaugh's abilities and capacities in both the understanding and knowledge of the law. I suspect that he will continue to show his intellect, sound judgment, and judicial temperament.

I have no doubt that Mr. Kavanaugh fully appreciates the proper role and limitations placed on Federal appellate judges in our constitutional system. And while I am not pleased with all the circumstances that have resulted in holding this unusual if not unprecedented second hearing, I take solace in the fact that Chief Justice Roberts, whom many in the public and a super-majority of Senators found to be an extremely capable individual after his confirmation hearings last September, was also subject to two confirmation hearings before he was able to sit on the D.C. Circuit. I hope that Brett Kavanaugh's confirmation will not be delayed as long as now-Chief Justice Roberts's was. He was delayed for 11 solid years, between the time that the first President Bush nominated him and the time that the second President Bush, our current President, renominated him.

Now, while today's hearing will and should concentrate and focus on qualifications of Brett Kavanaugh to serve on the D.C. Circuit

Court of Appeals, when you see nominees with the backgrounds of John Roberts and Brett Kavanaugh having been held up for so many years for so little reason, sometimes you have to ask yourself if there may be motivations at play that have nothing at all to do with the nominee's actual fitness to sit on the bench. To date it has been almost 3 years since Mr. Kavanaugh was first nominated. I think it is time to vote on his nomination, and frankly it is past time for the Senate to vote on Mr. Kavanaugh's nomination.

So at this point, I would like to welcome you, Mr. Kavanaugh, your wife and baby and of course your family. Since the last time before this Committee, you have become a husband and father, and I join in welcoming Mrs. Kavanaugh here and your 8-month-old daughter Margaret to the Committee.

I also want to acknowledge the presence of Mr. Kavanaugh's parents. I have known them for a long time. Ed Kavanaugh for many years, he headed up the major trade association, the Cosmetic, Toiletries, and Fragrance Association, and he is deservedly admired by many in this town. And his mother served with distinction as a State court judge in Maryland for many, many years.

Sometimes in these confirmation hearings, in the rush to get to more controversial matters, there is a tendency to skip over too quickly on the qualities and attributes that led the President to nominate the individual—and in this case, Mr. Kavanaugh—in the first place. And I think Senator Specter has already given us an overview of the nominee's impressive educational and employment background. We have also heard the testimony of two excellent Federal court judges for whom he clerked, both of whom I know—Judge Kozinski of the Ninth Circuit and of course Judge Stapleton of the Third Circuit Court of Appeals. I think we should weigh their words very carefully. These are people of impeccable reputations and ability on the bench.

Not only did you distinguish yourself as a clerk on two appellate courts, but you also served as a clerk on the Supreme Court. You had an academic career that was pretty impressive as well, at Yale. You've had a series of impressive and highly responsible jobs in both the executive branch and in the private sector. And you're a talented appellate advocate as well before the Supreme Court.

Now, let me just say—my time is running out, but in addition to your three judicial clerkships, as you have mentioned, you worked in the Solicitor General's Office, in the Department of Justice, with Ken Starr, and of course with the Office of Special Counsel. And of course nobody should judge you as an attorney for having worked in something that was as unpleasant as that. Attorneys work on unpleasant matters in many ways, and you would be a pretty doggone poor attorney if you were not willing to work with distinction and with fairness when called upon to do so. And I think knowing you and knowing what happened in the Clinton matter, you served with distinction and fairness.

My time is about up so I just—I will make some more comments if we have another round, but I just want to congratulate you for standing in there and being willing to serve on the circuit court of appeals. I know you could make a fortune on the outside, but you have made public service your life and I do not see how we can find a better person to serve and give public service than you. So I just

want to personally express my fondness for you, my high admiration for you, and the fact that you will have my support in every step of this process.

Chairman SPECTER. Thank you, Senator Hatch.

Under the early bird rule, on the side for the Democrats are Senator Feinstein, Senator Durbin, Senator Kennedy, Senator Feingold, and on the Republican side are Senator Coburn, Senator Graham, Senator Sessions, and Senator Kyl. So under the early bird rule we now turn to Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Kavanaugh, thank you for returning. In 2003, Jay Bybee was confirmed to a seat on the Ninth Circuit. A year and a half later, we learned he had authored the infamous torture memo when he headed the Justice Department's Office of Legal Counsel. In the memo he claimed the President has the right to ignore the law that makes torture a crime and narrowly defined torture as abuse that causes pain equivalent to organ failure or death.

The torture memo was requested by, addressed to the then-White House Counsel, Alberto Gonzales. So clearly the White House Counsel's Office knew that Mr. Bybee had authored the torture memo at the time of his nomination. Did you know that Mr. Bybee authored the torture memo or similar memos at the time of his nomination?

Mr. KAVANAUGH. No, Senator, I think you're referring to the August 1, 2002, memo. I was not aware of that memo until there was public disclosure of it in the news media, I think in the summer of 2004.

Senator DURBIN. The administration has now repudiated the memo. In retrospect, should the fact that Mr. Bybee authored the torture memo have disqualified him from consideration as a nominee?

Mr. KAVANAUGH. Senator, I don't think, sitting here as a prospective judge, as a nominee to a court of appeals, I should talk about another sitting judge and whether that person should or should not have been nominated. I just don't think that's a proper role for me.

Senator DURBIN. But you see that is what we are struggling with here. We do not have a number of cases that you have argued before a court, because you haven't. We do not have trials that you have taken to a jury verdict, because there are none. We have to rely on what you have done with your life and where you have been to try to determine what your values are. Senator Schumer asked you a series of questions related to the work of your life, which you did not feel were appropriate to answer. And now I am trying to plumb that same type of well to find out what you really believe and who you are. And every time we get close, you say sorry, I can't answer. That is a problem for a person seeking a seat on the second-highest court in the land. I do not know where to go in questioning you. You do not want to talk about what you have done that might have any political implication. And frankly, when it comes to legal work, there is not much to turn to. Do you see the problem we are facing?

Mr. KAVANAUGH. Senator, on that memo, I can say that the administration has repealed that memo. I agree with that decision. I do not believe the analysis in that memo was correct. I think that

memo did not serve the presidency or this President well. And I am willing to talk about the memo itself.

Senator DURBIN. Well, let me ask you. You were in charge of judicial nominations, or at least involved in judicial nominations with the White House. And that is why we are going into this. Let's go to another nominee and see if you might respond to this.

In September 2003, the President nominated William Haynes to be a judge on the Fourth Circuit. As General Counsel to the Department of Defense, Mr. Haynes had been the architect of the administration's discredited detention and interrogation policies. For example, Mr. Haynes recommended that Secretary Rumsfeld approve the use of abusive interrogation techniques, like threatening detainees with dogs, forced nudity, and for forcing detainees into painful stress positions. During the 108th Congress, Mr. Haynes's nomination stalled after his involvement in this scandal came to light. Just this February, the President decided to renominate him.

What was your role in the original Haynes nomination and decision to renominate him? And at the time of the nomination, what did you know about Mr. Haynes's role in crafting the administration's detention and interrogation policies?

Mr. KAVANAUGH. Senator, I did not—I was not involved and am not involved in the questions about the rules governing detention of combatants or—and so I do not have the involvement with that. And with respect to Mr. Haynes's nomination, I've—I know Jim Haynes, but it was not one of the nominations that I handled. I handled a number of nominations in the Counsel's Office. That was not one of the ones that I handled.

Senator DURBIN. So let me try this approach and see if we can learn a little more. Manny Miranda was an employee of the Senate Judiciary Committee on the Republican staff and then on the Senate Majority Leader's staff. He hacked into the computers of the members and staff of this Committee, stealing thousands of documents and memoranda which were then shared with others. Did you know Manny Miranda, or do you know him today?

Mr. KAVANAUGH. I knew Manny Miranda because he was a member of Senator Hatch's staff and then Senator Frist's staff working on judicial nominations.

Senator DURBIN. Did you ever work with him in terms of judicial nominations?

Mr. KAVANAUGH. He was part of a group of Senate staffers that did work on judicial nominations with people at the Department of Justice and the White House Counsel's Office. We talked about this last time. I did not know about any memos from the Democratic side. I did not suspect that. Had I known or suspected that, I would have immediately told Judge Gonzales, who I'm sure would have immediately talked to Chairman Hatch about it. Did not know about it, did not suspect it. He was part, however, of the staff, of course, that worked on judicial nominations, including with—on both sides.

Senator DURBIN. My time is up. But I think one of the problems you had with the American Bar Association when they downgraded your rating was they thought you were dismissive of this, that you did not take this as a serious problem, that a Republican staffer had broken into the computers of Democratic Senators and their

staff, were stealing documents and sharing them with those who were plotting the strategy for the White House. Would you like to respond as to whether or not you think this was a serious matter, perhaps criminal?

Mr. KAVANAUGH. Senator, I don't know what the American Bar Association said about that, but I know what I told them and what I've told the Committee. Had I known or suspected anything like that, I would have immediately told Judge Gonzales, who I'm sure would have immediately called Chairman Hatch. I know the matter has been under investigation in the Senate. I know the matter has been under investigation by a special prosecutor. That is a serious matter. And that is what I said to the American Bar Association and that's what I'm saying to this Committee.

So that's my view on the matter.

Senator DURBIN. Thank you.

Chairman SPECTER. Thank you very much, Senator Durbin.

Senator Coburn.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Thank you, Mr. Chairman.

I just want to put a few points into the record. Of the 12 members of the D.C. Circuit and the two seniors, none have as broad experience in terms of measurement points as our nominee here today. Only five have clerked on the Federal appeals court out of the 14; only four have clerked on the Supreme Court; only six have argued before the court of appeals; only five have argued before the Supreme Court; only seven have had editorial positions on law review; only four have had previous judicial experience. Of everybody that is on there now, only four have had previous judicial experience and only four had any legislative branch experience.

Again, I want to address the issues out in the open. I think what is happening here today I am somewhat embarrassed about. We have somebody who is obviously qualified. The ABA says he is qualified. He is not downgraded, he is recognized as qualified. He is extremely well qualified and well qualified. This time he is well qualified, with a minority extremely well qualified—or qualified and well qualified.

But what it requires is "qualified." And if you look at the ABA's position of what "qualified" is—and let me read it for you, should we have any questions regarding that—let me find it. It means that the nominee meets the committee's very—this is "qualified."—means that the nominee meets the committee's very high standards with respect to integrity, professional competence, judicial temperament, and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a Federal judge.

Everybody on that ABA says you are qualified. And I just read what it means. The idea that we are fishing around because we do not like something the Bush administration has done, or we are going to imply and impugn the integrity of somebody who has been in a position of responsibility and has offered his good services to fulfill the requirements of the executive branch, and anything you do not like about the executive branch you are going to try to tie

to this gentleman, is improper. It also is dismissive of our open form of Government. And is exactly, again—I will say again—exactly what the American people are sick of, partisan sniping that is not about the issues but trying to score a point and trying to undermine somebody's integrity who has absolute integrity on these issues.

They have answered the questions. We are here—we are here—to give a second look at somebody who has already answered the questions. And there is precedent to not give answers to questions about certain privileged communications within the White House. That does not mean that those are necessarily devious or wrong. It means you protect the Office of the Presidency. That is an appropriate role. There is nothing wrong with that.

I will have one question for you. Why do you want to be a Federal judge?

Mr. KAVANAUGH. Senator, I want to be a Federal judge because I know from experience and through my upbringing the role of the courts in protecting the rights and liberties of the people. I know how essential the rule of law is to our country. I know how the independence of our Federal judiciary is central to our constitutional form of Government. I think, based on my experience and my background, I can make a contribution to the administration of justice. I think I can be a good judge. And it's part of my commitment to public service that I've carried out for most of the 16 years since I graduated from law school.

Senator COBURN. Do you think it makes any difference on your ability to be an appellate judge in this country which side of the issue you were on the impeachment or which side of the issue you were on any of these issues that have been raised? Your personal opinion, when you have testified that you are not going to allow a personal opinion to interfere in your interpretation of the law and the independence of the judiciary, does that have a bearing?

Mr. KAVANAUGH. Senator, I absolutely believe in the idea that judges are neutral and impartial and that whatever activities may have occurred in someone's past life in terms of Government activities, those are good experience to have to become a good judge. But it also is true, once you put on the black robe, you're impartial and you represent the law. As Justice Kennedy used to tell us, the essential neutrality of the law. And I think that is a principle that I would seek to follow were I to be confirmed to the D.C. Circuit Court of Appeals. I think it's essential to our entire system of Government. There's no such thing on the courts as a Republican judge or a Democratic judge. Once you're on the court, all the judges are there representing the justice system, representing the idea of justice.

Senator COBURN. Thank you. My time has expired.

Chairman SPECTER. Thank you, Senator Coburn.

Senator Feinstein.

Senator FEINSTEIN. I am happy to yield to Senator Kennedy. My understanding is you wanted to go next?

Senator KENNEDY. I appreciate that. We have this health legislation on the floor now which we are trying to work through. If it is convenient for the Senator from California, I would just take the time. I thank the Chair.

Congratulations to you, Mr. Kavanaugh, for gaining the President's confidence. The Circuit Court, as you know, has such special jurisdiction in terms of so many different areas of legislation that we pass—National Labor Relations Board, the relationship of workers and what happens to workers, discrimination against workers in the workplace, environmental kinds of issues they are working through. And their judgments on so many of these end up being the law, and so few go on to the Supreme Court. And we have seen very interesting trends that have taken place in the District court. So this has a special relevancy and importance. So that is at least why we spend as much time as we do on this particular nomination.

Just on the—I want to just really focus in on this issue, again, of torture and rendition, your role there. I am on the Armed Services Committee and we have spent a lot of time. We have had 10 investigations of torture, and none of them have revealed what we are constantly seeing revealed now with newer reports that have come on up in the newspapers and exposed by Freedom of Information reports. So it is something that is—And we have a policy of rendition which is of enormous concern to many of us.

And we also know that Mr. Gonzales was in touch with Mr. Bybee when he was over at OLC. I mean, we have gone through all of this. This was all through the Gonzales—when Mr. Gonzales was up for Attorney General. And we also know that Haynes was in touch with the White House at that time, good chance that he was in touch with OLC.

So this is the background. Have you ever previously—as you well know, that Bybee memorandum effectively said that if you go on out, you are in the military service or under contract and you go out and torture someone, it does not make any difference how badly you torture or what pain you inflict, as long as your purpose is to get information rather than to hurt an individual, you are going to be vindicated in terms of any kind of protections. I mean, effectively. That also was included in the Bybee.

And Mr. Gonzales repudiated it when he came up before the Committee to be Attorney General. Is this the first time you have every made a comment on the Bybee memorandum? You responded to Senator Durbin and said that, in sort of a followup question, that you did not agree with the reasoning or the rationale for it. Is this the first time that you have ever said anything about the Bybee?

Mr. KAVANAUGH. I believe it is. It is possible I have said something to people I work with, but this is the first time, certainly, I have been questioned about it.

Senator KENNEDY. But you have not, prior to this time, ever made a comment or statement to others indicating that you found it particularly offensive. Because it has been a major issue, an issue in question out there. Please.

Mr. KAVANAUGH. Senator, I know that Judge Gonzales in the summer of 2004 had a press conference where the memo was repealed and talked about this issue. I think also at his confirmation hearing in 2005, he said he disagreed, I believe, with the legal analysis in there, that the legal analysis in there was incorrect.

And so I know members of the administration have repudiated that memorandum, or at least the legal analysis in that memorandum.

Senator KENNEDY. And your testimony is that you had nothing with the promotion of Bybee to the Ninth Circuit. Is that correct?

Mr. KAVANAUGH. That was not one of the nominations I worked on, and I knew he was, of course, being nominated but I didn't know some of the issues that you're talking about today.

Senator KENNEDY. Well, then you are saying that you did not know he wrote what we know is the Bybee memorandum at the time that he was being considered for the circuit?

Mr. KAVANAUGH. I first learned of the existence of that memo, I think, when there was a Washington Post story in the summer of 2004. I think that is the first—I'm pretty sure that's the first time I learned anything about the August 1 memo.

Senator KENNEDY. And for Mr. Haynes, have you expressed an opinion in terms of the legal counsel for the Defense Department, for promotion? I understand you have not handled the Haynes nomination?

Mr. KAVANAUGH. That's correct, Senator. And in terms of my portfolio in the Counsel's office, it involved a lot of civil justice issues—worked on nominations, some ethics issues, separation of powers issues. It did not involve the kinds of issues you're raising in your questions.

Senator KENNEDY. Well, are not most of those—I mean, the—most of those issues, class actions, insurance reform, are not most of those handled in the various departments, or were they—are those not sort of policy issues handled in the departments? Those are the issues that you were working on?

Mr. KAVANAUGH. I worked, I would say, primarily on judicial nominations. In the wake of September 11th, there were a number of civil justice issues that I worked on, including the terrorism insurance litigation.

Senator KENNEDY. OK. Just finally, on the documents that were taken here from the Committee and that you have the familiarity—and you have indicated that you, in reviewing them, had no understanding or awareness that they had been taken, been stolen. Have you ever gone back, now that you are aware of it, and seen what decisions you may or might not have taken on the basis of documents that were illegally taken? To see whether you may have made some judgments or decisions to reach certain conclusions, now that you know that they were not properly taken? Have you ever thought, well, I ought to go back, I might have made some judgments or decisions when I was working for the President and I ought to take a look at this, since you know that these documents now were taken? Have you ever thought about that?

Mr. KAVANAUGH. Senator, there's a very important premise in your question that I think is incorrect, which is I didn't know about the memos or see the memos that I think you're describing. So I think—

Senator KENNEDY. Oh, you never saw any of those?

Mr. KAVANAUGH. No, Senator, that's correct. I'm not aware of the memos, I never saw such memos that I think you're referring to. I mean, I don't know what the universe of memos might be, but I do know that I never received any memos and was not aware of

any such memos. So I just want to correct that premise that I think was in your question.

Senator KENNEDY. OK. My time is up, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kennedy.

On the Republican side, we have, in sequence, Senator Graham, Senator Sessions, Senator Cornyn, and Senator Kyl. And on the Democratic side, we have, who has not questioned, Senator Feinstein and Senator Feingold. I had Senator Feinstein ahead of Senator Kennedy on the list.

Senator FEINSTEIN. Yes, I yielded to Senator Kennedy.

Chairman SPECTER. OK, I just wanted to be sure that the list is correct. It is sometimes judgmental. Senator Feinstein was here first, but she left for awhile. Senator Kennedy came. But at any rate, Senator Feinstein yielded. But I wanted it known that that was the list that I had. And now Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. I want to congratulate you for having the hearing, because I think it is appropriate. It is a lifetime appointment, that people be able to ask questions and he be able to answer within his ability to do so without compromising what he believes to be his ethics or any proper role he may have played as a lawyer.

Do you believe you were treated fairly by the ABA?

Mr. KAVANAUGH. Senator, the American Bar Association has rated me three times. I'm going to get directly to the question, but I'm going to give you some background, if I could. I've been rated three times by the American Bar Association. And each time, there were 14 individual reviews conducted by members of the Committee. So there have been a total of 42 separate reviews conducted of me based on interviews with lots of people and review of lots of record.

All 42 have found that I'm well qualified or qualified to serve on the D.C. Circuit Court of Appeals. So I'm pleased with that and I'm proud of that. And to the extent—and none of the 42 has found that I'm not qualified, and I think the Chair of the Committee yesterday said that there's not been a breath of anyone saying that I'm not qualified. So I'm proud and pleased with the 42 of 42.

Senator GRAHAM. So do you think you were fairly treated?

Mr. KAVANAUGH. Senator, I think, sitting here as a nominee, I would prefer not to talk about my—you know, about the American Bar Association other than to say that I'm pleased and proud to have 42 of 42 rating me well qualified or qualified.

Senator GRAHAM. Based on your going through that experience, would you recommend that we continue to consult the ABA when it comes to judges?

[Laughter.]

Mr. KAVANAUGH. Senator, again, I'm pleased and proud of the ratings. Their—in the future, maybe, will look back and have some observations, but right now I don't think I have any observations to offer the Committee about the American Bar Association.

Senator GRAHAM. Your time at the White House, you dealt with, I think you described your job. One of these constitutional questions that we are trying to wrestle with here is the inherent authority of the President in a time of war versus any designated role of the judiciary or the Congress in general. Do you agree with Jus-

tice Jackson's evaluation in the *Youngstown Steel* case that the President or the executive branch is at their strongest maximum power when they have concurrence of the legislative body?

Mr. KAVANAUGH. I agree completely with that, Senator.

Senator GRAHAM. Very specific question. Do you believe that at a time of war, the Congress has the ability to amend, pass the Uniform Code of Military Justice and not infringe on the President's inherent authority as commander in chief?

Mr. KAVANAUGH. Senator, that sounds like a specific hypothetical that could come before the court, so I'd hesitate to give an answer. In terms of Justice Jackson's framework, that of course for a half century has been the guiding framework. I think it's a work of genius, that opinion, in terms of setting out the different categories of Presidential power and Congressional power in times of war and otherwise, in terms of, as you say, category I, when the President and the Congress work together, that's when the power is at the strongest. And category II, that's what they call the twilight zone in the opinion. And then in category III, where a President acts against the express or implied will of Congress, that's where the President's power is at its lowest ebb and raises some very serious constitutional questions, according to Justice Jackson. I think that's an exceptional opinion that has guided American law, the relationship between Congress and the executive for about a half-century, and it's really been the foundation of these kinds of issues that I know you and the Committee have been working on.

Senator GRAHAM. Finally, and if you don't want to answer it, you don't have to, but are you a Republican? If so, why?

Mr. KAVANAUGH. Senator, I am a registered Republican. As I said before to Senator Coburn, I believe very much that it's good to have judges who've participated in Government. That's been part of our experience in the past, to have judges on the D.C. Circuit who've participated in the executive branch, who've worked in the executive branch; judges on the Supreme Court.

Specifically, to answer your question, when I was first registering to vote, President Reagan was President and I agreed with him on some issues and registered Republican in the first election in—I guess 1984 was the first one I voted in.

Chairman SPECTER. Thank you very much, Senator Graham.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Let me just say this. This is a difficult nomination. First of all, you're very young, which is, I think, a blessing for you. But in terms of an appellate judge, I think it is a detriment. Obviously, you've had a good education, you have done well. You have spent a lot of your life in at least a semi-political capacity. The question comes up, how can you assure us that you will be fair? Would you recuse yourself from any judgment that concerned this administration?

Without a record either as a trial lawyer or as a judge, it's very difficult for some of us to know what kind of a judge you would be and whether you can move away from the partisanship and into that arena of objectivity and fairness.

Mr. KAVANAUGH. Senator, thank you for the question. I think in the past, on the D.C. Circuit and on the Supreme Court and on

other courts of appeals other than the D.C. Circuit, prior Government experience in the legislative branch or the executive branch has been seen as a very valuable asset, whether it was Judge Abner Mikva or Judge Patricia Wald, Judge John Roberts on the D.C. Circuit, Judge Merrick Garland, who President Clinton appointed to the D.C. Circuit. That kind of experience has been seen as very valuable experience and valuable background.

And of course the question—I think only four of the last 21 judges on the D.C. Circuit have actually had prior judicial experience, so the norm on the D.C. Circuit, in fact the overwhelming norm, is for the judges on the D.C., Circuit since 1977, not to have had prior judicial experience. What they've had usually is Government experience in the legislative branches or the executive branches.

And your question really goes to how do you assess someone's record. And I think that's done through an assessment of going back, in my case 16 years in my career, and looking at the things I've done. In the Staff Secretary's Office now, where I'm an honest broker, where I have to be fair and even-handed in the kind of role I perform for the President, some of the work I've done in the Counsel's Office on judges, I've worked with your office and Senator Boxer's office in the past on judges I know and worked closely on that. When I was in private practices, working on not just institutional clients, but pro bono cases. One of my proudest cases is I worked on a pro bono case for a synagogue in my home county that was seeking to build in a new location. Some of the neighbors didn't want it there. I represented them. They won in Federal district court.

And the Independent Counsel's Office, I know, Senator, that that's controversial and that's raised some questions. And I think in that office, my record shows that I was fair and conducted myself responsibly. I've written an article about some reforms that I think would help avoid some of the problems that I think were systemic in the Independent Counsel's—

Senator FEINSTEIN. I am running out of time. Answer the recusal question?

Mr. KAVANAUGH. On the recusal question, I know that there will be issues of recusal that I will face. There are standards in place under 28 U.S.C. 455, and I will analyze those closely were I to be confirmed to be a judge. There will be some difficult questions. I do not want to prejudge how I would rule on any recusal motion or how I would handle any particular case, but I do know, Senator, that it will be an issue in certain cases. I pledge to you that I'll take that seriously, that I'll study the precedents of people like myself who've come to the bench, that I will talk to my colleagues, were I to be confirmed, and that I'll make the judgment responsibly. I pledge that to you.

Senator FEINSTEIN. As you look back at the Kenneth Starr investigation today—I just read the op-ed you wrote in 1999—what are your thoughts? What do you think?

Mr. KAVANAUGH. On the Independent Counsel Office investigation in general, I think a couple things, Senator. First of all, I think it was, in retrospect, probably a mistake for Judge Starr to be assigned additional investigations after the initial Whitewater

and Madison investigations. So he got new jurisdiction over a Travel Office matter, an FBI files matter, and eventually the Lewinsky matter. I think it would have been better in retrospect for Judge Starr to have handled what he was initially assigned and, if there was a new Special Counsel needed in these other matters, for new people to be appointed. By adding to the jurisdiction, it created the impression that Judge Starr was somehow the permanent special investigator of the administration. He was assigned a very specific matter.

So that's one thing in retrospect. And frankly, even at the time that I thought it was a concern, I think the way the report was released was a real problem. I thought that at the time. And I think the way that was released did not serve anyone well. And I've written in my law journal article about the problems with prosecutorial reports, the way people's reputations are damaged. So I've proposed some real reforms there.

I also know that it was a very serious matter in terms of the underlying issue in 1998 in terms of the things that members of this body weighed and members of the House of Representatives weighed and that Judge Wright dealt with in terms of the contempt motion that she dealt with. So there was a serious underlying matter there; I believe that. I believe that there was—that Judge Starr tried to do it thoroughly. But again, to go back to the core problem, I think there was too much jurisdiction added to Judge Starr that created a mistaken public impression that harmed the credibility of the investigation.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feinstein.

The next questioner on the Republican side is Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Mr. Kavanaugh, thank you for your thoughts on Senator Feinstein's question about the Starr investigation. I think you have provided some good insight and I think that probably is a reason why your reputation as a member of that prosecutorial team was very high, and people had a clear impression that you were a cool head and a wise member of that team. And that is the reputation I have heard, and I can see why you had that.

I would note that Ken Starr was a former Solicitor General of the United States, a man of impeccable integrity, extraordinary legal skill, and anyone would have been proud to answer his call to serve him.

Looking at the ABA evaluation, I think, first of all, you did extremely well, extraordinarily well to be rated well qualified by them, in the sense that you were relatively young and were working in the Bush administration. You were given the highest possible rating by them. And you have been there now in a less legal capacity and a few new members decided to give you the qualified rating instead of well qualified rating, but I do not think that is a big issue.

In fact, I would quote Mr. Tober, Stephen Tober, the Chairman of the Committee on the Judiciary. This is what he said to me in a telephone conversation. He said this: "Let me underscore, we did

not find him unqualified. There's not a breath in that report or any earlier report. We found him qualified; minority, well qualified. What I said at the end is what in fact many people said, that he has a solid reputation for integrity, intellectual capacity—a lot of people refer to him as brilliant—and an excellent writing and analytical ability. Those are great skills to bring to the court of appeals. There's no question about that."

You wouldn't object to them saying that about you, would you?

Mr. KAVANAUGH. As I said, Senator—

Senator SESSIONS. We will pass over that.

Then he went on to say this: "He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components. He has those skills that will serve him well, certainly on a Federal court."

And then he goes on to say: "It is true"—I think maybe to Senator Hatch's question—"it is true there's not a single not-qualified vote in the picture."

So I think the ABA rating, whether it is as high as it could be, and all of them did not vote you well qualified, the highest possible rating, but they did rate you qualified and the Chairman of the Committee gave some very interesting insights, I think.

I would just like to note on the age question that you are 6 years older, I believe, than Judge Stapleton when he was appointed to the bench, the court of appeals, and 6 years older than Judge Kozinski when he was appointed to the bench, both of whom you clerked for. I think the Chairman made that earlier. And Justice Kennedy was appointed to the Ninth Circuit 3 years younger than you are today. I think those are qualities that—I think other qualities are at stake here.

Let me just say this about my thinking of how you evaluate a nominee, that is, you consider the entire breadth of the gifts and graces they bring to the job. And if a person has less—I like a person who has been in private practice. I think that is fine. But if a person does not have private practice or a lot of—you were a partner in one of the country's best law firms; that ought to be some private practice experience. But whether you had a great deal of that experience or not, other factors are considered in here. You were editor of the Yale Law Journal, one of the editors of that. You clerked for two circuit judges, both of whom have testified for you. The first one said you should be a judge, he saw that in you when you first clerked for him and advised you of that as a career path.

So you worked for two court of appeals judges. You sat at the right hand of two judges who hold the very position you will be holding today. And then you were given the rare honor of clerking for a justice on the U.S. Supreme Court, Justice Kennedy, a judge who is considered a moderate, middle-of-the-road judge, I guess. You served under his leadership. So those are things that I think are extraordinarily important.

And you served in the Solicitor General's Office of the United States. That is the greatest law office in the world, where you represent the United States before the Federal appellate courts in the country arguing cases before the very court that you would sit upon, as well as arguing cases before the U.S. Supreme Court, an honor very few lawyers have.

So I think it is a good experience and extraordinary academic record, Mr. Chairman, and I believe he should be confirmed.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Feingold arrived earlier but has departed. Senator Leahy arrived later and is ranking, and Senator Leahy has agreed he will yield to Senator Feingold.

Senator LEAHY. Go ahead. After these tough, tough questions that Senator Sessions has been asking, where the nominee just sits there and is canonized, I am overwhelmed by that. So I yield to Senator Feingold.

Chairman SPECTER. You should have been here earlier to hear Senator Hatch's tough questions.

[Laughter.]

Chairman SPECTER. Senator Feingold?

Senator LEAHY. He only asks tough questions of Democrats. He coordinates the others.

Senator SESSIONS. Well, this is the second time around.

STTEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. I thank both the Chairman and the Ranking Member. And I thank you, Mr. Chairman, for holding this hearing. It was obviously the right thing to do, given that it has been nearly 2 years since the first hearing and, frankly, in light of Mr. Kavanaugh's incomplete responses to written questions, even though he delayed providing those responses for 7 months.

Among those written questions were several questions that I submitted concerning ethical issues that came up in connection with the nominations of three judges who I believe Mr. Kavanaugh assisted as part of his duties in the White House: Charles Pickering, who received a recess appointment and subsequently retired; and D. Brooke Smith and Ron Clark, who are currently on the bench.

In his November 2004 responses, Mr. Kavanaugh essentially refused to answer my questions. I wrote him a letter on Friday explaining why I believe these questions are appropriate and asking him to supplement his responses. Late yesterday I received a response, not from Mr. Kavanaugh but from Mr. Moschella at the Justice Department, that said the following: "As you know, Chairman Specter has scheduled a hearing on Mr. Kavanaugh's nomination on May 9, 2006. At that time, Mr. Kavanaugh will be available to respond to questions from all Senators on the Committee."

Mr. Chairman, first, I would like to put in the record a copy of my letter and Mr. Moschella's response.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator FEINGOLD. Thank you, Mr. Chairman.

Now, Mr. Kavanaugh, I assume you were consulted and approved of Mr. Moschella's response. I hope that you will now respond to my questions. Here is the first one for which I sought an additional response.

During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later

became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Professor Stephen Gillars of NYU Law School has written, "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

So, sir, my first question is this. Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? And if not, when did you become aware that Judge Pickering had solicited these letters of support?

Mr. KAVANAUGH. The answer to the first question, Senator, is no. This was not one of the judicial nominees that I was primarily handling. I became aware of suggestions of this sort, I assume, at some time during the proceedings, probably when it was raised. I don't know if it was raised in the media or raised by the Senate in the first instance. Without commenting on the facts and circumstances of that matter, because I really don't know the facts and circumstances, when a judge asks a lawyer who's got a case before him or her to do something, that does put the lawyer in a very awkward position and makes it difficult for the lawyer to say no. So just in terms of a hypothetical situation, there is a situation there. Again, I don't know the facts and circumstances of what was going on there. I only heard about it, really, from either the media or from when the members of this Committee were talking about that issue.

Senator FEINGOLD. Well, I would like to know if you think that Judge Pickering's conduct was consistent with the ethical obligations of a Federal judge.

Mr. KAVANAUGH. Senator, I don't know if there's been fact finding on what his conduct was. In terms of the hypothetical situation of a judge asking a lawyer who has a case before him or her to do something, I know that raises some questions. Again, I don't know the facts and circumstances of what Judge Pickering did. I've given you my general principle.

Senator FEINGOLD. Well, it's a good general principle, but the facts are pretty clear. I don't think he denied that he solicited these letters and that these were individuals that appeared before him. There was some debate about the significance of it, but— Am I off track in suggesting that it looks like at least those set of facts, whether you think they occurred in this case, would be a violation of the Code of Ethics?

Mr. KAVANAUGH. I hesitate to comment on another judicial nominee. Again, Senator, I'm happy to state a general principle that I believe in. Again—

Senator FEINGOLD. Let's go with the general principle, then. If a judge is up for nomination and he solicits letters from lawyers who have cases before him, is it not the general principle that that would be a violation of the Code of Ethics?

Mr. KAVANAUGH. I think that raises some questions that warrant some further questions to find out what happened.

Senator FEINGOLD. Mr. Kavanaugh, I—my time is up. Thank you.

Chairman SPECTER. Thank you very much, Senator Feingold. The next questioner is Senator Cornyn.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman.

Welcome back, Mr. Kavanaugh.

Mr. KAVANAUGH. Thank you, Senator.

Senator CORNYN. This is the second hearing 2 years, roughly, after your first hearing, and we have learned a lot has changed in your personal life.

Mr. KAVANAUGH. Yes, sir.

Senator CORNYN. But I do not think a lot has changed in terms of your professional record as it would relate to your qualifications to serve on the D.C. Circuit.

Mr. Chairman, I have a statement that I would like to make part of the record, without objection.

Senator HATCH. [Presiding.] Without objection.

Senator CORNYN. Thank you.

I want to ask a little bit about some of the questions that you have been asked here today. The rationale given for a second hearing that was requested is that there might be some new information that would be revealed that might change the minds of some of those who have previously expressed some skepticism as to whether you should be confirmed or not. But I think—this is my observation, not yours, but I think what we have seen is part of what has become a fairly common practice in the course of these hearings, and that is to ask you questions, the nominee questions that they cannot or should not ethically answer. And that, coupled frequently with demanding documents which are not in your possession and which you cannot produce because they are the subject of a privilege. And then of course there is, of course, then the claim that you are somehow too extreme, out of the mainstream.

Unfortunately, I do not think those are the kinds of questions or the kind of approach that is designed really to reveal very much in the way of information that is helpful to us to make decisions, but rather part of a plan to try to damage your nomination and to justify a No vote, or perhaps even a filibuster of your nomination on the Senate floor. You have been asked about everything from the Clinton impeachment to torture to rendition policy to Judge Pickering. It strikes me that, rather than finding out about your experience and background and your qualifications as an individual, that there has been some attempt to associate you with other issues with which you have no knowledge and perhaps, as you say, have not had any contact.

So I know that Chairman Specter had agreed to do this second hearing based on the representation that there might be some bona fide attempt to elicit information that would actually change some votes and attitudes, but unfortunately I do not see that happening in the course of this hearing so far. I guess one can always hope.

Of course, as you know, I met you a number of years ago when I was Attorney General of Texas and had the honor to represent my State in an argument before the U.S. Supreme Court. That was *Santa Fe Independent School District* v. *Doe,* which involved a

question of whether school children could voluntarily offer a prayer or an inspirational saying before school football games in Texas. And as you know, the Court ultimately ruled against that voluntary student prayer in the case. Chief Justice Rehnquist, in dissent, said that the Court's ruling exhibited hostility to all things religious in public life. And I am very concerned about that because I do believe that the Founders thought that the posture of the Government with regard to religious expression should be one of neutrality, not hostility.

I realize as a lower court judge you are going to be bound by the Supreme Court's precedents, but I wonder if you would address the issue of religious liberty and religious speech insofar as how you believe in your position as a circuit court judge, how you would approach those issues.

Mr. KAVANAUGH. Senator, if I were confirmed to be a D.C. Circuit judge, I would of course follow the precedent of the *Santa Fe* case. That case addressed a question that had been left open in the *Lee* v. *Weisman* case in 1992. In that case, there was a school-sponsored prayer at a graduation ceremony where the Government was actually involved, and one of the questions that was left open was what happens if a student or a private speaker participates in a school event as a private speaker. And in the *Santa Fe* case, I think the Court concluded, based on the facts and circumstances of the case, that it could be attributed to the school and so was a violation of the Establishment Clause.

I think the overall area represents a tension the Supreme Court has attempted to resolve throughout the years in terms of facilitating the free exercise of religion without crossing the Establishment Clause lines that the Court has set out for many years now. I know that the Court in recent years has made clear in a number of cases that private religious speech, religious people, religious organizations cannot be, or should not be, discriminated against and that treating religious speech, religious people, religious organizations equally—in other words, on a level playing field with nonreligious organizations—is not a violation of the Establishment Clause. In past years there had been some suggestion that treating religious organizations the same way in the public square as nonreligious organizations could sometimes be a violation of the Establishment Clause. I think the Court's really gone to a principle of equality of treatment does not ordinarily violate the Establishment Clause—again, equality of treatment of religious speech, religious people, religious organizations; equality in the public square. That's been something we've seen over the last, I'd say, decade or a little more.

The *Santa Fe* case, again, the issue there was that although it was a private speaker, the Court found, based on all the facts and circumstances, that it was attributed to the school and therefore fell within the prohibition in *Lee* v. *Weisman*.

Chairman SPECTER. Thank you, Senator Cornyn.

Mr. Kavanaugh, we are almost to the 2-hour mark. Would you care to take a break?

Mr. KAVANAUGH. I'm OK, Mr. Chairman.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. Mr. Chairman, I have an opening statement, which I will not make, but I would like to put in the record.

Chairman SPECTER. Without objection, your opening statement will be made a part of the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator LEAHY. I would also note for the record, in that, I realize we have—the President wants to move forward Judge Terrence Boyle, and I have suggested, in fact, call on the President to withdraw Terrence Boyle's name. The North Carolina Police Benevolent Association, North Carolina Troopers Association, Police Benevolent Associations, South Carolina, Virginia, the National Association of Police Organizations, many other civil rights groups and others have opposed it. I can think of an awful lot of reasons why he should withdraw it. That is not in the province of what Mr. Kavanaugh has to worry about, but I would hope, rather than go through a needless exercise, that Terrence Boyle's name be withdrawn, especially in light of the recent allegations of unethical conduct.

Mr. Kavanaugh, you are aware of the somewhat unique—we originally understood there would be ABA to testify here today. That had been agreed to, but apparently that was done by a phone call Monday while most of us were out of town. Are you aware of what transpired in that phone call?

Mr. KAVANAUGH. Senator, I'm—

Senator LEAHY. You have seen the transcript?

Mr. KAVANAUGH. I have not read the whole transcript. I have seen some excerpts of the transcript that were reported in news articles, as well as other excerpts that I've seen.

Senator LEAHY. I'd ask that the transcript be made part of the record if it's not already.

Chairman SPECTER. Without objection, it will be made part of the record.

Senator LEAHY. They spoke of you as not having handled a case to verdict; is that right; you never tried a case to verdict, or have you?

Mr. KAVANAUGH. That is correct, Senator. I have not been a trial lawyer. I think I'm in the same boat there with people like Chief Justice Roberts and Justice Breyer.

Senator LEAHY. I am asking about you. We had a hearing on Chief Justice Roberts. I voted for him for Chief Justice, and I voted for him for the D.C. Circuit. I know Chief Justice Roberts. You are not Chief Justice Roberts. You have your own qualities, so let's just talk about you, if that is all right, if you do not mind.

Mr. KAVANAUGH. Senator, I have not tried a case to verdict. I have been an appellate lawyer.

Senator LEAHY. That was my question. They also said your litigation experiences over the years was in the company of senior counsel; is that correct?

Mr. KAVANAUGH. I've argued many cases on my own, Senator Leahy. I've argued in the Supreme Court of the United States. I've argued in the Fifth Circuit. I've argued twice in the D.C. Circuit Court of Appeals.

Senator LEAHY. Did you do those as the sole person arguing?

Mr. KAVANAUGH. Yes, Senator.

Senator LEAHY. Thank you.

Mr. KAVANAUGH. Senator, let me just add one thing. In one D.C. Circuit case there were two counsel that argued on our side, so I just want to be clear on that, but I also—I argued for myself on—it was a Government attorney client privilege case.

Senator LEAHY. I was going to ask you about that, but you clarified it. Thank you.

Why did you take 7 months to answer the written questions you were given after your hearing last time?

Mr. KAVANAUGH. Senator, I take responsibility for that, and I'm happy to answer any additional questions.

Senator LEAHY. Why did you take 7 months?

Mr. KAVANAUGH. Senator, again, I take responsibility for that, and—

Senator LEAHY. Of course you take responsibility for it. Obviously, they are your answers. But why 7 months?

Mr. KAVANAUGH. Senator, if there was—I take responsibility for that. I think I had a misunderstanding, which is my responsibility. I'm happy to answer additional questions today that you may have, or other members of the Committee may have. Again, I take—

Senator LEAHY. What was the misunderstanding?

Mr. KAVANAUGH. Senator, I take responsibility for that.

Senator LEAHY. Mr. Kavanaugh, we are not playing games. I am just asking you a question.

Mr. KAVANAUGH. Yes, Senator.

Senator LEAHY. One of the—I will not go into one of the ways one judge described your conduct in court. I began to think that perhaps he was right. But I take responsibility, fine. That is kind of a catch-all. Everybody says that. I just asked you why? I mean is it that difficult?

Mr. KAVANAUGH. Senator, my understanding was that the timeline for the questions was to make sure they were in before the end of the Congressional session because there was going to be no further action on my nomination in the Committee. I met that timeline. From a later letter that members of the Committee, that you signed, it appears that I had a misunderstanding of that, and I take responsibility for that, and I'm happy to answer any questions you have.

Senator LEAHY. What was your reaction—as Staff Secretary, you see virtually every piece of paper that goes to the President; is that correct?

Mr. KAVANAUGH. On many issues, yes, Senator. Not everything, but on many issues.

Senator LEAHY. Did you see documents relating to the President's NSA warrantless wiretapping program?

Mr. KAVANAUGH. Senator, I learned of that program when there was a New York Times story—reports of that program when there was a New York Times story that came over the wire, I think on a Thursday night in mid December of last year.

Senator LEAHY. You had not seen anything, or had you heard anything about it prior to the New York Times article?

Mr. KAVANAUGH. No.

Senator LEAHY. Nothing at all?

Mr. KAVANAUGH. Nothing at all.

Senator LEAHY. What about the documents relating to the administration's policies and practice on torture; did you see anything about that, or did you first hear about that when you read about it in the paper?

Mr. KAVANAUGH. I think with respect to the legal justifications or the policies relating to the treatment of detainees, I was not aware of any issues on that or the legal memos that subsequently came out until the summer, sometime in 2004 when there started to be news reports on that. This was not part of my docket, either in the Counsel's Office or as Staff Secretary.

Senator LEAHY. I have more questions. My time is up, and I will save them for the next round.

Mr. KAVANAUGH. Thank you.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Just on that last point, I gather that in the briefings to the President by the CIA and other members of the intelligence agency, there were a lot of things that did not come across your desk, that they were given directly to the President; is that correct?

Mr. KAVANAUGH. That's correct.

Senator KYL. I was not here, unfortunately, to hear the introduction of you, but I was impressed by what was said. It was written down for me, and I am very impressed that these judges for whom you clerked would have such a high opinion of you. Judge Kozinski, who is one of the finest judges that I know, said that you were one of the finest clerks he has had, and a breadth of mind and breadth of vision, and a great sense of humanity. And I think Judge Stapleton, a judge's dream as a law clerk, and that you understand the rule of precedent, exceptionally well qualified in terms of experience, superb candidate, and so on.

I think those are important because they represent the opinion of someone for whom we have a great deal of regard, as sitting appellate judges, of you, and I think that is an important qualification.

There have been a couple of questions raised about this matter of qualification, one, the ABA rating, and two, your relative age. I just want to talk about a couple of those here. As I understand it from Mr. Stephen Tober's statement, that this entire difference between qualified and well qualified boils down—and I will quote it from his statement, page 7, "It is, at its most basic, the difference between the highest standard and a very high standard." And so it seems to me that for us to try to make some distinction, and somehow deem you not qualified based upon that very fine distinction, is to establish a standard that we have never applied in this Committee in the past.

May I just ask you, how many of the people that rated you were there again who either rated you qualified or well qualified, and was there anyone who dissented from either of those two rankings?

Mr. KAVANAUGH. Senator, from the ABA ratings, there were 42 individual reviews conducted over the course of 3 years, and all 42 found me well qualified or qualified to sit on the D.C. Circuit.

Senator KYL. So this seems to me, in terms of making a decision on this Committee, a distinction without a difference. I will just quote from page 9 and then move on to the next point. After talking about your breadth of experience, consistently praiseworthy statements, and so on, here is what Mr. Tober said: "The nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability." And it seems to me that that pretty well answers that point.

Now, this matter of age is something that perhaps we should take a look at. As was noted, several important nominees—Justice Kennedy, appointed to the Ninth Circuit when he was 38; Judge Kozinski, 35; Judge Stapleton, 35. I also note the current chief of the Ninth Circuit, my circuit, Marie Schroeder, 38 when she was appointed. Judge Sam Alito, age 40, all younger than you are. But it seems to me that we could actually take some solace from your age based upon the experience in this Committee, Mr. Chairman. We have to look no further than the distinguished Ranking Member of the Committee and the senior Senator from Massachusetts and the second-ranking member of this Committee to note that in all three cases of Senator Biden, Senator Kennedy, and Senator Leahy—

Senator LEAHY. We were elected.

Senator KYL. Elected at the age of 30, 30, and 34. And look what great things each of them accomplished from those early beginnings.

[Laughter.]

Senator SCHUMER. May I interrupt? Each of them has almost a lifetime appointment.

[Laughter.]

Senator KYL. Well, we did not have any say in that.

Senator LEAHY. My Republican State did.

Senator KYL. And it certainly makes the point that at the constitutional age, that is, the age at which the Constitution says one must be qualified, we have elected to the U.S. Senate and confirmed to the courts of appeals and even the U.S. Supreme Court some incredibly qualified individuals who have acquitted themselves very well, and I count all of the colleagues whom I have mentioned here in that category. And, therefore, it seems to me that if that is any precedent, we have nothing but the greatest expectations for your service on the court of appeals, and I am very proud to add my voice to those who are in support of that nomination.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Brownback?

Senator BROWNBACK. Thanks, Mr. Chairman, and welcome, Mr. Kavanaugh. I appreciate your meeting with me. I think I am only one of two people on the Committee now that were not on the Committee when you previously—or the first time you came in front of the Committee, and I appreciated your time that you spent with me answering my questions. I appreciate the information you provided to my staff, and that has been very helpful in my decision-making process with you.

I want to ask a couple of questions that I find important. You may have answered them in other types of settings, but I wanted to look at—and they are general, but I think they are the sort of thing that we on the legislative side need to get out in the open for our decisionmaking—your view of the Constitution and the issue of judicial restraint. These were key items on Judge Roberts's and Judge Alito's hearings. They are important going to a circuit court.

Just if you would—and you have probably answered this already, and I apologize if you have and I have not heard it. But just give me your view of the Constitution as a document itself. Can you put yourself in a category? Do you have a view that it is established as a living document, as a strict constructionist of the Constitution itself?

Mr. KAVANAUGH. Senator, I believe very much in interpreting text as it is written and not seeking to impose one's own personal policy preferences into the text of the document. I believe very much in judicial restraint, recognizing the primary policymaking role of the legislative branch in our constitutional democracy.

I believe very much, as a prospective inferior court judge, were I to be confirmed, in following the Supreme Court precedent strictly and absolutely. Once as a lower court judge, I think that is very important for the stability of our three-level system for lower courts to faithfully follow Supreme Court precedent, and so that is something that I think is very important.

In terms of the independence of the judiciary, I think that is something that is the hallmark of our judiciary, the hallmark of our system that judges are independent from the legislative branch and independent from the executive branch. I think that is central to my understanding of the proper judicial role.

So in terms of text, precedent, restraint, independence, those are the kinds of principles that I think would inform my approach to judicial decisionmaking were I to be confirmed.

Senator BROWNBACK. Let me go specifically to the issue of judicial restraint, if I could, on that particular area. I believe it was Judge Roberts who noted that that is the—where a number of us are concerned about areas that the court has gotten involved in in recent years, and that that has really led to the public's concern about the judiciary in general because it keeps getting into more and more areas that many of us thought were the proper purview of the legislative process rather than the judicial branch. And so the judicial activism charge then gets put forward.

Several have said, well, the key restraint on the judiciary is the judiciary itself. And yet if the judiciary does not show restraint on what cases that it brings up or what cases that it takes, you know, the Congress is left to try to act on limiting review by the courts to try to amend the Constitution, to change the court interpretation, all of which are difficult things to do.

There was a case recently—we just held the flag-burning amendment that passed through the Subcommittee that I chair, and that is in response to the Court saying that you can burn the flag as a statement of free speech. And it was as a response to a court that overturned a prior court opinion saying you could not do it.

It is those sorts of things that I think really frustrate the public, and then the issue of marriage that is coming up that has been a longstanding issue for legislative process, coming now, working through the court system.

Do you have a viewpoint on issues, say, as marriage and the determination of the definition of that? Is that something that the court should establish or is it left to the legislative bodies?

Mr. KAVANAUGH. Well, Senator, that is the kind of question that, were I to be confirmed, could come before me, so I would hesitate to talk about the specific issue.

In terms of your general principle about judicial activism, I do think that some of the worst moments in the Supreme Court's history have been moments of judicial activism, like the Dred Scott case, like the Lochner case, where the Court went outside its proper bounds, in my judgment, in interpreting clauses of the Constitution to impose its own policy views and to supplant the proper role of the legislative branch.

So I think in terms of judicial activism, that is something that all judges have to guard against. That is something that the Supreme Court has to guard against. And throughout our history, we have seen that some of the worst moments in the Supreme Court history have been moments of judicial activism where courts have imposed their own policy preferences.

Senator BROWNBACK. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Brownback.

Let me make an assessment here as to a potential second round. Senator Leahy, do you care for a second round?

Senator LEAHY. I do.

Chairman SPECTER. Senator Schumer?

Senator SCHUMER. Yes.

Chairman SPECTER. I infer that all those absent do not.

Senator LEAHY. I would not infer. We will ask them on this side.

Chairman SPECTER. Could you find out?

Senator LEAHY. We are doing that right now.

Chairman SPECTER. Senator Hatch?

Senator HATCH. Frankly, I will pass for now.

Chairman SPECTER. Senator Cornyn?

Senator CORNYN. Mr. Chairman, my intention would be to pass, but if questions come up during the questioning, if you would give me an opportunity to followup on that. Otherwise, I will pass.

Chairman SPECTER. That is a qualified pass. All right.

Senator HATCH. Same here. Qualified pass.

Chairman SPECTER. Qualified pass for Senator Hatch.

Well, we will proceed with the second round. I think we will finish before 5 o'clock, as it appears to me, Mr. Kavanaugh. You declined a break 20 minutes ago. You may reconsider that without petition at any time you choose, if you would like a break.

Mr. KAVANAUGH. Thank you, Mr. Chairman. I am OK.

Chairman SPECTER. You are OK. OK, then you have established a number of qualities without further comment.

[Laughter.]

Chairman SPECTER. Mr. Kavanaugh, on the second round, which we begin now, I have noticed a reticence on your part to criticize

people, not necessarily a bad habit. You did not want to criticize Karl Rove. You did not want to say how you would vote on impeachment to criticize President Clinton. You did not want to criticize Judge Pryor on Roe being an abomination. You did not want to criticize Judge Bybee on the Bybee memo. You did not want to criticize Mr. Manny Miranda. You did not want to criticize Judge Pickering. You did not even want to criticize the American Bar Association.

Now, I do not consider that—and you did not want to criticize Justice Scalia or Justice Thomas. I do not consider that necessarily a bad quality. Senators sometimes criticize people. In fact, it is seldom when we do not. That seems to be a stock in trade by the United States Senators, and perhaps most people in public office. Maybe that is our calling really in connection with our oversight responsibilities.

But let's take up the values behind your declination to criticize. As to what Judge Pickering is alleged to have done—never mind the hypothetical—would you ask lawyers to write letters for you? If you were a judge sitting on their cases, and you were under consideration for a higher court, would you do that?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. When you were asked about Mr. Manny Miranda, the investigation is still ongoing, but there has been considerable information about his having invaded the Democrats' computer system and downloaded and used it for partisan political purposes. Now, without characterizing it as larceny, would you engage in that kind of a practice?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Would you sanction or participate in torture?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Would you accept the principle that you could inflict any amount of pain in order to get information, as long as you were seeking information, no limit as to the amount of pain you would inflict?

Mr. KAVANAUGH. No, Mr. Chairman.

Chairman SPECTER. Would you engage in rendition, send a suspect to a foreign country where torture was a practice, in order to get information where you would not have to commit the torture on U.S. soil?

Mr. KAVANAUGH. No, Mr. Chairman. I do not want to—no, Mr. Chairman. I think that is an issue I have not been involved in. I do not know the facts and circumstances—

Chairman SPECTER. I know you have not been involved in it, but now we are trying to find out your values.

Mr. KAVANAUGH. Right, and I—

Chairman SPECTER. You have not criticized certain people, and somebody may say you have not answered the question, so let's go beyond the hypothetical or let's go beyond the criticism, and let's take up the values, which is what I am asking you now.

Now, you did not want to criticize Justice Scalia or Justice Thomas, but when you were asked the question would you consider yourself in their mold, you selected Justice Byron White and Justice Robert Jackson.

Now, Mr. Kavanaugh, there may be some implicit criticism there, but we will move beyond that. Why do you choose Justice White? What are his qualities distinguished from Justice Scalia or Justice Thomas that you choose Justice White?

Mr. KAVANAUGH. I do not want to comment on currently sitting Justices. The reason I chose Justice White is for several reasons: He was a rock of integrity. His work as Deputy Attorney General in the Department of Justice enforcing the civil rights laws in the early 1960's I think was heroic. I think his approach to judging, judicial restraint, in terms of recognizing the primary policy—

Chairman SPECTER. OK. That is enough. Why did you choose Justice Jackson?

Mr. KAVANAUGH. I chose Justice Jackson—

Chairman SPECTER. You are not permitted to filibuster, Mr. Kavanaugh.

Mr. KAVANAUGH. Yes, Mr. Chairman.

Chairman SPECTER. Why did you choose Jackson?

Mr. KAVANAUGH. I chose Justice Jackson because of, again, his leading role in the Department of Justice, being involved in the public—

Chairman SPECTER. That is enough, Mr. Kavanaugh.

Now, on independent counsel, you have some criticism of the structure of independent counsel on the operation you had with Judge Starr, and that is why you made some recommendations for changes, right?

Mr. KAVANAUGH. That's correct, Mr. Chairman.

Chairman SPECTER. And you have a value not to exclude blacks, African Americans, on peremptory challenges. That is your value.

Mr. KAVANAUGH. Yes, Mr. Chairman, and I believe in proper procedures to make sure that racial bias does not occur in the courtroom in the jury selection process.

Chairman SPECTER. OK. My red light went on on round two. I will yield now to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

You know, the reason I kept asking about your taking 7 months to answer the questions and why I found your answer inadequate, you did spend years vetting judicial nominees up here and telling them what they were supposed to do and everything else. And it is difficult to understand, having told them how they are supposed to answer, that you did not understand yourself.

Be that as it may, tomorrow the White House is finally going to release its logs of visitors to the White House, having been forced by a Federal judge to do so, something they did not want to do. So I ask you this: Do you know Mr. Abramoff?

Mr. KAVANAUGH. I do not.

Senator LEAHY. Have you ever met him or seen him at the White House?

Mr. KAVANAUGH. No.

Senator LEAHY. Have you ever met Susan Ralston, who is Karl Rove's personal assistant at the White House, formerly worked as Mr. Abramoff's secretary?

Mr. KAVANAUGH. She works in the Deputy Chief of Staff's office today.

Senator LEAHY. You know her.

Mr. KAVANAUGH. I do know her, yes, sir.

Senator LEAHY. Thank you. Have you ever met David Safavian?

Mr. KAVANAUGH. No.

Senator LEAHY. When did you learn that he was being investigated for receiving illegal payments?

Mr. KAVANAUGH. Senator, on that matter, I think whatever I learned, I learned reading the newspapers.

Senator LEAHY. So prior to the time it became public that he was being charged, you did not know about it prior to that time?

Mr. KAVANAUGH. That's correct, Senator.

Senator LEAHY. Have you ever met Michael Scanlon?

Mr. KAVANAUGH. No.

Senator LEAHY. When did you learn that he was being investigated for criminal activities? These are all people from the White House. That is why I am asking.

Mr. KAVANAUGH. I don't think Michael Scanlon worked at the White House. I could be wrong about that.

Senator LEAHY. He was connected—well, go ahead. When did you first learn of his—

Mr. KAVANAUGH. Again, reading the newspapers is all I know about that matter.

Senator LEAHY. And what about the disclosure of the identity of Valerie Plame?

Mr. KAVANAUGH. I do not know anything about the facts and circumstances of that matter.

Senator LEAHY. So you did not do anything about it or were not required to do anything about it? You did not do anything about it?

Mr. KAVANAUGH. I didn't know anything about the facts and circumstances of that matter. I know it's under investigation, of course, and it's not part of my responsibilities nor have I learned about it.

Senator LEAHY. So what you would know about it would be what you have gotten from news sources, public sources?

Mr. KAVANAUGH. What I've read in the newspapers, that's correct. I do not know the facts and circumstances of that matter. It is under investigation, of course.

Senator LEAHY. Did you see documents of the President relating to the NSA's warrantless wiretapping program?

Mr. KAVANAUGH. No.

Senator LEAHY. What about documents related to the administration's policies and practice on torture? Did you see any documents on that whatsoever, according to the President?

Mr. KAVANAUGH. No. The only time I have learned of the legal memos and have read some of them was after there was public disclosure of some of those memos in the summer of 2004, and I think in late 2004 or early 2005 I might have read some of those memos. Of course, they had already been publicly released at that point.

Senator LEAHY. What about the Presidential signing statements that indicated reservation on the part of the President regarding provisions in law passed by the Congress? You have seen those signing statements, have you not?

Mr. KAVANAUGH. Signing statements come through the staff secretary's office and also when I was in the counsel's office before

that, the counsel's office sometimes has a role in signing statements. So signing statements traditionally for past Presidents and this President identified potential constitutional issues such as Appointments Clause, Presentment Clause, or record—

Senator LEAHY. These signing statements reserving the President's rights of whether to follow or not follow some parts of the law that he is signing, there have been more—you said this has been done by past Presidents, but there have been more done by this President than all past Presidents put together. So let me ask you this: There was a great deal of publicity here on the Hill and at the White House when the President signed the so-called McCain amendment against torture or inhuman treatment of detainees and prisoners, far less fanfare a couple days later there was a signing statement to basically reserve—the President reserved the right to determine who is going to have to follow the law. Did you see that signing statement?

Mr. KAVANAUGH. I did see that signing statement, Senator.

Senator LEAHY. What was your reaction to it?

Mr. KAVANAUGH. Senator, the President has made clear that the United States and this Government does not torture or condone—

Senator LEAHY. That is not my question. Do you believe that the President had a right to reserve the exercise of parts of that law that he might not like or to reserve its application to certain people?

Mr. KAVANAUGH. My understanding of that signing statement, which is what the President's spokesman said a few days after it was issued, and questions like the one you are raising were raised to him, is that the President intends to follow that law as written. He shook hands with Senator McCain in the Oval Office about that. He has made clear and the President's spokesman made clear that the administration will follow that law as written, as I understand it.

Senator LEAHY. Then why the—I mean, you saw the signing statement. It passed through your hands. Why have a signing statement then that basically reserves the President's right not to follow the law if he does not want to? Why do that? Do you have any qualms about these kind of signing statements?

Mr. KAVANAUGH. Senator, that signing statement, as I recall it, identified a number of issues other than the one you are talking about. On the specific sentence that relates to the question you are raising, I believe the signing statement identified that this fell into something that the President has authority on, to go back to Justice Jackson's Youngstown concurrence that I—

Senator LEAHY. Well, that also makes it very clear if there is a law that the President's ability to act, as Justice Jackson pointed out, is at its absolute minimum.

Let me ask you this: Does the President, if he is claiming a Commander-in-Chief override or anything else, does he have the authority to authorize or excuse the use of torture in interrogations of enemy prisoners despite domestic and international laws prohibiting the practice?

Mr. KAVANAUGH. Senator, the President under Article II of the Constitution has the constitutional responsibility to follow the Con-

stitution and the laws passed by the Congress of the United States. That is part of his responsibility, including—

Senator LEAHY. In treaties we—

Chairman SPECTER. Let him finish his answer.

Senator LEAHY. I want to make—

Chairman SPECTER. No, no. Let him finish his answer. He is in the middle of an answer.

Senator LEAHY. Go ahead.

Mr. KAVANAUGH. Including the laws against torture reflected in 18 U.S.C. 2340 and related provisions, including other statutes passed by this body. That is part of his Article II responsibility.

Senator LEAHY. Including treaties that this country has entered into, which have become the law of the land once we have entered into them.

Mr. KAVANAUGH. When the treaty is the law of the land, the President has the constitutional responsibility to follow the Constitution of the United States and the laws of the United States.

Senator LEAHY. So is your answer—and I do not want to interrupt you from answering. Does the President have the authority to authorize or excuse the use of torture in interrogation of enemy prisoners when there are domestic or international laws that we have entered into prohibiting the practice?

Mr. KAVANAUGH. Senator, the President has said that the administration follows the law, that the United States does not torture, that the United States does not condone torture, the United States does not participate in torture. The President has said that many times. He said he met with Senator McCain in the Oval Office on one statute. The President's spokesman clarified a question you raised and said that the President intends to follow that law as written.

Senator LEAHY. You know, it is funny, but I would think differently after Abu Ghraib and after the rendition by Americans under the authority of the Commander-in-Chief, renditioning of people to countries knowing they would be tortured.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch, anything further?

Senator HATCH. Let me take just a few seconds. You know, I do not know why we needed this second hearing. In fact, I know we did not. Everybody had a shot at the first hearing and, frankly, I do not see any reason—and especially when I read through this transcript of the ABA. Here is what they say: "This nominee"—I am just reading a few of the accolades toward you. And, by the way, I read the ABA description of each member on the Standing Committee. A number of them are Democrats, have very strongly supported Democratic Senators and others, but found you not only qualified but well qualified.

Here is what they say: "This nominee enjoys a solid reputation of integrity, intellectual capacity, and writing and analytical ability. The concern has been and remains focused on the breadth of his professional experience and the most recent supplemental evaluation has enhanced that concern. Taken in combination with the additional concern of whether this nominee is so insulated that he should be unable to judge fairly in the future and placed alongside

the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context."

And then he said, when he was asked by Mr. Jensen whether—you know, you provided a few negative quotes about Mr. Kavanaugh in your written statement. He said, "Let me underscore, Pete, that we did not find him not qualified. There is not a breath of bad in this report or the earlier report. We found him qualified, minority well qualified. What I said at the end is that, in fact, many people said he has a solid reputation for integrity, intellectual capacity. A lot of people refer to him as brilliant and an excellent writing and analytical ability. These are great skills to bring to the court of appeals."

Now, these are just a few of the comments. Let me just give a couple others.

Mr. Tober again for the Bar Association: "The positive factors haven't changed a whole lot. He is found to have high integrity. He is found to be brilliant. He is a very skilled writer and legal analyst. He has those components. And I have said this before, but I think you were probably doing better things. He has those skills that will serve him well certainly on a Federal court."

Well, I asked him, I said, "I just wanted to mention that I am correct in looking at the record that he has had some 24 people evaluate him, and not one has found him not qualified." Mr. Tober of the Bar Association: "I don't know the number to be 24. I would take your word on that. But it is true there is not a single 'not qualified' vote in the picture."

I wonder what all the fuss is about. Frankly, to force a second hearing—now, I acknowledge our colleagues have a right to do that, but the fact of the matter is I have not heard anything here today that would cause anybody to vote against you who is fair. I have just got to say, you know, I came here expecting to hear some bombastic things that might show that they think you might not be qualified to sit on the court. My gosh, your experience is virtually, other than the law firm experience where you were a partner in Kirkland and Ellis, one of the greatest law firms in the country, your experience has been an experience of service. And everybody with whom you have worked has felt the same way.

I want to put in the record, Mr. Chairman, a whole list of letters from former Attorneys General, former Solicitors General, your classmates, bipartisan, both Democrats and Republicans, all of whom support you wholly and without reservation.

Again, I just say, you know, I do not want to question my colleagues. They have a right to ask these questions, and I suspect they had a right to call for this second meeting. But I have not heard anything here today that justifies having had the second meeting.

Now, all I can say is that I am proud to support you because I believe that the Bar Association is right here.

Thanks, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Schumer?

Senator SCHUMER. Thank you, and I would say to my good friend from Utah, hope springs eternal. Many of us had hoped that maybe

Mr. Kavanaugh would answer some of the questions he did not answer in the first hearing in the writings, but he has not, in general.

In your written responses to Senator Durbin, you said—well, let me first—you said you were not involved in the nomination process either of Mr. Haynes or of Judge Bybee. Is that right? You said that in reference to questions asked before?

Mr. KAVANAUGH. I did not have primary responsibility—

Senator SCHUMER. I did not ask that. Were you involved?

Mr. KAVANAUGH. There is a Committee that meets to discuss prospective judicial nominees.

Senator SCHUMER. Were you involved in those discussions? Did you voice opinions about Haynes and Bybee at that committee?

Mr. KAVANAUGH. Senator, I don't remember the timing of that, but if it was when I was in the counsel's office, it would have come through the Judicial Selection Committee when I was part of it, and it would have been part of the committee's—

Senator SCHUMER. Can you give me a yes or no answer? Were you involved in discussions involving the nominations of Haynes or Bybee?

Mr. KAVANAUGH. Senator, I believe those were when I was still in the counsel's office, so the answer would be yes.

Senator SCHUMER. Thank you. I think before you—

Mr. KAVANAUGH. I want to—

Senator SCHUMER. I would just like—I do not have the record in front of me, but I would like to look at what you said in reference to other people's questions there.

Here is what you said in your written questions in response. You said, "It is fair to say that all of the attorneys in the White House Counsel's Office who worked on judges, usually ten lawyers, participated in discussions and meetings concerning all of the President's judicial nominees."

Do you remember, were you supportive of the nominations of Haynes and Bybee at the time?

Mr. KAVANAUGH. I don't remember talking about them, but they were members of the administration who people had worked with and knew. So I don't—

Senator SCHUMER. You don't remember talking—

Chairman SPECTER. Let him finish his answer.

Mr. KAVANAUGH. I assume it would have come up at a Judicial Selection Committee meeting, and maybe I should explain how that works, Senator.

Senator SCHUMER. I don't have that kind—unless I can have a little extra time, and I would be happy to let him explain.

Chairman SPECTER. Well, that is part of the answer to the question, Senator Schumer.

Senator SCHUMER. OK. Then I will—I will not—

Chairman SPECTER. You can have an extra 2 minutes. Go ahead.

Senator SCHUMER. Well, that is very kind of you. Thanks, Mr. Chairman. Go ahead.

Mr. KAVANAUGH. Judge Gonzales, when he was counsel, set up a Committee which included members of the White House Counsel's Office as well as Justice Department officials. Within the White House Counsel's Office, one of the associate counsel—there

were eight of us—would ordinarily be assigned to particular States, particular circuit seats, so—

Senator SCHUMER. I understand that. I am just asking a—

Chairman SPECTER. Senator Schumer, let him finish his answer.

Senator SCHUMER. Mr. Chairman, please, we have limited—all right. Then I will ask for a third round, because there is limited time here, and we know the general structure. It is described in the writings. I am asking a specific question. I am asking whether Mr. Kavanaugh can recall whether he was supportive in those discussions. He said here, it is fair to say, all of the attorneys participated in the discussions concerning all of the President's judicial nominations. He is brilliant. He went to every law school—or the best law schools—Haynes and Bybee, no, he cannot. OK. I am now on that. He said so he probably did.

I am asking if he remembers being supportive of either of those nominees, not—you were not in charge of those nominees. We have established that three times over. Were you supportive in those general discussions, which you say all of the attorneys participated in?

Mr. KAVANAUGH. If both of them were nominated before July 2003, then the answer is yes.

Senator SCHUMER. Were you supportive?

Chairman SPECTER. Now he is right in the middle of an answer, Senator Schumer. Let him finish.

Senator SCHUMER. That was not my question.

Mr. KAVANAUGH. Then the answer would have been yes, because it would have come before the Judicial Selection Committee.

Senator SCHUMER. Thank you. Now, let me ask you this.

Mr. KAVANAUGH. Senator, if I may—

Senator SCHUMER. Please.

Mr. KAVANAUGH. What question—the answer is yes, that they would have been discussed at the Judicial Selection Committee.

Senator SCHUMER. I thought you were answering—so, please, answer my question, not the general procedure. Were you supportive of the nominations of Haynes and Bybee when they came before that committee? Did you dissent? Did you say nothing? Were you supportive?

Mr. KAVANAUGH. With respect to—this is a line that I think Judge Gonzales has maintained—with respect to individual deliberations about prospective judicial nominees, that's something that it's not appropriate for me to disclose in this context.

Senator SCHUMER. And why is that?

Mr. KAVANAUGH. Because the President benefits from having candid and full discussions of his prospective judicial nominees, and for those to be candid, there has to be a guarantee of confidentiality there.

Senator SCHUMER. Let me ask you this. Do you ever recall having dissented when a name was brought before this Committee in the general discussions? Did you ever—to any of them, do you ever recall having dissented and saying, "I don't think this person should be put forward?"

Mr. KAVANAUGH. Senator, in all the deliberations that we've had on judges and other issues, I've never been a shrinking violet. I've always been—put forward my views, and you can assume I put for-

ward my views strongly. Once Judge Gonzales or the President makes a decision, I also adhere to that decision.

Senator SCHUMER. I understand. I am asking you did you dissent about potential nominees before—when the Committee discussed it before the President made a decision? You were the Committee that was vetting these people.

Mr. KAVANAUGH. And I'm giving you an answer that says there were a lot of deliberations. A lot of people would debate the merits of nominations, and you can assume that various people would disagree about particular nominees.

Senator SCHUMER. Did you disagree?

Mr. KAVANAUGH. Senator, I don't want—

Senator SCHUMER. To any of these nominees, any of these potential nominees when it came before the committee? You said you are a person of strong opinion, which you are. I know that, or my colleague, the Chairman, said you did not criticize this list of people, but I have a long list of people you were free to criticize, who happen to be at a different political viewpoint. But that is not what I am asking here. I am asking you, did you object and say, "I don't think this person or that person should be nominated," when you were in this committee?

Mr. KAVANAUGH. Senator, I do not think it's appropriate—

Senator SCHUMER. I am not asking about a specific person.

Mr. KAVANAUGH. I do not think it's appropriate for members of the President's staff to disclose whether they agreed or disagreed with recommendations on particular judicial nominees.

Senator SCHUMER. Why is it not appropriate? There is no privilege, I presume?

Mr. KAVANAUGH. Because that would chill the candid discussion that the President benefits from in hearing advice about prospective—

Senator SCHUMER. You mean not to mention a specific name, but to simply ask someone whether they dissented on any would chill discussion? That if you admitted you dissented on some, then people would be chilled from saying that? I did not ask a particular name.

Mr. KAVANAUGH. I'm saying that there were candid deliberations in the judicial selection process.

Senator SCHUMER. We know that.

Mr. KAVANAUGH. That there would be particular people that would come up for consideration, and there would be debate about them.

Senator SCHUMER. Did you dissent? Did you ever say in the meetings, "I don't think this particular person belongs on the bench?" That is not a question that should chill anybody. That, in fact, I would argue, sir, is your obligation to answer us. We do not have much of a record here. My colleagues here, justifiably, have said you have had a lot of Government service and that is what justifies you. We try to find out anything about that Government service, and we do not get an answer. Now, what is the harm to future deliberations of future counsels, deputy counsels, by your saying I did or I did not dissent and say certain people should not be on the bench, other than you just do not want to answer the question for us, and we cannot compel you, particularly when ev-

eryone on the other side is going to vote for you no matter what you say.

Mr. KAVANAUGH. Senator, let me try it this way. On a previous question you had, I said I needed to check with the counsel. I went back. Karl Rove does participate in the White House Judicial Selection Committee.

Senator SCHUMER. Thank you.

Mr. KAVANAUGH. On this question I would like also to go back to the counsel, if I could, and I'll try to provide you a timely answer in the same way.

Senator SCHUMER. But I have some followup questions I would then ask you to answer as well. What was the basis of your dissent? I do not want to ask about specific people. I would like to. I think it is relevant, but there you might have an argument. I would also like you then, if the counsel says that it is OK to answer, that you tell us the basis for the dissent. Was it temperament? Was it ideology? Was it this? Was it that?

Chairman SPECTER. Senator Schumer, you are 2 minutes over the extended time. That means you are 9 minutes plus into this questioning. How much longer would you like?

Senator SCHUMER. I would like another few minutes. I think it is important. I cannot tell you. It depends where the questions go, but I will not take a half hour. I will not take much time.

Chairman SPECTER. Well, we are going to go—

Senator SCHUMER. I think this is—

Chairman SPECTER. You are almost up to 10 minutes. We are going to go to this side for a minute or two, and we will come back to you for another round.

Senator SCHUMER. Thank you. That is just fine. Thank you, Mr. Chairman.

Chairman SPECTER. Senator Schumer, I do not want you to be cut short.

When you say that everybody on this side is going to vote in favor of Mr. Kavanaugh, if that raises any suggestion that everybody on this side is not going to vote against him, that might draw some raised eyebrows.

Senator SCHUMER. Mr. Chairman—

Chairman SPECTER. Now wait a minute. It is my 5 minutes. Start the clock. I am on round 3, because Senator Schumer is going to have round 3. And I will come back to you too, Senator Coburn.

I have listened to your testimony very carefully, Mr. Kavanaugh, but, frankly, it has been hard because there have been so many interruptions. But let me plow this ground again to see if I understand what you have said.

You have said that when you had a certain job up till 2003, it was your responsibility to sit on a panel, a group of people evaluating judges; is that right?

Mr. KAVANAUGH. That's correct, Senator.

Chairman SPECTER. And then when you changed jobs, it was no longer your responsibility to sit on a panel evaluating judges?

Mr. KAVANAUGH. That's correct, Mr. Chairman.

Chairman SPECTER. And what date is that?

Mr. KAVANAUGH. That would be early July 2003.

Chairman SPECTER. And that is when you changed from being an Assistant White House Counsel to being Staff Secretary?

Mr. KAVANAUGH. That's correct.

Chairman SPECTER. Now, you said that you are no shrinking violet and you disagreed when you thought that there was somebody up whom you disagreed with as to their qualifications. Isn't that what you said?

Mr. KAVANAUGH. Yes, Mr. Chairman.

Chairman SPECTER. And you would not specify which individuals you disagreed on?

Mr. KAVANAUGH. No.

Chairman SPECTER. You are not going to specify which individuals you disagree on because you think that is part of the deliberative process and it would unfairly impinge on freedom of discussion there, or a chilling effect. Is that what you have testified to, the Senator Schumer?

Mr. KAVANAUGH. That's correct, Mr. Chairman.

Chairman SPECTER. Now, you also testified, as I could de-garble it through the interruptions, that you do not remember which people you disagreed on, or do you remember which people you disagreed on? I am not asking you which ones they were, but do you recall the specific individuals whom you thought should not be submitted for a judgeship?

Mr. KAVANAUGH. I think the question here is because there can be multiple candidates for a particular judgeship that would come up, and you may rank them differently from how the ultimate decision comes out. That doesn't mean that the final selection is a bad decision.

Chairman SPECTER. Are you saying then that you never said as to any, "I think they're unqualified," but only that you ranked them?

Mr. KAVANAUGH. Well, Mr. Chairman, I don't think I should talk about that issue, at least without checking.

Chairman SPECTER. Well, let's explore that for just a minute. We are talking about generalized procedures, and you sit on a panel. This is while you are Assistant White House Counsel. And you are asked about a number of possible nominees for a judgeship. That is the procedure. Do you feel comfortable answering that?

Mr. KAVANAUGH. Yes. Yes, Mr. Chairman, that's the procedure.

Chairman SPECTER. You have said that you are not a shrinking violet and you speak your mind. So at some point you either disagreed with the qualification of an individual, or thought that they fell behind some others in terms of a ranking system. Is that a fair inference or conclusion from your testimony?

Mr. KAVANAUGH. I think it is, Mr. Chairman. The one thing I want to be careful about is talking about the qualifications of an individual as opposed to ranking individuals. And that's, in terms of the qualifications of an individual, some people are more qualified than others. You may rank them differently from how some other members of the committee, and you may disagree with the ultimate selection. I'm sure that happens all the time in any process like that.

Chairman SPECTER. I am sure it does too. That is what you are testifying about. How many individuals were you considering, many, many, many, were you not?

Mr. KAVANAUGH. There have been hundreds, Senator, that have been confirmed, and that means that there are many hundreds more, because you assume for each one of those spots—

Chairman SPECTER. OK, so we are in the hundreds.

Mr. KAVANAUGH. It could be over a thousand.

Chairman SPECTER. I am not asking you whom you disagreed with or whom you ranked where. Do you remember among those hundreds you confirmed and hundreds more you considered, among those hundreds and hundreds of people, can you recall specific individuals and rankings at this time, some 3 years after the fact?

Mr. KAVANAUGH. I certainly, Mr. Chairman, do not recall the specific deliberations. I do recall some, of course, and that is natural. It is also natural for there to be debate and discussion on judicial nominations by the Judicial Selection Committee. That's what we want so that the President gets the best advice, the best recommendations of the staff.

Chairman SPECTER. OK. There are some that you recollect because they stand out for one reason or another, right? Correct?

Mr. KAVANAUGH. That's correct, Mr. Chairman.

Chairman SPECTER. And you are not prepared to identify those individuals because you believe that would restrict the candid discussion. We have been through this on Chief Justice Roberts, on the Solicitor General's Office. We have been through it on a lot of decisionmaking processes, and I do not want to get into the question about limited privilege here today. I just want to understand your thinking as to why, among those whom you remember, you will not identify. And as I think you have testified in response to Senator Schumer, but I am not sure because of the garbled nature with the interruptions, that you will not be specific even as to those whom you remember because you do not want to impinge upon that deliberative process. Is that right?

Mr. KAVANAUGH. That's correct, Mr. Chairman.

Chairman SPECTER. Senator Schumer, you have five more minutes, and then we are going to wrap up your side.

Senator LEAHY. I just wanted to respond to something that you said, Mr. Chairman, this idea of a closed mind. I spent 17 months as Chairman of this Committee.

Chairman SPECTER. Let's start the clock if Senator Leahy is speaking.

Senator LEAHY. I spent 17 months as Chairman of this Committee during President Bush's term. We moved 100 judges. We have had two Republican chairmen since. Both are friends of mine. Neither one of them have moved President Bush's nominees through as fast as I did. So let's not talk about closed minds or the partisanship. And we did this notwithstanding the fact that the Republicans had pocket-filibustered 64 of President Clinton's nominees in the few years leading up to that. We Democrats moved 100 of President Bush's nominees through in 17 months, an all-time record.

Now, what I want to know is how do you approach recusal? You have been a key member of the Bush-Cheney administration. We

have a President making sweeping claims, nearly unchecked executive power. A number of these matters, issues are going to come before the D.C. Circuit, assuming we have any check and balances. The Congress has not done much in the way—with some few notable exceptions, has not done much in the way of checks and balances. The rest of America waits for the courts to do that. How do you determine what you are going to recuse yourself from? What about if it is a challenge to the administration's practice of rendition, of sending people to other countries to be tortured? What if it is about the administration's interrogation practices in detention? What about their wiretapping of Americans without warrants through NSA? Where do you recuse yourself?

Mr. KAVANAUGH. Senator, if I am confirmed to the D.C. Circuit, I will do the analysis under 28 U.S.C. 455. There are some specific recusal obligations in Section 455(b), which I would of course follow. There's also a more general recusal prescription in Section 455(a), which talks about when a judge's impartiality reasonably might be questioned. I would do the analysis of that by looking at the precedents. There have been other people who have gone from the executive branch to the judicial branch, of course. I would do it by consulting with my colleagues, and do it by looking at the facts and circumstances of each particular case.

I think it's hard to make a recusal determination in the abstract here—

Senator LEAHY. Would you think if a question came up about the administration's practice, the Bush-Cheney administration's practice of rendition of people to other countries, would that at least raise a red flag in your mind?

Mr. KAVANAUGH. Senator, on recusal questions generally, I don't think I can—because I haven't done the work necessary—identify specific cases, and we don't know what those cases might be where I might recuse. I can pledge to you a serious process. I understand there could be issues. I would follow the precedents, look at the precedents, consult with my colleagues.

Senator LEAHY. What if it is questioning a policy or practice with which you were involved at the White House, either forming the policy or making the decisions; would that be a pretty easy one?

Mr. KAVANAUGH. Well, I think without knowing exactly where you're saying, on 28 U.S.C. 455(b), there's a specific prohibition that applies to Government lawyers who have worked on certain matters, and depending on the hypothetical, if that fell within that, I would have no hesitation about recusing. And just generally, Senator, I would have no hesitation about recusing. I just want to do the work and know the facts and circumstances before I make any determination.

Senator LEAHY. These are not dissimilar to questions I asked Judge Roberts both when he was up for D.C. Circuit, and the Supreme Court. In his case, I was satisfied with his answer, and I voted for him, in his case.

I understand, Mr. Chairman, Senator Feingold is not able to return for another round. He has written a followup letter to Mr. Kavanaugh. I ask that that letter be made part of the record.

Chairman SPECTER. Without objection it can be made part of the record, but he is not seeking followup answers from the witness, is he?

Senator LEAHY. I think that this is—yes, there is a specific one to which the nominee has expressed a willingness to respond, so that is very specific. Mr. Kavanaugh has been handed this. He has not seen it yet. The staff has—

Chairman SPECTER. I want all the questions for Mr. Kavanaugh to be asked because as stated during our Executive last week, it is the intention to vote on him on Thursday, and he is going to stay here long enough within reason to answer the questions.

Senator LEAHY. Well, I would hope that he would look at this, and I would hope that he might be prepared to answer. I think it can be done fairly quickly.

Chairman SPECTER. Let me take a look at it first, and give him a copy, and I will pass it on to him, and meanwhile we will go on to Senator Coburn for a round of questions.

Senator COBURN. Thank you, Mr. Chairman.

Mr. Kavanaugh, does the president have—

Chairman SPECTER. But we are coming back to you, Senator Schumer.

Senator COBURN [continuing]. An obligation to try to preserve Presidential powers through signing statements? Is that not the purpose for them?

Mr. KAVANAUGH. Presidential signing statements have been used throughout our history, Senator, and particularly in the last four Presidents that I'm aware of, to identify specific constitutional issues that can arise in provisions of statutes. They're usually focused on things like the Appointments Clause. Suppose there's a new board or commission and there's an Appointments Clause issue. The Recommendations Clause, when reports are required that might be inconsistent with the Recommendations Clause. This is part of the conversation, the dialog, that the executive and the legislative branch have on issues like this through the years.

Senator COBURN. But it is an important function of the president to elicit those areas of potential conflict on a constitutional basis, and to put a statement from the sitting President in regards to those. Is that not correct?

Mr. KAVANAUGH. That is correct, Senator, and Presidents have been doing that throughout our history.

Senator COBURN. So a reasonable man could believe somebody would not necessarily believe in torture, but might put something into the record on a signing statement that might be related to preserve Presidential powers or appointments or some other area, and not necessarily believing in torture, but be castigated that they do believe in torture because they happened to put that in, not for the purpose of torture, but for the purpose of protecting and enhancing or—not enhancing—protecting and securing what was there before in terms of Presidential powers. Is that not—a reasonable man could not think that?

Mr. KAVANAUGH. Senator, Presidential signing statements, I think, the Counsel's Office in particular in the Department of Justice, seek to rely on the precedents of the executive branch and legislative branch interaction, where there have been issues identified,

and when new legislation comes up, say an Appointments Clause issue, a Presentment Clause issue, or Recommendations Clause issue, to identify that kind of issue.

That's been done throughout our history, and I think it's very traditional.

Senator COBURN. Would you think much of a President, who if they just ignored not doing that, they just decided, well, that is not important, I am not going to do that?

Mr. KAVANAUGH. Senator, I think all the Presidents, at least in modern times, have identified issues when they come up. And again, it's part of the conversation, part of the healthy back and forth between the executive and the legislative when these kinds of issues come up.

Senator COBURN. But it is also done to preserve a point of view, so that when it is looked at in the future, somebody can understand what the debate was at that time; is that not correct?

Mr. KAVANAUGH. Exactly, Senator. Puts it on the record. People know. It's an open process. Then there can be discussion about issues that might be, for example, an Appointments Clause problem with a new board or commission, then there can be discussion back and forth. If there is a problem, it can be fixed in a subsequent statute, for example.

Senator COBURN. Do you believe President Bush's statements on torture?

Mr. KAVANAUGH. President Bush has said the United States does not torture, condone torture—

Senator COBURN. I know what he said. I am asking you do you believe him?

Mr. KAVANAUGH. Absolutely, Senator.

Senator COBURN. So you do not have any heartburn over his signing statements in regard to anything if they are consistent with what he said and what he believes?

Mr. KAVANAUGH. That's absolutely correct, Senator. He has stated that the United States will not torture, does not condone torture, follows the laws against torture. He's made that clear.

Senator COBURN. Thank you.

I yield back, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Coburn.

Senator Schumer, you had a little over 10 minutes on an opening statement, 6½ minutes on your first round, a little over 10 minutes on the last round. I want to conclude by five o'clock. You have five more minutes.

Senator SCHUMER. Mr. Chairman, it is a lifetime appointment, and I think we should be allowed to ask questions. You put people in a box. If he goes on, I do not get a chance to ask all my questions. If I try to get to my answer by cutting him short, you take some umbrage. I do not think that is a fair way to proceed. OK?

Chairman SPECTER. Well, I do not cut short. I asked you not to cut him short.

Senator SCHUMER. Well, then just give me the time that I need instead of telling me we must end at five o'clock for a lifetime appointment.

Chairman SPECTER. Well, your questions may exceed the tenure of his appointment, Senator Schumer.

Senator SCHUMER. No. My questions are fair questions for somebody who is going to have tremendous power. I think they are relevant.

Chairman SPECTER. Let's put the clock back to 5 minutes, and start in, and see how we do.

Senator SCHUMER. Thank you, Mr. Chairman. I appreciate it. And I just make a couple of quick comments here.

First, I did not ask you, Mr. Kavanaugh, although Senator Specter interpreted it that way, to name specific judges. I asked you did you ever dissent—and I was explicit—not on specific judges. And you said to me you would not be able to answer that question until you checked with counsel. Is that correct?

Mr. KAVANAUGH. That's correct, Senator.

Senator SCHUMER. Did you then answer Senator Specter saying you did dissent? Did you change that answer? That is what I am trying to figure out here.

Mr. KAVANAUGH. I think it goes, Senator, to whether there was a different rank order in particular discussions, or whether you thought someone was unqualified for the—

Senator SCHUMER. I never asked about a rank order. I asked you—

Mr. KAVANAUGH. It just came up.

Senator SCHUMER. Yes, Senator Specter did, but he was saying what I asked you, and he was not interpreting what I asked you. I asked you explicitly, was there ever a nominee—you don't have to name him, and I was explicit—that you thought should not go forward and you said that? Not where you ranked him, but that you said should not go forward and you ranked him. Now, you said to me, as I recall—we can check the transcript—that you were not sure you could answer that question, although I expressed befuddlement as to why because we were not asking a specific name. Are you willing to say that you blocked certain—not blocked—that you urged that certain potential nominees not go forward, or do you want to go to counsel and see if you can answer that question?

Mr. KAVANAUGH. Senator, I'm sure I, in the course of 2½ years of debate over judges, I'm sure that all of us had preferences that weren't reflected in the final decision. Is that your question?

Senator SCHUMER. My question is did you, do you recall having ever stated that you do not think X potential nominee should move forward for whatever reason?

Mr. KAVANAUGH. I'm confident, Senator, that on occasion, I would have rank ordered them differently from how the—so that the final decision was different from what my recommendation would have been.

Senator SCHUMER. I did not ask that. I asked you did you ever express, at these meetings of the 10 counsel, this person should not be nominated? Do you want to go back and check your recollection and answer in writing before tomorrow?

Mr. KAVANAUGH. Can I just ask a followup?

Senator SCHUMER. Please.

Mr. KAVANAUGH. Which is, do you mean should not go forward, period, regardless of who else was in the mix? Is that the—

Senator SCHUMER. I mean, yes, that a person, regardless of who is in the mix, there might be certain people who you did not think deserved to be on the bench, whether someone else was in the mix or not?

Mr. KAVANAUGH. I think that kind of question goes to the heart of the deliberative process that the President relies on for picking judges, to talk about whether you disagreed with the final selection, really, that's something the President—

Senator SCHUMER. OK. I am not asking an explicit name. I am just asking whether that happened. And you cannot recall, you cannot give me a yes or no answer to that?

Mr. KAVANAUGH. Senator, again, I think that would go to the heart of the deliberative process. As I understand it, it's important to protect the deliberative process so that the President gets the best advice. When the President makes a decision to nominate someone, it defeats the process for members of the staff subsequently to go out and say, "Well, I disagreed with the President on that," or even if you don't name names, to say, "I disagreed with some of his selections," that's—

Senator SCHUMER. I think that is—

Mr. KAVANAUGH [continuing]. Inconsistent with—

Senator SCHUMER. Is—

Chairman SPECTER. Let him finish, Senator Schumer.

Senator SCHUMER. I have 1:27 left here. Are you going to let me ask a few more questions if I might?

Chairman SPECTER. How many?

Senator SCHUMER. I do not know. A few.

Chairman SPECTER. Finish your answer, Mr. Kavanaugh, if you can remember where you were.

Mr. KAVANAUGH. I think that's inconsistent with the deliberative process that the President needs to rely on to pick the best judges for the Federal judiciary.

Senator SCHUMER. I fail to see any reason. I think people are put on the Committee to make that very decision, and I have a lot of questions. It puts questions in my mind why you refuse to answer that question. But let's move on.

You did say you would check with counsel earlier, and then you came back to me about Karl Rove, and you said he was involved in the process. OK. In what capacity was he involved? How often did he consult with you and the other counsels about prospective nominees?

Mr. KAVANAUGH. Again, Senator, he's part of the committee. The Committee meets weekly. I'm not sure how often he attended. I know he participated though.

Senator SCHUMER. Was it more than once?

Mr. KAVANAUGH. He was a regular participant.

Senator SCHUMER. A regular participant in the Committee of 10?

Mr. KAVANAUGH. Well, it's actually much bigger than 10. The committee—

Senator SCHUMER. But he was a regular participant in the decisions?

Mr. KAVANAUGH. In the committee process there's many more than 10. I'd say it's about—

Senator SCHUMER. And what do you recall—

Chairman SPECTER. He is right in the middle of an answer, Senator Schumer.

Senator SCHUMER. Go ahead.

Mr. KAVANAUGH. I just want to be careful to make sure you understood that the committee, at least when I was on it—I don't—haven't gone since 2003—but included all the people in the White House Counsel's Office plus several Justice Department lawyers, plus people from other White House offices like the Legislative Office on occasion it would attend. So it's many more than 10. I don't know the exact number though.

Senator SCHUMER. And did he ever discuss politics relevant to why this judge should go forward or that one should not, like it is am important State to us, it is an important reason, so-and-so wants him? Did that ever come up?

Mr. KAVANAUGH. Senator, I think it's important not to disclose the internal deliberations that might occur. Of course we worked very closely with the Senators in each State. We've worked closely in New York with you and Senator Clinton on judicial nominations, and Judge Raggi, and many district court nominations. We've worked well together with you, and so that's of course part of the process, is, OK, the Senators in this home State are suggesting so-and-so. Is that person the best person? And then a back and forth of the home State Senators. That's part of the process, and those discussions would often occur at the—those kinds of discussions would often occur. And so I think that's—

Senator SCHUMER. And Karl Rove was involved in those?

Mr. KAVANAUGH. Karl Rove participated in the process.

Senator SCHUMER. OK. Let me ask you this. Who else was on that—you said Karl Rove was a regular participant. Who else who was not in the Counsel's Office was a regular participant?

Mr. KAVANAUGH. Senator, I would think the Counsel's Office, if the Counsel thought this was appropriate, could provide you a list, if she thought it was appropriate, and I don't know the answer to that question.

Senator SCHUMER. But you said you consulted her and it was OK to mention that Karl Rove was part of the process?

Chairman SPECTER. Mr. Kavanaugh, answer the questions within the scope of your recollection, not referencing anybody else who can provide a list. I do not want to have any strings outstanding. You are here today to answer questions.

Senator SCHUMER. I thank you, Mr. Chairman.

Chairman SPECTER. You answer the questions as to what you know.

Mr. KAVANAUGH. Mr. Chairman, Senator Schumer, I don't know that it's appropriate for me to list everyone who's on the committee. I can tell you the offices that are in it, the White House Counsel's Office, the Department of Justice, offices that work closely with the committee, Office of Legal Policy on Judges, Karl Rove was involved. Chief of Staff's Office on occasion. I think those are the people—if I'm leaving anyone out, Senator Schumer, I'll make sure to—

Senator SCHUMER. Was there ever anyone outside of Government who participated in these groups?

Mr. KAVANAUGH. No.

Senator SCHUMER. And if you told us that Karl Rove participated, is there any legal, imaginable, legal reason that you couldn't tell us who else participated by name, not by their offices?

Mr. KAVANAUGH. Senator Schumer, I think I was saying that I could tell you the offices. I don't know that I could remember all the names, sitting here, of who was at the particular meetings, but I told you the offices.

Senator SCHUMER. Anyone from outside those three offices that you mentioned, the White House Counsel, the Office of Legal Council, the Justice Department, anyone else from—Rove was not part of those—anyone else from outside of those offices?

Mr. KAVANAUGH. Office of Legal Policy. Again, going back, it was Office of Legal Policy at Justice, just to be clear.

Senator SCHUMER. Right, thank you.

Mr. KAVANAUGH. Going back to my own time, from 2001 to 2003, and keeping in mind what the Chairman told me to testify what I remember—

Senator SCHUMER. Well, the Chairman is trying to move your nomination forward as quickly as possible. That is why he did that.

Chairman SPECTER. Senator Schumer and I finally found an agreeable point.

[Laughter.]

Senator SCHUMER. There are more than you think, but not on judges.

Mr. KAVANAUGH. If I'm leaving anyone out, I'll send it in later, but Legislative Affairs, of course, on occasion because we deal with the Senate staffs; the Chief of Staff's Office on occasion—

Chairman SPECTER. When you send it in later, Mr. Kavanaugh, anything you are going to send in later has got to be in by tomorrow.

Mr. KAVANAUGH. It will be in this evening, Mr. Chairman.

Chairman SPECTER. OK.

Mr. KAVANAUGH. I just want to make sure I'm not leaving anyone out, so the offices that I've mentioned, Deputy Chief of Staff's Office on occasion would participate.

Senator SCHUMER. OK. Just one final line of questioning, Mr. Chairman.

And this involves what you said last time, which is that you testified that what the President is looking for is nominees who have respect for the law and who understand the legal system, and the role as a judge is different from one's personal views. Do you believe that Justice Ginsburg and Justice Breyer have a respect for the law?

Mr. KAVANAUGH. Absolutely, Senator.

Senator SCHUMER. Why then do you believe the President keeps talking about judges in the mold of Scalia and Thomas, if the methodology, the rationale is respect for the law?

Mr. KAVANAUGH. Senator, I think the President has talked about a general judicial philosophy that he's looking for in prospective judicial nominees.

Senator SCHUMER. But you indicated to me in the first hearing that you did not think ideology played a role at all in the selection of nominees, which I found incredulous.

Mr. KAVANAUGH. Senator, in the first hearing, there was—I don't think I explained clearly what ideology could entail. To my mind, the President considers, of course, one's judicial approach, whether someone believes in interpreting the law and not imposing their own policy views. We do not ask your views on specific cases or issues.

Senator SCHUMER. Understood.

Mr. KAVANAUGH. Do not ask your views on policy issues that might exist. The President looks and wants his staff to look for people who share the kind of judicial approach he's outlined, and of course, with this President, as with past Presidents, most judicial nominees are of the same party—

Senator SCHUMER. So let me ask you this. If you believe that Justice Ginsburg and Justice Breyer have a respect for the law, as well as Justice Scalia and Justice Thomas, why are there so few nominees who seem to have the judicial philosophy of Justice Ginsburg and Justice Breyer, and many, many, many, who have the judicial philosophy of Justice Scalia and Thomas if ideology does not play a role in the selection? I am not saying it is wrong that it does, and I am not saying that it—but I was surprised that you, at your initial hearing, said it did not. If respect for the law is the judicial philosophy, that is what the President is looking for, then theoretically, the panoply of nominees should be much broader in terms of all kinds of things, their political affiliation, their judicial philosophy, their views on a variety of issues, and you are saying it did not play any role when you were there or others were there. I find that hard to believe, given who the President has sent before us.

And one other point I would make just parenthetically. The reason I mentioned I sort of had an idea that that side of the Committee would vote one way, was because they voted yes on every single nominee the President has sent forward thus far. There has not been one single dissent of the 240 nominees, where on our side there have been a lot of yeses and a lot of noes. So it would be harder, at least by past experience, to judge that. That is why I said that.

But anyway, go ahead.

Mr. KAVANAUGH. Senator, I want to be very clear that the President has said that one's judicial philosophy does play a role, does in fact play a role in the types of judges he's looking for. Your approach to judging, whether you're someone who believes in interpreting the law and not legislating from the bench. He's made it very clear that does matter. What doesn't matter is your view on—and what we do not ask—

Senator SCHUMER. I understand. You have said that, and I accept that, that you do not ask about specific issues like are you pro-choice or pro-life.

Mr. KAVANAUGH. Correct.

Senator SCHUMER. But still, do you think that, for instance, Justice Breyer and Justice Ginsburg have any less respect for the law or are less likely to try to interpret the law than say Justice Thomas or Justice Scalia?

Mr. KAVANAUGH. Well, Senator, as a nominee for an inferior court, I don't think I should be talking about the Supreme Court

Justices and trying to assess them. What I will say is the President has—

Senator SCHUMER. How about between—

Chairman SPECTER. What he will say is? Let him finish his answer.

Senator SCHUMER. He did not answer my question. That is why I am trying to get an answer.

Chairman SPECTER. Well, that is his answer.

Senator SCHUMER. Go ahead. As long as we have time.

Chairman SPECTER. And you may have a followup question.

Senator SCHUMER. Thank you.

Mr. KAVANAUGH. What I will say is the President has made it very clear that he does believe in appointing judges who will interpret the law as written, who will not legislate from the bench, who will not seek to impose their own policy views. He's made that very clear. So judicial philosophy is a part of the judicial selection process. He said that many times, and I just want to be clear on that.

Senator SCHUMER. Do you think that former Justice, the last Justice Thurgood Marshall, and say, Robert Bork, have a different view of what interpreting the law is, as opposed to imposing their own views, or do you think they each do it the same way?

Mr. KAVANAUGH. I think Judge Bork has made clear that he has a different interpretive approach than say, Justice Marshall. For example, both in his testimony before this Committee, and in books he's written since, Judge Bork made clear he had a different type of approach than Justice Marshall.

Senator SCHUMER. Even though both have a respect for the law and understand the legal system?

Mr. KAVANAUGH. Senator, I think—

Senator SCHUMER. Those were your words.

Mr. KAVANAUGH. Respect for the law is a necessary qualification, of course, but it does not encompass judicial philosophy. That's a separate issue to look at in terms—

Senator SCHUMER. The reason I ask you this is we rarely get an opportunity to question somebody who has sat on the Committee in this administration who does this. But it is obvious to me in what you say that clearly judicial philosophy and ideology make a difference here, and you have more or less said that. Nothing wrong with it. Democratic Presidents might do it too. But that is clearly happening. Would you disagree with that?

Mr. KAVANAUGH. Judicial philosophy is part of what the President looks at because he's made clear he wants to appoint judges who interpret the law.

Senator SCHUMER. How is that different than the word "ideology" which I used to you at the first hearing?

Mr. KAVANAUGH. Because I think "ideology" can encompass four different things, and we need to be very clear what we're talking about so there's no confusion. Ideology could encompass political affiliation. It could encompass your general approach to judging. It could encompass your specific view on particular cases, and it could encompass your policy views. The first two are the factors that are looked at in the final—

Senator SCHUMER. But if what you mean by ideology is differing judicial philosophies, then clearly the President—if you mean that—then clearly ideology enters into the selection process, right?

Mr. KAVANAUGH. Judicial philosophy matters, and if that's how you're defining it, then judicial philosophy matters.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Mr. Kavanaugh, I do not want the record to be incomplete in any way. Senator Feingold, rather, Senator Leahy handed to me a letter that Senator Feingold purportedly wrote to you, dated yesterday, marked "hand delivery," relating to answers to questions 3 through 7, which he had asked you before. Did you get this letter? Aside from what was just handed to you, Mr. Kavanaugh—look at me—did you get this letter?

Mr. KAVANAUGH. Yes, sir.

Chairman SPECTER. Hand him the letter, would you, please?

Mr. KAVANAUGH. I think this is a copy, sir. I was told about this letter and that—

Chairman SPECTER. Now, never mind what you were told about. Just answer my question. Did you get this letter?

Mr. KAVANAUGH. I don't believe I got this letter, Senator. I'm just making sure.

Chairman SPECTER. OK. Well, it is dated yesterday. Senator Feingold was here. He could have handed you the letter, or he could have asked you these questions. But he says he did not ask you questions 3 through 7, so I am going to take his part and ask his questions, although he should have. I do not want any loose threads hanging out of this hearing. I will ask them as best I can because his questions are not, with all due respect, self-explanatory. The staff has marked up the record on his written questions, saying that he had asked you all of the parts of question 3.

Mr. KAVANAUGH. That's correct.

Chairman SPECTER. And moving on to question 4, he asked you about Judge D. Brook Smith's not resigning from a club which he promised during a Senate hearing he would resign from. If you promised to resign from a club, Mr. Kavanaugh, would you keep that promise and resign from the club?

Mr. KAVANAUGH. Yes, Mr. Chairman.

Chairman SPECTER. On to question 5. This also refers to Judge Smith, but the relevant question is your values. And you probably already covered this in connection with other questions, but I will ask it to be sure that everything Judge Feingold wants asked is asked. Would you conform to the Judicial Disqualification Statute, 28 U.S.C. Section 455, and recuse yourself if it is called for by that statute?

Mr. KAVANAUGH. Yes, Mr. Chairman.

Chairman SPECTER. On to Number 6. There was a question about whether Judge Smith complied with Advisory Opinion No. 67, which sets forth the standards for free trips to educational seminars sponsored by, as he put it, ideological organizations, such as the Montana-based Foundation, et cetera. Will you comply with the requisite ruling with respect to acceptance of free trips?

Mr. KAVANAUGH. Yes, Mr. Chairman, I certainly will.

Chairman SPECTER. Would you go further, and decline to go on free trips? There are quite a few of us around here who decline to go on free trips because of the conflicts question involved and the reporting. I made a speech at NYU several years ago on a legal issue, took the train up and back, and read about it in the newspaper forever. Would you consider declining going on free trips?

Mr. KAVANAUGH. That's my intention, Mr. Chairman, for the reason you identify, that I would not go on any trips, and, you know, basically would go by a pay my own way philosophy. That's my intention.

Chairman SPECTER. Senator Feingold's last question, No. 7, was related to a district judge, after confirmed by the Senate to a district judgeship in Texas, he told the New York Times that despite his confirmation, right now he is running for State representative. If you are confirmed, will you run for any other office?

[Laughter.]

Chairman SPECTER. Would that articulate a value that you would avoid?

Mr. KAVANAUGH. I will not run for any other office, Mr. Chairman.

Chairman SPECTER. Wise answer. Now, back to a revisit on dissenting and ranking. We played a tennis game here with Senator Schumer questioning you and my trying to clarify it, and Senator Schumer going back and asking some more questions, some might say not clarifying it, but Senator Schumer would not agree with that, so I will not press it. But let me review the bidding here very briefly.

You engaged in a system where you ranked prospective nominees where there were a number of people for a single judgeship, correct?

Mr. KAVANAUGH. That's correct, Mr. Chairman, through a process. It may not be as formal as you're describing, but, yes, basically.

Chairman SPECTER. In that process, were you ever called upon to dissent, in Senator Schumer's terms, that is to say, "Candidate X is unqualified as far as I am concerned," or did you pursue the ranking, which you have already testified to?

Mr. KAVANAUGH. Well, certainly with respect to candidates, of course there would be certain candidates you'd say, "I don't think this person is suitable for the bench," when you're talking about candidates. I think Senator Schumer was talking about whether ultimate nominees, if there was dissent on ultimate nominees.

Senator SCHUMER. If I might, Mr. Chairman?

Chairman SPECTER. I will yield to you, Senator Schumer.

Senator SCHUMER. Thank you.

Chairman SPECTER. For one question.

Senator SCHUMER. I was asking about potential nominees. Were there potential nominees that you said, as it came before this committee—not the ranking system, I have said it three times. I think it is clear as a bell, even if my colleague does not want to say that is true.

Chairman SPECTER. Are you saying who came before the committee?

Senator SCHUMER. Who were discussed at this committee, who you said—I am not asking names—who said, "This person does not belong on the bench, and I don't think we should recommend to the President that that person be nominated." It is a very simple, clear question that I have asked three or four times.
Chairman SPECTER. I do not—
Senator SCHUMER. Can I—
Chairman SPECTER. Go ahead.
Senator SCHUMER. And at one point you said to me that you would have to ask counsel if you could answer that question, and at another point I believed you said that you did not think it was appropriate to answer that question, and now, in reference to Senator Specter's question—maybe you did not know it was potential nominees—you said—well, why don't you answer it?
Mr. KAVANAUGH. If it's talking about—
Chairman SPECTER. If you understand that question, go ahead. [Laughter.]
Mr. KAVANAUGH. If we're talking about—
Senator SCHUMER. I think everybody understands that question.
Mr. KAVANAUGH. If we're talking about the general—
Chairman SPECTER. I do not care about everybody. I care about him. Do you understand that question?
Mr. KAVANAUGH. I now do. I think there might have been some confusion. Of course, when there's a list of candidates that come before the committee, you might say someone's not qualified, of course, before the Judicial Selection Committee. Some people just are not suitable for the bench. They might be recommended by someone. For example, they get on a list of recommended people that come from a Senator, from a Governor, from a Member of Congress, and you might assess that person's record and say, "You know what? That person is just not suitable for the Federal bench." Of course that happens.
Senator SCHUMER. Then may I ask a followup question, Mr. Chairman?
Chairman SPECTER. Yes.
Senator SCHUMER. Give us some of the reasons. Did you ever invoke the notion that their judicial philosophy was not appropriate for a judge?
Mr. KAVANAUGH. The President's made clear that judicial philosophy matters, so if someone did not share the judicial philosophy that the President has articulated, of course, that would be a reason, yeah. Also—
Senator SCHUMER. And you would say that? You would say, "I don't think Mr. X or Ms. X shares the President's judicial philosophy?"
Mr. KAVANAUGH. I think the President's made clear that he will not appoint judges who seek to use the bench to impose their own personal—
Senator SCHUMER. I understand. So you would say that on occasion when a nominee came before the committee?
Mr. KAVANAUGH. Well, that's what the President wanted, so we work for the President.
Chairman SPECTER. Can you give him a simple yes?
Mr. KAVANAUGH. Yes.

Senator SCHUMER. Thank you. Thank you, Mr. Chairman. I think the question was pretty clear.

And do you recall—and again, I do not need the name of the nominee—an example of why this person was not appropriate in terms of judicial philosophy?

Mr. KAVANAUGH. If someone in our judgment or the assessment of the committee or the assessment of the interviewers, concluded that this person, in either direction, had policy views that they couldn't separate from their judicial views, who didn't seem to understand the difference that I think I've articulated today between the judicial role and the legislative role—and there are such people who sometimes get interviewed—if someone doesn't understand that role, then that person would be—could be deemed not suitable for—

Senator SCHUMER. And how often did that happen? And I do not need an exact number or anything like it.

Mr. KAVANAUGH. I think most of the candidates that members of the Senate recommend, that Governors recommend, usually come with the proper appreciation of the judicial role, but there are occasions where people share a different philosophy, or where people simply do not—someone might be interviewed who simply does not seem to recognize the distinction, which is critical in my judgment, between the policymaking role and the judicial role, but that—

Senator SCHUMER. But you would never use the words, too liberal or too conservative, or would you?

Mr. KAVANAUGH. Well, I think too activist.

Senator SCHUMER. Would you? You would say too activist?

Mr. KAVANAUGH. If someone doesn't understand the judicial role and you would say that person believes in judicial activism and not judicial restraint, and the President's made clear to us and made clear to the American people, that he's looking for people who believe in judicial restraint to be judges. And, of course, that person wouldn't fit what the President told us to look for.

Senator SCHUMER. So you would occasionally say somebody would be too activist, in your opinion, to meet the President's criteria?

Mr. KAVANAUGH. Well—

Chairman SPECTER. That is what you are saying, Mr. Kavanaugh. Can you give him another yes?

Mr. KAVANAUGH. I'll give him a yes, and say that's what the President said to the American people—

Senator SCHUMER. I understand.

Mr. KAVANAUGH. —twice—

Chairman SPECTER. OK, Senator Schumer.

Senator SCHUMER. Just one more question. Were there ever people who were too activist from the conservative side as opposed to the liberal side?

Mr. KAVANAUGH. Yes.

Chairman SPECTER. This is your last question, Mr. Kavanaugh. Did you say yes?

Mr. KAVANAUGH. Yes.

Chairman SPECTER. Atta boy.

[Laughter.]

Senator SCHUMER. You can see why the Senator from Pennsylvania was a very fine prosecutor. He is very good at helping his witness.

[Laughter.]

Chairman SPECTER. All out in the open, all out in the open, all transparent.

Senator Graham, you have been waiting patiently. I have tabulated Senator Schumer's questions were 42¾ minutes, so you are limited now to 37¾ minutes.

[Laughter.]

Senator GRAHAM. I really do not have much to add, but that will not stop me. I found it actually fascinating. I mean you seem no worse for the wear. Senator Kennedy's staff has a good question I think. Maybe I should not have said that, but I think it is a good enough question I will make it my own.

Mr. Bybee, Judge Bybee, if you had known—well, you repudiated the memo, you thought it was not good legal reasoning; is that correct, the Bybee memo?

Mr. KAVANAUGH. Yes. The administration has repealed that memo, and I stated my own personal agreement with repealing the memo.

Senator GRAHAM. Would that have disqualified him, in your opinion, from being a judge if you had known it?

Mr. KAVANAUGH. Senator, I've drawn a line here today which I think is important for maintaining the integrity of the judicial selection process, not to talk about people who are currently sitting judges or other judicial nominees by name. I don't think that is appropriate for me to do.

Senator GRAHAM. I will just end it and take my time. There is a fine line between doing your job as a White House counselor, being part of the judicial selection team and being a judge yourself. There is a line between being advocate and being a judge. I think you understand that line. And I think the questions have been very, very good, to be honest with you. And I expect President Bush to live up to his campaign promise of picking strict constructionist, non-judicial activists as he sees it. That is what the election was about. And if you have been part of that weeding-out process to make sure somebody in the conservative movement or the liberal movement does not get on the court, then I think not only have you done a good job in the White House, you fulfilled your obligation to the President.

Now, your obligation is no longer to President Bush. Your obligation is to those people that come before you like they came before your mother. You are going to have a lot of characters come before you in a courtroom where their case is on appeal. And some of them you won't like, and some of them you may feel close to philosophically.

If you could, just in a very short statement, tell me what your job, what you will do with that responsibility, no matter who the person is that comes before you. What is your job now?

Mr. KAVANAUGH. Senator, if I were confirmed, I believe in the absolute sanctity of ensuring the integrity of the—sanctity and integrity of the judicial process, which means treating all parties who come before the court equally. I think I did that as a law clerk for

the two Court of Appeals judges and Justice Kennedy. I understand that function. That's really central to the whole judicial role, equal justice under law. It doesn't matter where you come from, it doesn't matter what you look like, doesn't matter what your background is. When you come into that courtroom, you have the right to present your case, and if you're right on the law, you should prevail in your case. It doesn't matter.

And that's the genius of our system. It's been part of our system throughout our history, and if I were confirmed, I pledge to you and to all the members of the Senate that I would absolutely fall within that tradition.

Senator GRAHAM. I look forward to voting for you. Thank you.

Chairman SPECTER. Thank you very much, Mr. Kavanaugh. As previously announced, we will proceed to a vote on Mr. Kavanaugh on Thursday. I believe at this date—and I have checked with staff, who have been listening attentively, as have I—there are no outstanding questions for you to answer. Gone over what Senator Feingold's letter said, and I believe you have responded on the Karl Rove answer, and I believe all the issues have been responded to.

I want to compliment you on your stamina. I will reserve comments on your testimony until we meet on Thursday, when we will discuss your nomination, Mr. Kavanaugh, but I do not think there will be any disagreement in 3 hours and 27 minutes, without having moved from the witness chair, of your stamina, which is a tribute to your age and good health.

[Laughter.]

Chairman SPECTER. That concludes the hearing.

[Whereupon, at 5:27 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

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COMMITTEE ON THE BUDGET
COMMITTEE ON FOREIGN RELATIONS
COMMITTEE ON THE JUDICIARY
SELECT COMMITTEE ON INTELLIGENCE
DEMOCRATIC POLICY COMMITTEE

May 5, 2006

VIA FAX to the Department of Justice – [202-353-9163]

Mr. Brett Kavanaugh
Assistant to the President and Staff Secretary
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. Kavanaugh:

As you know, I was not able to attend your first hearing before the Senate Judiciary Committee on April 27, 2004, but I did submit written questions to you following that hearing. Those questions were delivered to the Committee for transmission to you on May 4, 2004. Your attached responses, which were not sent to the Committee until November 19, 2004, were inadequate. In light of your failure to answer written questions for over seven months, it was by no means clear that you were serious about pursuing the nomination so I did not ask you for additional information at that time.

In recent weeks, the leadership in the Senate has indicated renewed interest in your nomination, and Chairman Specter has now scheduled a second confirmation hearing for you on Tuesday, May 9, 2006. In anticipation of that hearing, I request that you now answer my questions 3 through 7. These questions, other than the very last part of question 7, concerning your recommendation to the President on the signing of Judge Ron Clark's commission, which I hereby withdraw, fall into two categories. Both kinds of questions are entirely appropriate for me to ask and for you to answer:

1. Factual questions concerning your knowledge and the timing of your knowledge of ethical controversies that arose in connection with certain nominations that occurred during your time in the White House Counsel's office. Answering these questions will not in any way intrude on internal Executive Branch communications concerning these long since confirmed judges. Many of them can be answered with a simple "yes" or "no."

2. Questions concerning your current, personal judgment on and analysis of certain ethical issues raised during consideration of nominations that occurred during your time in the White House Counsel's office. It is not

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only appropriate but crucial for you to answer questions concerning judicial ethics since you seek confirmation to be a federal appellate judge.

I would appreciate your providing answers to these questions, which are not complicated or lengthy, by the close of business on Monday, May 8, so that I may discuss them with you at the hearing on Tuesday. Thank you for your prompt attention to this matter.

Sincerely,

Russell D. Feingold
United States Senator

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 8, 2006

The Honorable Russell Feingold
United States Senate
Washington, D.C. 20510

Dear Senator Feingold:

We write in response to your May 5, 2006, letter to Mr. Brett Kavanaugh requesting that he supplement his previous responses to your written questions. As you know, Chairman Specter has scheduled a hearing on Mr. Kavanaugh's nomination on May 9, 2006. At that time, Mr. Kavanaugh will be available to respond to questions from all Senators on the Committee.

As we previously informed the Chairman, the Department looks forward to working with the Committee to facilitate its consideration of Mr. Kavanaugh's nomination. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

William E. Moschella
William E. Moschella
Assistant Attorney General

cc: The Honorable Arlen Specter
Chairman
Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Feingold

1. According to your Judiciary Committee questionnaire, while working in the White House Counsel's office, you "worked on the nomination and confirmation of federal judges." You state that you also worked on "various ethics issues." As part of your responsibilities in that office, did you review the records of potential nominees for their compliance with standards of legal and judicial ethics?

Response: The responsibility for reviewing background investigation files was performed by the Counsel and Deputy Counsel to the President, as well as attorneys in the Department of Justice. I therefore was rarely involved in that particular aspect of the judicial selection process.

2. Do you believe that adherence to strict ethical standards is an important qualification for being a federal judge?

Response: Yes.

3. During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Prof. Stephen Gillers of NYU Law School has written: "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges.... The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? When did you become aware that Judge Pickering had solicited these letters of support?

Do you believe that Judge Pickering's conduct in this instance is consistent with the ethical obligations of a federal judge?

Do you believe it is appropriate for federal judges to solicit letters of support from lawyers who practice before them and ask that those letters be sent directly to him to be forwarded to the Senate Judiciary Committee?

Response: I believe Judge Pickering addressed inquiries about this matter in his confirmation hearings. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

4. During the Senate's consideration of Judge D. Brook Smith's nomination to the Third Circuit, the Judiciary Committee learned that Judge Smith had not resigned from the Spruce Creek Rod and Gun Club until 1999, even though he had promised during a

confirmation hearing in 1988 that he would do so if he was unable to bring about a change in the club's discriminatory membership policies.

When Judge Smith was nominated did you know that he had made this promise to the Judiciary Committee in 1988 and that he remained a member until 1999? If not, when did you become aware of these facts?

Did you work with Judge Smith in preparing his discussion of his membership in the Spruce Creek Rod and Gun Club in this Judiciary Committee questionnaire and his answers to questions about that membership in the club? Did you review his answers to questions on this matter before they were submitted?

Do you believe Judge Smith's continued membership in the Spruce Creek Rod and Gun Club from 1992 to 1999 was consistent with the Code of Conduct for United States Judges?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

5. Also in connection with Judge Smith's nomination, the Committee considered allegations that he violated the judicial disqualification statute, 28 U.S.C. section 455, by not recusing himself earlier in *SEC v. Black*, and by not recusing himself immediately upon being assigned the criminal matter in *United States v. Black*. Prof. Monroe Freedman of the University of Hofstra University Law School called his violations "among the most serious I have seen."

Were you aware of the controversy over Judge Smith's handling of the *SEC v. Black* and *United States v. Black* cases when he was being considered for nomination to the Third Circuit?

Do you believe that Judge Smith's actions in these cases were consistent with his obligations under the judicial disqualification statute and the Code of Conduct?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

6. As you may know, I have questioned a number of judicial nominees about their acceptance of what some have termed "junkets for judges" – free trips to education seminars sponsored by ideological organizations such as Montana-based Foundation for Research on Economics and the Environment ("FREE"). In answer to a written question, Judge Smith stated that under Advisory Committee Opinion No. 67, which sets out the ethical obligations of judges who wish to go on such trips, he did not need to inquire about the sources of funding of seminars put on by the Law and Economics Center at George Mason University.

Do you agree with Judge Smith's interpretation of Advisory Committee Opinion No. 67?

If you are confirmed, will you accept free trips from organizations such as FREE and the Law and Economics Center?

Response: On these kinds of ethics issues, I would faithfully follow all applicable statutes, court decisions, and policies. I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

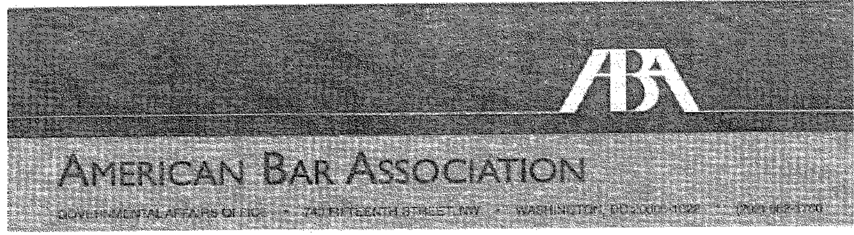
7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, "right now, I'm running for state representative." Indeed, he admits that he was actively campaigning for office, stating "I go to functions, go block walking, that sort of thing." The Code of Conduct prohibits a candidate for judicial office from engaging in partisan political activity.

Were you involved in discussions about the timing of Judge Clark's commission or whether Judge Clark should continue to campaign for office after he was confirmed by the Senate?

Do you believe that Judge Clark complied with his ethical obligations in campaigning for the Texas legislature while he was awaiting his commission from President Bush? If not, did you ever recommend to the President or your supervisors that Judge Clark's commission not be signed?

Response: It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

SUBMISSIONS FOR THE RECORD



STATEMENT

of

STEPHEN L. TOBER

on behalf of the

STANDING COMMITTEE ON FEDERAL JUDICIARY

of the

AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF BRETT MICHAEL KAVANAUGH

TO BE JUDGE OF THE UNITED STATES COURT OF APPEALS
for the
THE DISTRICT OF COLUMBIA CIRCUIT

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

May 8, 2006

I. Statement of Stephen L. Tober

Mr. Chairman and Members of the Committee:

My name is Stephen L. Tober. I am a practicing lawyer in Portsmouth, New Hampshire, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. I am submitting this written statement for the hearing record to present the Standing Committee's supplemental peer review evaluation of the nomination of Brett Michael Kavanaugh to serve on the United States Court of Appeals for the District of Columbia Circuit. This statement is divided into two sections. In this first section, I am pleased to summarize the Standing Committee's general investigative procedures and present an overview of the investigation of the nominee. In the second section, I will explain the process in this particular matter and the reasons for the Standing Committee's rating.

After careful investigation and consideration of his professional qualifications, a substantial majority of our Committee is of the opinion that the nominee is "Qualified" for the appointment. A minority found him to be "Well Qualified."

A. Procedures Followed By the Standing Committee

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures. A more detailed description of the Committee's procedures is

contained in the Committee's booklet (commonly described as our *Backgrounder*), *Standing Committee on Federal Judiciary: What It Is and How It Works (2005).*

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee -- his or her competence, integrity and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, knowledge of the law, breadth of professional experience, courtroom experience, character, integrity, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. In the current case, Pamela Bresnahan conducted the original formal investigation in 2003, and updated her report in 2005, as the District of Columbia Circuit representative on the Standing Committee. Marna Tucker, who succeeded Attorney Bresnahan as the District of Columbia Circuit representative on the Standing Committee in August 2005, subsequently conducted a further supplemental evaluation of the nominee.[1]

The investigator starts his or her investigation by reviewing the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications,

[1] Marna Tucker was joined by Federal Circuit representative John Payton for the interview of the nominee.

including professional experience, significant cases handled and major writings. The investigator makes extensive use of the questionnaire during the course of the investigation. In addition, the investigator examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence and judicial temperament of the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer-review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the investigator will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the Standing Committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the investigator takes whatever additional steps are necessary to reach a fair and accurate assessment of the

nominee.

Upon completion of the investigation, the investigator submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the investigator then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications. This formal report, together with the public portion of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire committee, composed of fourteen "circuit" members and the Chair. After carefully considering the formal report and its attachments, each member independently submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified" or "Not Qualified." An investigator who is not a current member of the Standing Committee would not vote.

I would like to re-emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the Committee members by multiple sources. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given a full opportunity to explain the matter and to provide any additional information

bearing on it. If the information cannot be shared with the nominee, it is not included in the formal report and is not considered by the Committee in reaching its evaluation.

B. The Investigation of the Nominee

The Standing Committee has issued three evaluations on the nomination of Brett Kavanaugh. This is due to the fact that Mr. Kavanaugh has been nominated once (2003) and re-nominated twice (2005 and 2006). It is the established practice of the Standing Committee to conduct a further investigation on any nominee who is re-nominated, and the extent and scope of that further investigation is often influenced by the length of time that has passed from the date of the original evaluation and rating. Whenever a supplemental evaluation is performed, copies of all previous confidential formal reports on the nominee are reproduced, and presented to every member of the Standing Committee for review before they vote, alongside the new formal report. Thus, it is important that every supplemental evaluation performed goes back to the end-date of the original formal report, and brings the investigation forward from that point. That is what occurred here.

Concern has been raised that the most recent rating from the Standing Committee somehow results solely from a "change in personnel" on the Committee. In fact, such is not the case. Indeed, no less than six members who served on the Standing Committee before August, 2005,[2] and who continue to serve today, changed their votes on this nominee from "Well Qualified" to "Qualified" between the rating issued on February 16,

[2] Appointments to the Standing Committee are made by the incoming ABA President, and according to the ABA Constitution, all new appointments to this committee begin their service at the conclusion of the ABA Annual Meeting, which is generally in August of each year.

2005, and the rating issued April 3, 2006.

There are at least three general reasons to support the most recent rating given to this nominee. First, there was a wider universe of individuals contacted during the supplemental evaluation, than during the initial formal report or its update. The Standing Committee generally requires, at a minimum, 40 to 60 contacts with judges, lawyers and others in any nomination it is reviewing, although an evaluator is certainly free to do more. In 2003 there were 55 such contacts regarding Mr. Kavanaugh. In 2006, there were 91 such contacts. Nineteen more judges and seventeen more lawyers with potential knowledge about Mr. Kavanaugh were contacted, and not all of the original 55 contacts were summarily repeated. Thus, in 2006 a larger group of individuals was given the opportunity to share with the Standing Committee knowledge of the nominee's integrity, professional competence, and potential for judicial temperament.

Second, some individuals who may have had no contact with the nominee in 2003 were now individuals who had crossed paths with him. Some in public service or in the practice of law in 2003 were now no longer active, having been replaced in some measure by others. And, simply put, events and times had moved on, creating new and different developments and landscapes in which the professional qualifications of the nominee could be viewed, that were not present in 2003 or even 2005.

Third, it should be pointed out that with both earlier ratings issued by the Standing Committee, there was a "minority Qualifed" as part of the vote. The official rating by the Standing Committee has always been and remains the majority rating, yet nonetheless it is important to underscore that some members of the 2003 and 2005 Standing Committee considered this nominee to be "Qualified."

The Standing Committee takes most seriously its responsibility to conduct an independent, non-political, non-ideological examination of the professional qualifications of judicial nominees. There is no bright-line litmus test as to whether a nominee is "Well Qualified" or "Qualified." The *Backgrounder* makes clear that "(t)o merit a rating of 'Well-Qualified,' the nominee must be at the top of the legal profession in his or her legal community; have outstanding legal ability, breadth of experience and the highest reputation for integrity; and either demonstrate or exhibit the capacity for judicial temperament."

The *Backgrounder* also makes clear that "(t)he rating of 'Qualified' means that the nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge."

It is, at its most basic, the difference between the "highest standard" and a "very high standard." Our rating is not the result of tallying the comments - pro and con - about a particular nominee. Nor is it about politics or ideology or empirical data. Rather, in making our evaluation, we draw upon our previous experiences, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment.

From the outset in 2003, even with an earlier rating of "Well Qualified" for this nominee, there were considerations arising from confidential interviews and other background information that act to explain the thread of "Qualified" running through the Standing Committee evaluations. The 2003 confidential record makes it clear that there

were then-present concerns regarding this nominee's breadth of professional experience. It was noted that he had never tried a case to verdict or judgment; that his litigation experience over the years was always in the company of senior counsel; and that he had very little experience with criminal cases. Indeed, it is the circumstance of courtroom experience that fills the transcripts that make the record before the Court of Appeals, and concerns were expressed about the nominee's insight into that very process. Nonetheless, a substantial majority saw other overriding factors that supported a rating of "Well Qualified."

The additional interviews conducted in 2006 expanded upon those earlier concerns. One judge who witnessed the nominee's oral presentation in court commented that the nominee was "less than adequate" before the court, had been "sanctimonious," and demonstrated "experience on the level of an associate." A lawyer who had observed him during a different court proceeding stated: "Mr. Kavanaugh did not handle the case well as an advocate and dissembled." Other lawyers expressed similar concerns, repeating in substance that the nominee was young and inexperienced in the practice of law.

Further, the 2006 interviews raised a new concern involving his potential for judicial temperament. Unlike the earlier 2003 final report and 2005 updated report, the recent supplemental evaluation contained comments from several interviewees with more recent experience with the nominee, which caused them to characterize the nominee as "insulated." One interviewee suggested that much of his concern about the nominee being insulated was due, understandably, to the nominee's current position as Staff Secretary to the President. However, this interviewee remained concerned about the

nominee's ability to be balanced and fair should he assume a federal judgeship. And another interviewee echoed essentially the same thoughts: "(He is) immovable and very stubborn and frustrating to deal with on some issues." Both issues—his professional experience and the question of his freedom from bias and open-mindedness—were brought up (along with others) with the nominee during his 2006 interview, and he was provided a full opportunity to address them in detail as part of our supplemental evaluation material.

This nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability. The concern has been and remains focused on the breadth of his professional experience, and the most recent supplemental evaluation has enhanced that concern. When taken in combination with the additional concern over whether this nominee is so insulated that he will be unable to judge fairly in the future, and placed alongside the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context. A substantial majority of the Standing Committee believes that Mr. Kavanaugh is indeed qualified to serve on the federal bench.

Thank you for the rather unique opportunity to present these remarks.

AMERICAN BAR ASSOCIATION

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May 18, 2006

Honorable Arlen Specter, Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Brett Kavanaugh, nominee to the U.S. Court of Appeals for the District of Columbia

Dear Chairman Specter:

During the teleconference hearing on Monday, May 8, between Members and staff of the Senate Judiciary Committee and members of the ABA Standing Committee on Federal Judiciary (FJC) to discuss FJC's recent evaluation of Brett Kavanaugh, your nominations counsel, Pete Jensen, asked us to submit a written response to three issues raised during the telephone exchange. This letter responds to that request.

1. In response to the suggestion that FJC's 2006 rating of the nominee, which differed from its 2005 rating, was the result of a change in composition of FJC, I explained that eight members of the current committee were also members of the committee in 2005, when the earlier evaluation was rendered. I disclosed that six of those eight members had changed their votes from "well-qualified" in 2005 to "qualified" in 2006. Mr. Jensen asked if the other two "carryover" members changed their vote from "qualified" to "well-qualified." I was unable to answer with certainty at the time. I have now had an opportunity to review the voting record of the committee and the answer is that the other two members who participated in both evaluations did not change their votes.

2. Mr. Ajit Pai, on behalf of Senator Brownback, asked how many nominees have received three evaluations. After explaining that such a statistic would only be available and useful for comparative purposes for the period covering 2001 to the present because of the change in our role in 2001 from conducting pre-nomination evaluations (for which there are no records) to conducting post-nomination evaluations, I told Mr. Pai that I would have to get back to him with an answer. From 2001 to the present, FJC has evaluated nine additional nominees three times. These are the only nominees we have evaluated more than twice. A chart listing the nominees and their ratings is attached for your reference.

3. Mr. Jensen asked if FJC had ever been asked to testify for a lower court nominee who had received a "qualified" rating. I responded that to our knowledge this had only happened once before, during a confirmation hearing for J. Harvie Wilkinson, III, nominated to the U.S. Court of Appeals for the Fourth Circuit. Mr. Jensen asked us to provide additional information regarding the circumstances for our testimony, including whether we testified before or after his nomination was reported out of the Senate Judiciary Committee.

FJC testified during a hearing on the nominee held on August 7, 1984, which was called after the nomination was on the Senate floor to help end a filibuster of the nominee (Congressional Record, p.S.9658-9, August 2, 1984: unanimous consent agreement to hold a further hearing on the Wilkinson nomination on August 7, 1984, with witnesses specified, followed by cloture vote on August 9).

Judge Wilkinson was first nominated in 1983 (98th Congress, 1st Session). His nomination was withdrawn at the end of the 1st Session and resubmitted at the start of the 2nd Session in January 1984. On November 14, 1983, and again on January 31, 1984, FJC apprised the Senate Judiciary Committee that the nominee had received a formal rating of Q (sm)/ NQ (min). FJC was not asked to testify at an earlier hearing on the nominee. During the August 7, 1984, hearing, FJC was asked questions about its process and whether its rating was influenced by alleged lobbying of members of the committee on behalf of the nominee, including telephone calls from Justice Lewis F. Powell, Jr. to three of the six ABA members who had voted on the nomination and were present at the hearing. When it was disclosed that the three members contacted by Justice Powell had given him the minority rating of "NQ," the issue was dropped. Two days later, the nominee was confirmed by a vote of 58-39.

Please let us know if you have additional questions, and we will be happy to respond.

Sincerely,

Stephen L Tober
Chair

cc: The Honorable Patrick Leahy

Bush II Nominees
Rated More Than Twice for the Same Position by FJC
During
107th Congress - May 15, 2006, 109th Congress
(January 3, 2001-May 15, 2006)

Nominee	# of Ratings	Date of Nomination	Court	Rating
*Boyle, Terrence W.	3	5/9/01 1/7/03 2/14/05	4th Circuit	Q unanimous Q unanimous WQ unanimous
Griffin, Richard A.	**3**	**6/26/02 1/7/03 2/14/05**	**6th Circuit**	**WQ^{sm}/Q^{min} WQ^{sm}/Q^{min} WQ^{sm}/Q^{min}**
Kavanaugh, Brett M.	**3**	**7/25/03 2/14/05 1/25/06**	**DC Circuit**	**WQ^{sm}/Q^{min} WQ^{sm}/Q^{min} Q^{sm}/WQ^{min}**
Ludington, Thomas L.	**3**	**9/12/02 1/7/03 2/14/05**	**USDC: Eastern District of MI**	**WQ unanimous WQ unanimous WQ unanimous**
McKeague, David W.	3	11/8/01 1/7/03 2/14/05	6th Circuit	WQ^{sm}/Q^{min} WQ^{sm}/Q^{min} WQ unanimous
Neilson, Susan Bieke	**3**	**11/8/01 1/7/03 2/14/05**	**6th Circuit**	**WQ unanimous WQ unanimous WQ unanimous**
Owen, Priscilla R.	**3**	**5/9/01 1/7/03 2/14/05**	**5th Circuit**	**WQ unanimous WQ unanimous WQ unanimous**
Pickering, Charles W.	**3**	**5/25/01 1/7/03 2/6/04**	**5th Circuit**	**WQ^{sm}/Q^{min} WQ^{sm}/Q^{min} WQ^{sm}/Q^{min}**
Pryor, William H.	**3**	**4/9/03 3/12/04 2/14/05**	**11th Circuit**	**Q^{sm}/NQ^{min} Q^{sm}/NQ^{min} Q^{sm}/NQ^{min}**
Saad, Henry W.	3	11/8/01 1/7/03 2/14/05	6th Circuit	Q^{m}/WQ^{min} Q^{m}/WQ^{min} WQ^{sm}/Q^{min}

- Bolded entries indicate rating changed for nominee.

SENATE JUDICIARY COMMITTEE HEARING ON THE NOMINATION OF BRETT M. KAVANAUGH TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Senator John Cornyn
Statement for the Record

Thank you, Mr. Chairman.

Here we are again. It's been nearly three years since the President nominated Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit. And it's been over two years since Mr. Kavanaugh came before this Committee and ably answered many tough—and even perhaps some unfair—questions.

In fact, Mr. Kavanaugh answered more than 165 questions at that first hearing in April 2004. Following that hearing, he submitted answers to nearly 350 written questions from Democrat Senators on this Committee. That's over 500 questions that he has answered for this Committee, on the record—prior to today's hearing. And I would point out that this total does not include Mr. Kavanaugh's answers to the Judiciary Committee's detailed questionnaire, his interviews and other screening by the ABA Standing Committee, and his one-on-one meetings with Senators from both sides of the aisle.

I would submit that, even before today's hearing began, it's clear that Brett Kavanaugh has been one of the most poked and prodded circuit court nominees in history. He is a known commodity if ever there was

one. Through all of this, Mr. Kavanaugh has remained patient, good-natured, and forthcoming.

So I feel compelled to state the obvious: today's hearing has very little to do with Brett Kavanaugh at all. Everyone knows that this Committee is set to vote straight along party lines—just like the Committee's vote on Justice Alito—and that's a real shame.

That was why some members on my side, including myself, were initially opposed to a second hearing. But I've had a change of heart. I've concluded that this hearing is a valuable chance for the American people to hear from my colleagues on the other side. A chance to be reminded of the other side's approach to judicial nominations. A chance to learn why most of them so vigorously opposed Chief Justice John Roberts and Justice Samuel Alito. And a chance to be reminded of why they continue to oppose so many of the supremely qualified judicial nominees of this President—like the nominee before us today.

The tone and tenor of this nomination and this hearing are reminiscent of the Roberts and Alito confirmation battles. We are meeting under the cloud of the Minority Leader's recent threats of a filibuster. These filibuster threats have been noted by my side—and have certainly captured the attention of the American people.

Here we are today, just a few months removed from the bitter, partisan Alito hearings. A filibuster threat hung over those hearings as well. Recall that a filibuster of Justice Alito's nomination—organized from Davos, Switzerland—was attempted on the Senate floor. That filibuster failed because Justice Alito had earned the bipartisan support that this Committee had denied him.

We've already heard about Brett Kavanaugh's stellar qualifications—his three judicial clerkships, including a stint with Justice Kennedy on the Supreme Court, his public service with the Solicitor General's office and the executive branch, and his experience as an advocate on behalf of both the "big guy" and the "little guy"—to use the other side's descriptions. Like Chief Justice Roberts and Justice Alito, Brett Kavanaugh's intellect is first-rate. And like Chief Justice Roberts and Justice Alito, Brett Kavanaugh firmly believes in judicial restraint. He believes that judges should not make the law, but should simply apply the law made by the people's representatives. Like those two fine Supreme Court nominees, Brett Kavanaugh will not rewrite our Constitution and invent new rights out of thin air. He will respect the legislative choices made by the American people.

I remain convinced that the reason I supported Roberts and Alito—their philosophy of judicial restraint—is the same reason their detractors opposed their nominations. And it's the same reason they oppose Brett Kavanaugh. The sad fact is that there are some in this

country who do not want judges who respect the legislative choices made by the American people.

There are some in this country who have views that are so liberal they have no chance to persuade the American people to accept them. For example, there are some who want to end traditional marriage between only one man and one woman. There are some who want to continue the barbaric practice of partial birth abortion. There are some who even want to abolish the Pledge of Allegiance.

For these people, the only way they will ever see their views enacted into law is to circumvent the American people and to pack the courts with judges willing to impose their liberal agenda on the rest us. They believe in judicial activism because judicial activism is all they have.

Of course, they will never say they believe in judicial activism. They know the American people do not favor judicial activism. They know the American people believe in democracy and do not want unelected judges making the laws in this country.

So like the Roberts and Alito nominations, Brett Kavanaugh's qualifications are beyond reproach—and his opponents are forced to grasp for any means they can find to defeat his nomination. I am reminded of the statement made by Nan Aron, President of the

Alliance for Justice, and one of Justice Alito's biggest detractors. As Ms. Aron put it: "you name it, we'll do it" to defeat Judge Alito.

So here we are again. Very little has changed since Mr. Kavanaugh's first hearing two years ago. The objections to his nomination still proceed as follows. First, he lacks the proper experience. In the alternative, he's got the wrong kind of experience. And, mixed up somewhere in there, he's represented the wrong clients. As this hearing should demonstrate, each of these objections is flimsy at best. Today Mr. Kavanaugh will be introduced by two distinguished members of the judiciary—Judges Stapleton and Kozinski—men for whom he served as a law clerk. I am confident that they will speak to the qualities Mr. Kavanaugh possesses—qualities that make him an outstanding nominee: extraordinary intellect, legal experience, integrity, respect in the legal community, and a commitment to interpreting law rather than making it. These are the qualities that this President seeks in federal court nominees. He found these qualities in Chief Justice Roberts and Justice Alito—and has certainly found them in Brett Kavanaugh.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
May 9, 2006

CONTACT: Laura Capps/Melissa Wagoner
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STATEMENT OF SENATOR EDWARD M. KENNEDY ON NOMINATION OF BRETT KAVANAUGH

(AS PREPARED FOR DELIVERY BEFORE SENATE JUDICIARY COMMITTEE)

The Constitution gives the Senate the important responsibility of reviewing judicial nominations to guarantee that federal judges are truly independent, rather than merely a political extension of the White House. We must assure ourselves that judicial nominees, especially appellate nominees – particularly those to the D.C. Circuit - have the experience, ability, and temperament, for that key court, and a commitment to enforcing the basic constitutional and federal statutory protections that are central to our American democracy. If their primary qualification is partisan loyalty, they do not belong on any federal court, let alone the D.C. Circuit.

No matter where they live, all Americans are affected by appointments to the D.C. Circuit. It has a unique role among the federal courts in interpreting federal power. It's been given exclusive jurisdiction over many laws that protect consumers, employees' rights, civil rights, and the environment.

It's the only federal appellate court that can hear appeals on rules to protect the environment under the Clean Air Act and the Safe Drinking Water Act. It has exclusive jurisdiction over constitutional challenges to the North American Free Trade Act. It decides far more appeals than any other circuit of decisions by the National Labor Relations Board on unfair labor practices. As a practical matter, because the Supreme Court can review only a small number of lower court decisions, the judges on the D.C. Circuit often have the last word on interpretations of these important rights.

As a result, the Committee needs to take special care in considering judges for lifetime positions on the D.C. Circuit. We must be confident that appointees to this prestigious court have the highest qualifications and ethical standards, and will fairly interpret the laws, particularly laws that protect our basic rights.

The ABA has now completed three evaluations of Mr. Kavanaugh's qualifications. Each time they look more closely, his rating goes down, and now a majority of that committee does not believe he can meet their highest standard for federal nominees. Chairman Specter properly concluded that the ABA's downgrading justified a Judiciary committee hearing to review the details of their investigation and determination. But apparently the White House feared what the ABA would say in public, because at the last minute, we were presented with a private telephone conference call in which most members were unable to participate and no Senator was able to join for more than a few minutes.

The White House fears were justified, since the ABA's testimony and responses to staff questions raised a host of new questions which should be answered by the ABA and then by the nominee in open session. Among other revelations, it appears that, contrary to White House claims that changes in committee membership caused the downgrade, in fact many members of the ABA committee downgraded their own assessments of the nominee based on new information.

We don't know whether the nominee will be any more responsive now than he was in his original hearing three years ago and in his long-delayed answers to written questions two years ago.

So we have a lot to do to meet our constitutional responsibilities in this matter. Yet we are told that we must meet some artificial deadline for dealing with this nomination in Committee. That's uncalled for, and it would be irresponsible of us to consider this nomination until all the relevant questions have been asked and fully answered.

To start with, Mr. Kavanaugh has the heavy burden of showing that his White House experience qualifies him for this Court. He has less than half the average legal experience of D.C. Circuit nominees, having worked as an attorney for just over fourteen years, counting the time he spent as a law clerk. He's been a practicing attorney for only ten years, and he's never tried a case on his own or taken a case to verdict. When asked to name his ten most significant cases on his Senate questionnaire, Mr. Kavanaugh could identify only five in which he appeared in court, and only two in which he served as lead counsel.

So if, as a White House lawyer, he was not pursuing legal issues, he has a problem. If he was involved in legal issues, we need to know what they were, and what he did, and what he thought.

For example, I asked Mr. Kavanaugh whether he had any experience handling labor law matters. He couldn't provide a single example of work in this area - not one. Instead, he made only a vague reference to his work as a law clerk and his brief time in the Justice Department. He also couldn't give even one example showing that he has any experience involving the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act, or any other aspect of environmental law. Yet the D.C. Circuit plays a critical role in deciding questions under these statutes.

Mr. Kavanaugh is clearly intelligent and well-educated, but there's no question he lacks the depth of knowledge and legal experience that we expect for judges on the D.C. Circuit. The qualifications that he does have are weighted heavily toward partisan politics.

Whether you agree or disagree with the political positions he's advanced during his career, there's no question that he's been a partisan political operator, not a litigator.

Much of his public service has been in the current Bush White House, where his duties included recommending some of the President's most bitterly divisive judicial nominees. His best known work before the White House was investigating the death of Vincent Foster during the Clinton years, and drafting portions of the infamous Starr report.

He states that he worked on the Circuit nomination of Jay Bybee, the author of the notorious memorandum that provided a blueprint for the Administration's torture policy. He never provided that memorandum to us, so we were forced to vote on Bybee's life-time appointment to the federal bench without ever knowing his full record. We need to know whether Mr. Kavanaugh knew anything about the Bybee torture memo at any time before Bybee was confirmed.

Today, when the need is great to de-politicize the nominations process, and members of both parties have expressed a desire for judges who will rise above partisan political interests, it is hard to see why the majority is pressing this candidate. President Bush says he wants independent judges, but his nominations speak louder than any words. He has nominated a clear partisan to one of the nation's most important federal court of appeals – a person who has clearly shown through his own role in the nominations process that he views judges as political actors, not impartial decision-makers.

That is the real issue in this hearing, and it's wrong to duck it.

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Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on the Nomination of Brett Kavanaugh
May 9, 2006

Today marks the fifth anniversary of the day that this President announced his first group of judicial nominees and began his court packing efforts. I went to the White House in good faith that May five years ago to try to work with the President to fill the scores of vacancies left open when Republican Senators stalled more than 60 of President Clinton's nominees. Thereafter, first as Chairman of the Senate Judiciary Committee and later as its Ranking Member, I worked hard to treat those nominees more fairly than Republicans had treated President Clinton's nominees. We were able to join together to move nominations expeditiously, including the confirmation of five of the nine judges confirmed from the President's initial list who were among the 17 circuit court nominees the Senate confirmed in my 17 months as Chairman. I afforded hearings to a number of controversial nominees, something my Republican predecessor as Chairman refused to do. I voted for some and, in good conscience, voted against Senate consent for others.

All but one of those initial nominations has run their course. With regard to that one, the President should heed the call of North Carolina Police Benevolent Association, the North Carolina Troopers' Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and Paramedics of North Carolina, as well as the advice of Senator John Edwards, and withdraw his ill-advised nomination of Judge Terrence Boyle. Law enforcement from North Carolina and law enforcement from across the country oppose the nomination. Civil rights groups oppose the nomination. Those knowledgeable and respectful of judicial ethics oppose this nomination.

Since President Bush took office in January 2001, the Senate has confirmed 240 of his judicial nominees, including two Supreme Court Justices. One hundred of those judges were confirmed during the 17 months when there was a Democratic majority in the Senate compared to 145 judges in the other 45 months under Republican control. Unfortunately, as demonstrated by the recent withdrawals of several nominations— Claude Allen among them-- all too often this White House seems more interested in rewarding cronies and picking political fights rather than being thorough in selecting lifetime appointments of judicial officers who are entrusted with protecting the rights of Americans.

The difficult and controversial nomination and re-nomination of Judge Terrence Boyle and that of the nominee before us today are further signs that the Bush-Cheney Administration and its allies in the Senate are more interested in picking election year fights rather than well-qualified judges.

At a time when the Senate should be addressing Americans' top priorities, including ways to make America safer, the war in Iraq, rising gas prices, health care costs, stem cell research, comprehensive immigration reform and the reauthorization of the Voting Rights

Act, the President and his Senate allies, instead, try to divide and distract from fixing real problems by pressing forward with controversial nominations.

The siren call of the special interest groups on the right is urging the Senate Republican leadership toward confrontation over controversial judicial nomination, again. The Senate's job is to fulfill our duty under the Constitution so that we can assure the American people that the judges confirmed to lifetime appointments to the highest courts in this country are being appointed to be fair and protect their interests rather than to advance a political agenda.

The Senate Republican leadership is ready to cater to the extreme right-wing and special interest groups agitating for a fight over judicial nominations. These are the same narrow interest groups that opposed the nomination of Harriet Miers to the Supreme Court and forced the President to withdraw her nomination after he said that he would never do so.

With burgeoning scandals throughout the Administration, with word last week of yet another investigation, this one into poker parties at the Watergate and limousine services and who knows what else, with reports of lucrative government contracts being steered to cronies, with the investigations arising from the criminal convictions of Jack Abramoff, Michael Scanlon, and Duke Cunningham, we meet today to hear from a White House loyalist and insider.

With the sudden resignation last Friday of the President's hand-picked head of the CIA, America witnessed another "heck of a job" accolade to an Administration insider leaving a critical job undone. What is desperately lacking throughout this Administration is accountability. A Republican-controlled Congress has not provided a check and has made it all the more important for the courts to be that check to preserve our rights and way of life, to check the Government's overreaching.

This hearing gives this young man another chance to show his independence. Unless he demonstrates that capacity, I will oppose this nomination. I hope that he will start by using this opportunity to correct his testimony from his 2003 hearing and testify straightforwardly about the Administration's resistance to compensating the 9/11 families when I insisted that be part of the legislation granting the airlines special benefits.

Last year, when the President nominated Harriet Miers, a woman who had not gone to Ivy League schools but had a more impressive background of legal experience than this nominee, Republicans questioned her qualifications and demanded answers about her work at the White House and legal philosophy. They defeated her nomination before allowing her a hearing. It appears that Republicans are back to their rubberstamping routine with every Senate Republican ready to approve this nomination without question or deliberation.

I had hoped, as we discussed in open session last Thursday, the Committee would hear from ABA representatives today on why they took the unusual step of lowering Mr. Kavanaugh's initial ABA rating after two years. The White House had put out the word,

falsely, that this was merely the result of a change in the membership of the ABA evaluation committee. We now know that was not correct. In fact, three-quarters of those who continue on the Committee -- who voted previously on this nomination -- downgraded the nomination based on the recent interviews and review. One judge who presided over a case involving Mr. Kavanaugh said his argument was "less than adequate" and described him as "sanctimonious" and as someone who demonstrated "experience on the level of an associate." Others interviewed by the ABA raised concerns about Mr. Kavanaugh's ability to be balanced and fair given his many years in partisan positions working to advance a political agenda. Mr. Kavanaugh was described by interviewees as "insulated" and "immovable and very stubborn and frustrating to deal with on some issues." These are not qualities that make for a good judge.

His work for the past six years at the White House leads to many questions that require answers before we can proceed. What matters is he familiar with at the White House that he will recuse himself from as a judge, if confirmed? Will he protect the rights of the American people to know about their Government given the secrecy policies of this Administration, which he helped design? How did he exercise good judgment while serving in the important Staff Secretary position? And, as I have said, where is the demonstration of his independence from the policies of this Administration? I look forward to answers to these questions and others as this Committee seeks to fulfill its responsibilities to the Senate and the American people.

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S. HRG. 108–878

CONFORMATION HEARING ON THE NOMINATION OF BRETT M. KAVANAUGH TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

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NOMINATION OF BRETT M. KAVANAUGH, OF THE DISTRICT OF COLUMBIA, TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

TUESDAY, APRIL 27, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, Sessions, Cornyn, Leahy, Kennedy, Feinstein, Schumer, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Good morning. I am pleased to welcome to the Committee today members, guests, and our nominee, Mr. Brett Kavanaugh, who has been nominated by President Bush to be United States Circuit Judge for the District of Columbia Circuit. We also welcome members of his family. I would note his father, Mr. Ed Kavanaugh, a long-time president of CTFA. We all know Ed. We know what a fine person he is and what a great individual he is, and we all respect him. So we want to welcome you, Judge, Ed's wife, the mother of Brett, who is a renowned judge, and we appreciate having both of you here.

Before we turn to the nomination, I want to tell members of the Committee that I remain hopeful that we can continue to complete the work of the Committee on both legislation and nominees. I was disappointed that we were not able to accomplish more at the markup last week. Earlier this month, we did report five district judges and two circuit judges. So I do appreciate the Committee's efforts in that regard.

Now, I remain concerned about the executive calendar and floor action. I remain hopeful that an accommodation on nominees can be reached and that floor action can be scheduled for those judges. The Senate has confirmed only four judges this year—all district court judges. By comparison, in the last Presidential election of 2000, with a Democratic President and a Republican Senate, seven judges had been confirmed by this point in the year, including five circuit court judges. Furthermore, we are way behind the pace of that election year, which saw a total of 39 judges confirmed. And

we remain well behind President Clinton's first-term confirmation total of 203.

So while we have made some progress in reporting nominees to the full Senate, the work of confirming judges remains. We presently have 29 judges on the executive calendar. Five circuit court nominees remain from last year on the executive calendar in addition to the six reported this year. Eighteen district nominees are available for Senate confirmation, including two holdovers from the last session. But we are making progress, and I thank all members for their support and ask for their continued cooperation.

Now, today we will consider the nomination of Mr. Brett M. Kavanaugh. He is an outstanding nominee who has been nominated to the Circuit Court of Appeals for the District of Columbia. He comes to us with a sterling resume and a record of distinguished public service. Mr. Kavanaugh currently serves as Assistant to the President of the United States and Staff Secretary, having been appointed to the position by President George W. Bush in 2003. He previously served in the Office of Counsel to the President as an Associate Counsel and a Senior Associate Counsel.

After graduating from Yale Law School in 1990, Mr. Kavanaugh served as a law clerk for three appellate judges, so he has extensive judicial experience as well: Justice Anthony M. Kennedy of the Supreme Court, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, and Judge Walter K. Stapleton of the United States Circuit Court of Appeals for the Third Circuit. He served for 1 year as an attorney in the Office of the Solicitor General, where he prepared briefs and oral arguments.

Mr. Kavanaugh served in the Office of Independent Counsel under Judge Starr, where he conducted the office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. He also was responsible for briefs and arguments regarding privilege and other legal matters that arose during investigations conducted by the office. Mr. Kavanaugh was part of the team that prepared the 1998 report to Congress regarding possible grounds for impeachment of the President of the United States.

In addition to this extensive public service, Mr. Kavanaugh was also in private practice. As a partner at the distinguished firm of Kirkland and Ellis, one of the great firms in this country, he worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation.

Mr. Kavanaugh, as I have said, received his law degree from Yale Law School, where he was notes editor for the Yale Law Journal. He is a cum laude graduate of Yale College, where he received his B.A. degree.

The American Bar Association has rated Mr. Kavanaugh as "Well Qualified," its highest rating. Let me remind everyone what that rating means. According to guidelines published by the American Bar Association Standing Committee on Federal Judiciary, "To merit a rating of 'Well Qualified,' the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

I want to turn now to a few of the arguments which I have heard raised by a number of Mr. Kavanaugh's opponents and address some of the concerns I expect to hear today.

First, is that Mr. Kavanaugh is too young and inexperienced to be given a lifetime appointment to the Federal bench, particularly to the important Circuit Court of Appeals for the District of Columbia. Now, there are many examples of judges who were appointed to the bench at an age similar to Mr. Kavanaugh, who is 39 years old, and have had illustrious careers. For example, all three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39, and all have been recognized as distinguished jurists. Justice Kennedy was appointed to the Ninth Circuit when he was 38 years old; Judge Kozinski was appointed to the Ninth Circuit when he was 35 years old; and Judge Stapleton was appointed to the district court at 35 and later elevated to the Third Circuit Court of Appeals.

I think many of my colleagues would agree that age is not a factor in public service, other than the constitutional requirements. I would note that many in this body began their service in their 30s, if not barely age 30. Through successful re-elections, we have been benefited from a lifetime of service from such members of this body and members of the judiciary as well.

With regard to judicial experience, I would reiterate that Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials with extensive experience in the appellate courts themselves, both as a clerk and as counsel, having argued both civil and criminal matters before the Supreme Court and appellate courts throughout this country.

As I have pointed out with previous nominees, a number of highly successful judges have come to the Federal appellate bench without prior judicial experience. On this particular court, the D.C. Circuit, only three of the 19 judges confirmed since President Carter's term began in 1977 previously had served as judges. Furthermore, President Clinton nominated and the Senate confirmed a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the D.C. Circuit.

I would mention that I think the work in the Supreme Court and the Circuit Courts of Appeals that Mr. Kavanaugh has had, do qualify him highly, in addition to all the other qualifications that he has.

Opponents will attempt to portray Mr. Kavanaugh as a right-wing ideologue who pursues a partisan agenda. I have to tell you this allegation is totally without merit, and a careful scrutiny of his record will demonstrate otherwise. He is an individual who has devoted the majority of his legal career to public service, not private ideological causes. Within his public career, he has dedicated his work to legal issues, always working carefully and thoroughly in a professional manner.

In short, Mr. Kavanaugh is a person of high integrity, of skilled professional competence, and outstanding character. He will be a great addition to the Federal bench, and he has the highest rating

that the American Bar Association can give. And all of that stands him in good stead.

So I look forward to hearing your testimony and any responses that you might make to questions from the esteemed members of this Committee.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Now I will turn to our acting Ranking Member at this time, Senator Schumer, for any remarks that he would care to make, and then we will turn to Senator Cornyn, who will introduced Mr. Kavanaugh. But first I would like to introduce your fiancee. I will have you do that for us. Why don't you do it right now?

Mr. KAVANAUGH. My fiancee, Ashley Estes, from Abilene, Texas, is here, as well as my parents, Ed and Martha Kavanaugh.

Chairman HATCH. Ashley, Ed, and Martha, we are so grateful to have all of you here. Ashley, don't let this affect you, this meat grinder that we go through around here. Just understand, okay?

We will turn to Senator Schumer.

Senator SCHUMER. Mr. Chairman, I will defer to Mr. Cornyn first to introduce him, and then I will speak.

Chairman HATCH. That will be fine.

PRESENTATION OF BRETT M. KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. I appreciate that very much, Mr. Chairman and Senator Schumer, that courtesy. I do just have some brief comments I want to make by way of introduction.

It is my honor to introduce to the Committee, to supplement those remarks already made by the Chairman, about a distinguished attorney and devoted public servant, Brett Kavanaugh. I have known Brett for several years and had the privilege of working with him on a case that I argued to the United States Supreme Court, so I have had the chance to observe his legal skills from up close. And I have every confidence that he would be an exceptional jurist on the United States District Court of Appeals for the D.C. Circuit.

His distinguished academic and professional record confirms beyond all doubt that he possesses the intellectual ability to be a Federal judge. His temperament and character demonstrate that he is well suited to that office. Indeed, I can think of no better evidence of his sound judgment than the fact he has chosen to marry a good woman from the great State of Texas, who has just been introduced to the Committee. Brett deserves the support of this Committee and the support of the United States Senate.

As you know, Mr. Chairman, one-fourth of the active D.C. Circuit Court is currently vacant, and as you know, Mr. Chairman, the D.C. Circuit is unique among the Federal courts of appeals. Of course, it is an appellate court, not a trial court, and appellate judges do not try cases or adjudicate factual disputes. Instead, they hear arguments about legal issues. But unlike the docket of other courts of appeals, the docket of the D.C. Circuit is uniquely focused on the operations of the Federal Government. Accordingly, attor-

neys who have experience working with and within the Federal Government are uniquely qualified to serve on that distinguished court.

Brett Kavanaugh is an ideal candidate for the D.C. Circuit. He has an extensive record of public service. For over a decade, he has held the most prestigious positions an attorney can hold in our Federal Government. He is, as you pointed out, a graduate of Yale College and Yale Law School. He served as law clerk to three distinguished Federal judges, including United States Supreme Court Justice Anthony Kennedy.

Brett has also served in the Office of the Solicitor General representing the U.S. Government in cases before the United States Supreme Court. He served as a Federal prosecutor in the Office of Independent Counsel under Hon. Kenneth Starr. And as you pointed out, he personally has argued civil and criminal cases in the United States Supreme Court and courts of appeals throughout the country.

And he has been called upon for his wisdom and counsel by the President of the United States, first, by his service as Associate Counsel and Senior Associate Counsel to the President, and now as Staff Secretary, one of the President's most trusted senior advisers.

Mr. Chairman, I can think of few attorneys at any age who can boast this level of experience with the inner workings of the Federal Government. It is no wonder then that the American Bar Association has raised him "Well Qualified" to serve on the D.C. Circuit, the gold standard, as you observed.

Ordinarily, a nominee possessing such credentials and experience would have little difficulty receiving swift confirmation by the United States Senate. Unfortunately, observers of this Committee will know that we are not living under ordinary circumstances today.

I hope that this distinguished nominee will receive fair treatment. His exceptional record of public service in the Federal Government will serve him well on the D.C. Circuit bench. His wisdom and counsel have been trusted at the highest levels of Government. Yet I fear that it is precisely Brett's distinguished record of experience that will be used against him. I sincerely hope that will not happen. After all, it would be truly a shame to use one's record of service against a nominee, especially with respect to a court that is so much in need of jurists who are knowledgeable about the inner workings of the Federal Government.

Indeed, many successful judicial nominees have brought to the bench extensive records of service in partisan political environments. I have often said that when you place your hand on the Bible and take an oath to serve as a judge, you change. You learn that your role is no longer partisan, if it once was, and that your duty is no longer to advocate on behalf of a party or a client but, rather, to serve as a neutral arbiter of the law.

The American people understand that when your job changes, you change, and that people are fully capable of putting aside their personal beliefs in order to fulfill their professional duty. That is why this body has traditionally confirmed nominees with clear records of service in one particular party or of a particular philosophy.

For example, Ruth Bader Ginsburg served as general counsel of the ACLU. Of course, it is difficult for me to imagine a more ideological job than general counsel of the ACLU, yet she was confirmed by an overwhelming majority of the U.S. Senate, first by unanimous consent to the D.C. Circuit and then by a vote of 96–3 to the United States Supreme Court.

Stephen Breyer was the Democrats' chief counsel on the Senate Judiciary Committee before he, too, was easily confirmed to the First Circuit and then to the United States Supreme Court.

Byron White was the second most powerful political appointee at the Justice Department under President Kennedy when the Senate confirmed him to the Supreme Court by a voice vote.

Abner Mikva was a Democrat Member of Congress when he was confirmed to the D.C. Circuit by a majority of the Senate.

Indeed, as many as 42 of the 54 judges who have served on the D.C. Circuit came to the bench with political backgrounds, including service in appointed or elected political office. All received the respect that they deserved and the courtesy of an up-or-down vote on the floor of the U.S. Senate, and all received the support of at least a majority of Senators, as our Constitution demands.

So, historically, this body and this Committee have exercise the advise and consent function seriously and appropriately by emphasizing legal excellence and experience and not by punishing nominees simply for serving their political party. It would be tragic for the Federal judiciary and ultimately harmful to the American people who depend on it to establish a new standard today and declare that any lawyer who takes on a political client is somehow disqualified for confirmation, no matter how talented, how devoted, or how fit for the Federal bench they may truly be.

Brett Kavanaugh is a skilled attorney who has demonstrated his commitment to public service throughout his life and career. He happens to be a Republican, and he happens to be close to the President. This is a Presidential election year, but the rigorous fight for the White House should not spill over to the judicial confirmation process any more than it already has. Last year, it was wrong for close friends of the President, like Texas Supreme Court Justice Priscilla Owen, to be denied the basic courtesy and Senate tradition of an up-or-down vote simply to score political points against the President. And this year, it would be terribly wrong for Brett to be denied confirmation or at least an up-or-down vote simply because he has ably and consistently served his President, his party, and his country.

And, with that, I thank you, Mr. Chairman.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman HATCH. Thank you, Senator. Normally we would defer to the Democrat leader on the Committee, Senator Leahy, but he has asked that I first go to Senator Schumer, and then the last statement will be made by Senator Leahy, and then we will turn to you for any statement you would care to make, Mr. Kavanaugh.

Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. And, first, I want to welcome Brett Kavanaugh, his parents, and his fiancee to today's hearing. Something tells me this won't be the easiest or the most enjoyable hearing for them or for us. But I know that Brett appreciates what an important position he has been nominated to and how important this process is, and I know how proud his family is of him.

Now, Mr. Chairman, it is really unfortunate we have to be here again on another controversial nomination. It is unfortunate because it is so unnecessary. We have offered time and time and time again to work with the administration to identify well-qualified, mainstream conservatives for these judgeships, especially on the D.C. Circuit. Instead, the White House insists on giving us extreme ideological picks.

In this instance, the nomination seems to be as much about politics as it is about ideology, and I am sometimes a little incredulous. The President makes the most political of picks, and then my colleagues tell us not to be political. Tell the President, and maybe we could come to some agreement here together. While the nominations of William Pryor and Janice Rogers Brown and Priscilla Owen may be among the most ideological we have seen, the nomination of Brett Kavanaugh is among the most political in history.

Mr. Kavanaugh is a tremendously successful young lawyer. His academic credentials are first-rate. He clerked for two prestigious circuit court judges and a Supreme Court Justice. And he has been quickly promoted through the ranks of Republican lawyers. Some might call Mr. Kavanaugh the Zelig of young Republican lawyers, as he has managed to find himself at the center of so many high-profile, controversial issues in his short career, from the notorious Starr Report to the Florida recount, to this President's secrecy and privilege claims, to post-9/11 legislative battles, including the victims compensation fund, to controversial judicial nominations. If there has been a partisan political fight that needed a good lawyer in the last decade, Brett Kavanaugh was probably there. And if he was there, there is no question what side he was on.

In fact, Mr. Kavanaugh would probably win first prize as the hard-right's political lawyer. Where there is a tough job that needs a bright, hard-nosed political lawyer, Brett Kavanaugh has been there.

Judgeships should be above politics. Brett Kavanaugh's nomination seems to be all about politics. If President Bush truly wanted to unite us, does anyone believe he would have nominated Brett Kavanaugh? If President Bush wanted to truly unite us, not divide us, this would be the last nomination he would send to the Senate. Anyone who has any illusion that President Bush wants to change the tone in Washington ought to look at this nomination. You could not think of another nomination, given Mr. Kavanaugh's record, more designed to divide us.

Brett Kavanaugh's nomination to the D.C. Circuit is not just a drop of salt in the partisan wounds, it is the whole shaker.

The bottom line seems simple: This nomination appears to be judicial payment for political services rendered. There is much that

many of us find troubling about this nomination. I look forward to hearing the nominee address our myriad concerns. I would just like to take a moment to lay out two areas that will be central to this discussion.

First, for the first 2 years of the administration, when the administration was developing and implementing its strategy to put ideologues on the bench, Mr. Kavanaugh quarterbacked President Bush's judicial nominations. He spoke frequently at public events defending the President's decision to nominate such controversial jurists as Charles Pickering, Carolyn Kuhl, Priscilla Owen, and William Pryor.

As you all know, many of us have been shocked and appalled by the extreme and out-of-mainstream ideologies adhered to by these and other nominees. I speak for myself, many of my colleagues, and a sizable majority of the American people when I say we do not want ideologues on the bench, whether too far right or too far left. Judges who bring their own agendas to the judiciary are inclined to make law, not interpret law, as the Founding Fathers intended. We want fair and balanced judges in the real sense of those words.

Nonetheless, this administration has repeatedly bent over backwards to choose nominees who defend indefensible ideas and whose records are rife and replete with extreme activism.

During his time in the White House Counsel's Office, Brett Kavanaugh played a major role in selecting these judges, preparing them for hearings, and defending their nominations at public events. In the course of defending the administration's record on judicial nominations, Mr. Kavanaugh routinely cited the five criteria used by President Bush in selecting judges. The five criteria he cites are: one, extraordinary intellect; two, experience; three, integrity; four, respect in the legal community and the nominee's home State community; and, five, commitment to interpreting law, not making law.

I don't think I am stepping out on a limb when I say that every one of us up here sees those five criteria as outstanding factors to consider when choosing judges. But in the same public discussions of the President's judicial nominees where he cited these five criteria, Mr. Kavanaugh has routinely denied that the President considers a nominee's ideology. The record before us starkly belies that claim. It just does not hold water. If ideology did not matter, we would see nominations scattered across the political spectrum. There would be a roughly equal number of Democrats and Republicans, with a healthy dose of independents thrown in. We would see some nominees edge left of center while others tip right, while a few outliers would be at each extreme.

Even a President who wanted to have only some ideological impact on the bench would have some balance. That is not the case with the nominations Brett Kavanaugh has shepherded.

If you were to map the circuit court nominees on an ideological scale of 1 to 10, with 10 being very liberal and 1 being very conservative, there is a huge number of 1s and 2s, some 3s, and only a smattering of 4s and 5s. Of course, ideology played a role in this process. Suggesting otherwise insults our intelligence and the intelligence of the American people.

For the last 3 years, I have been trying to get us to talk honestly about our differences over judicial nominees. We have pretty much stopped citing minor personal peccadilloes in the nominees' histories as pretext for stopping nominations that we really oppose on ideological grounds. The process is better for the honesty we have brought to it.

Now, I hope we can have an honest dialogue today. Toward that end, I look forward to hearing Mr. Kavanaugh explain how it is possible that the President who has made some of the most extreme ideological nominations in history does not consider ideology when he makes those picks.

A second area I expect we will get into is closely related to the first. As I noted at the outset, there is no question that Brett Kavanaugh is a bright and talented young lawyer. There is no question that for someone of his age he has an extraordinary resume and that he has achieved in every job he has held. But there are serious questions—and it is not the age; it is that he has never tried a case; he has a record of service after he clerked almost exclusively to highly partisan political matters—why he is being nominated to a seat on the second most important court in America.

Why is the D.C. Circuit Court so important? The Supreme Court currently takes fewer than 100 cases a year. That means that the lower courts resolve the tens of thousands of cases a year brought by Americans seeking to vindicate their rights. All other Federal appellate courts handle just those cases arising from within its boundaries. So the Second Circuit, where Senator Leahy and I are from, takes cases coming out of New York and Connecticut and Vermont. But the D.C. Circuit doesn't just take cases brought by residents of Washington, D.C. Congress has decided there is a value in vesting one court with the power to review certain decisions of administrative agencies. We have given plaintiffs the power to choose the D.C. Circuit. In some cases, we force them to go to the D.C. Circuit because we have decided, for better or for worse, when it comes to these administrative decisions, one court should decide what the law is for the whole Nation.

So when it comes to regulations adopted under the Clean Air Act by EPA or labor decisions by the NLRB, rules propounded by OSHA, gas prices regulated by FERC, and many other administrative agencies, the decisions are usually made by the judges on the D.C. Circuit. To most, it seems like this is the alphabet soup court since virtually every case involves an agency with an unintelligible acronym—EPA, NLRA, FCC, SEC, FTC, FERC, and so on and so forth. The letters, though, that comprise this alphabet soup are what makes our Government tick. They are the agencies that write and enforce the rules that determine how much reform there will be in campaign finance reform. They determine how clean clean water has to be for it to be safe for families to drink. They establish the rights that workers have when negotiating with corporations.

The D.C. Circuit is important because its decisions determine how these Federal agencies go about doing their jobs. And in doing so, it directly impacts the daily lives of all Americans more than any other court in the country with the exception of the Supreme Court.

So there is a lot at stake when considering nominees to the circuit and how their ideological predilections will impact the decisions coming out of the court and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

Perhaps more than any other court aside from the Supreme Court, the D.C. Circuit votes, when you study them, break down on ideological lines with amazing frequency. People who went to same law schools and clerked for the same courts somehow vote almost dramatically differently depending on who appointed them. I wonder why. Ideology. And this divide happens in cases with massive national impact.

It is not good enough just to cite that someone went to a great law school and clerked for some very distinguished judges. We have an obligation to weigh how the ideological and political predispositions of those who are nominated are going to affect America. So we have a real duty to scrutinize the nominees who come before us seeking lifetime appointment to this court. And it is no insult to Mr. Kavanaugh to say that there is probably not a single person in this room, except perhaps Mr. Kavanaugh and his family, who doesn't recognize that there are scores of lawyers in Washington and around the country who have equally high intellectual ability but who have more significant judicial, legal, and academic experience to recommend them for this post.

It is an honor and a compliment that, despite his relative lack of experience, this administration wants Brett Kavanaugh to have this job. But when a lifetime appointment to the second highest court in the land is at stake, the administration's desire to honor Mr. Kavanaugh must come into question.

When the President picked Brett Kavanaugh, he was not answering the question of who has the broadest and widest experience for this job or who can be the most balanced and the most fair. He was rewarding a committed aide who has proven himself in some tough political fights.

Would we have welcomed the renomination of Alan Snyder or Elena Kagan, now dean of Harvard Law School, two extremely well-qualified Clinton nominees who never received consideration from this Committee? Of course we would have. But we also would have welcomed the nomination of a mainstream conservative who has a record of independence from partisan politics, who has demonstrated a history of non-partisan service, who has a proven record of commitment to the rule of law, and who we can reasonably trust will serve justice, not just political ideology and political patrons, if confirmed to this lifetime post.

Brett Kavanaugh is the youngest person nominated to the D.C. Circuit since his mentor, Ken Starr. If you go through the prejudicial appointment accomplishments of the nine judges who sit on the D.C. Circuit, you will see that Mr. Kavanaugh's accomplishments pale by comparison.

Chief Judge Ginsburg held several high-level executive branch posts, including heading the Antitrust Division of DOJ, and was a professor at Harvard Law School.

Judge Edwards taught at Michigan and Harvard law schools and was Chairman of Amtrak's Board of Directors and published numerous books and articles.

Judge Sentelle had extensive practice as a prosecutor and trial lawyer, and experience as a State judge and a Federal district court judge.

Judge Henderson had a decade in private practice, a decade of public service, and 5 years as a Federal district court judge.

Judge Randolph spent 22 years with Federal and State Attorneys General offices, including service as Deputy Solicitor General of the United States, and a law firm partnership.

Judge Rogers had roughly 30 years of service in both Federal and State governments, including a stint as corporation counsel for D.C. and several years on D.C.'s equivalent of a State Supreme Court.

Judge Tatel divided his nearly 30 years of experience between the public and private sectors, including a partnership at a prestigious law firm and service as general counsel of Legal Services.

Judge Garland practiced for 20 years, held a law firm partnership, and supervised both the Oklahoma City bombing and the Unabomber trial while in a senior position at the Justice Department.

And Judge Roberts spent nearly 25 years going back and forth between his law firm partnership where he ran his law firm's appellate practice and significant service in the Department of Justice.

Like Mr. Kavanaugh, many of the nine current judges on this court held prestigious clerkships, including clerkships on the Supreme Court. But they all had significant additional experience, non-partisan experience, to help persuade us that they merited confirmation. And, of course, they are of widely different ideologies.

If Mr. Kavanaugh had spent the last several years on a lower court or in a non-political position, providing his independence from politics, we might be approaching this nomination from a different posture. But he has not. Instead, his resume is almost unambiguously political. Perhaps with more time and different experience we would have greater comfort imagining Mr. Kavanaugh on this court. Suffice it to say, on the record before us Mr. Kavanaugh faces a serious uphill battle.

I look forward to hearing his answers to the difficult questions we will pose.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Chairman HATCH. Senator Leahy, we will now call on you, and then we will turn to Mr. Kavanaugh.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

I listened with interest to the Chairman's comments at the beginning about moving judges quickly or not. I would point out that we have confirmed more judges for President Bush so far in his term than all of President Reagan's first term, and President Reagan, of course, had a Republican majority throughout that.

Now, I know that sometimes there have been some differences. During the 17 months the Democrats controlled the Senate, we did confirm 100 of President Bush's nominees. During the 22 months that the Republicans were in control of the Senate, I believe they confirmed about 73 or 74.

One could say, if we just wanted to go by statistics, that the Democrats have been a lot better to President Bush on his judicial nominees than the Republicans have.

I would like to pick up on something that Senator Schumer said, and it refers to another statement made about whether everybody should get votes. We have differing opinions. The Democrats have blocked a handful of judges from votes. The Republicans, when they were in charge during President Clinton's time, blocked 61 judges from having votes. And I will mention a couple of them, and Senator Schumer has, too: Alan Snyder and Elena Kagan.

Alan Snyder was 54 years old when he was nominated to the D.C. Circuit. He had 26 years of experience as an appellate specialist at the firm of Hogan and Hartson. He was a graduate of the Harvard Law School. He held the prestigious post of president of the Harvard Law Review. He clerked with two Justices of the Supreme Court. But he was not allowed to have a vote by the Republican-controlled Senate, and the reason for that, he had represented Bruce Lindsey, who was an aide of President Clinton. And so I would tell my friend from Texas, he was told that because of his representation of a client he had had, he could not have a vote. And it was determined that he would not be allowed to have a vote by the U.S. Senate, even though I suspect he would have been confirmed had there been a vote.

Elena Kagan was another one. She, too, went to Harvard Law School. She served as a Law Review supervising editor. She supervised 70 student editors, including Miguel Estrada. She went on to clerk for a Justice of the Supreme Court, Justice Marshall, and extraordinarily qualified. But she was told, I guess, because she had had some association working, I think, a job similar to yours at the White House that she should not be allowed to have a vote, and this Committee determined she would not be allowed to come to a vote. One or two Republicans opposed her, so she was never allowed to even be given a vote. Of course, to point out her qualifications, she now has what is arguably the most prestigious post in legal academia. She is dean of the Harvard Law School.

I have made a suggestion to the White House—I realize that they may be disappointed that during Republican control of the Senate they have not moved as many of the President's nominees as the Democrats did during their control of the Senate, but I have made a suggestion to them of a way to move forward. As you know, Mr. Kavanaugh, because you worked in that area, we have the so-called Strom Thurmond rule, which has been followed by this Committee for years, which limits the number of nominees that you get within a few months of the nomination of Presidential candidates during a Presidential election year.

I have suggested that the White House do what all six Presidents have done since I have been here, and that is to work out, as we always have, a list of those who may well be confirmed. Every President can determine how they want it. That is what President

Ford did, that is what President Reagan did, what the former President Bush did, what President Carter did, and what President Clinton did. Maybe President Bush will decide to do the same. That is a decision he has to make, not this Committee.

Senator Hatch and I worked with a number of these other Presidents in doing that. I would hope that we might be able to do it again. As we have demonstrated, in the 17 months that the Democrats were in charge of the Senate, we moved 100, both district court judges and circuit court judges, President Bush's nominees. During the 22 months that the Republicans were in charge, they moved another 70 or 73. I forget what the exact number is. So we have demonstrated our good faith. We have done this notwithstanding the 61 of President Clinton's nominees that were blocked—61 of them were blocked by the Republicans.

Mr. Chairman, I appreciate you and Senator Schumer holding this hearing. I appreciate your courtesy, which I might say is typical of the courtesy you always show in having me make a statement. I will hold my time for questions.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator.

Mr. Kavanaugh, if you will stand and be sworn. Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KAVANAUGH. I do.

Chairman HATCH. Thank you. Mr. Kavanaugh, we will be happy to take any statement you would care to make at this time.

STATEMENT OF BRETT M. KAVANAUGH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. KAVANAUGH. Mr. Chairman, I don't have an opening statement. I am prepared to answer the Committee's questions. And Senator Schumer raised a number of important points. I look forward to answering his questions and the questions of the Committee today.

I do thank, again, my parents and Ashley for being here and look forward to the hearing.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

   Brett Michael Kavanaugh.

2. **Address: List current place of residence and office addresses.**

   Residence: , Washington, DC 20007.
   Office: Staff Secretary's Office, White House West Wing, Washington, DC 20502.

3. **Date and place of birth.**

   February 12, 1965. Washington, DC.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   Single. I have never been married.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Yale Law School, 1987-90. J.D. 1990.
   Yale College, 1983-87. B.A. 1987.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

   President George W. Bush.
   Assistant to the President and Staff Secretary, 2003-present.

   President George W. Bush.
   Senior Associate Counsel to the President, 2003.
   Associate Counsel to the President, 2001-2003.

   Kirkland & Ellis, Washington, DC.
   Partner, 1997-98, 1999-2001.

   Office of Independent Counsel Kenneth W. Starr.
   Associate Counsel, 1994-97, 1998.

Justice Anthony M. Kennedy, Supreme Court of the United States.
Law Clerk, 1993-94.

Office of the Solicitor General, U.S. Department of Justice.
Attorney, 1992-93.

Munger Tolles & Olson, Los Angeles, CA.
Summer Associate, Summer 1992.

Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit.
Law Clerk, 1991-92.

Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit.
Law Clerk, 1990-91.

Williams & Connolly, Washington, DC.
Summer Associate, Summer 1990.

Covington & Burling, Washington, DC.
Summer Associate, Summer 1989.

Miller Cassidy Larocca & Lewin, Washington, DC.
Summer Associate, Summer 1989.

Pillsbury Madison & Sutro, Washington, DC.
Summer Associate, Summer 1988.

Other:

Commission on the Future of Maryland Courts.
Research Associate to the Chairman, 1996.

Georgetown Prep Alumni Association (since 1990's).

Federalist Society.
Co-Chair of School Choice Subcommittee of Religious Liberties Practice Group, 1999-2001.

Class Secretary for Yale Law School Class of 1990 in 2000-01.

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

None.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Cum laude graduate of Yale College.
Notes Editor, Yale Law Journal, 1989-90.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

Maryland State Bar Association.
Montgomery County Bar Association.
District of Columbia Bar Association.
American Bar Association.
Federalist Society. Co-Chair of School Choice Subcommittee of Religious Liberties Practice Group, 1999-2001.
Commission on the Future of Maryland Courts. Research Associate to the Chairman, 1996.

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

Lobbying Organizations: None.
Other Organizations:
Congressional Country Club.
Holy Trinity Roman Catholic Church.
Georgetown Prep Alumni Association.
Delta Kappa Epsilon (when at Yale College).
Truth and Courage Society (when at Yale College).
I have been a member of the American Bar Association and the Federalist Society at various times since law school.

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Supreme Court of the United States, 1994.
Maryland, 1990.
District of Columbia, 1992. (Lapsed for brief period in 2002 when renewal form was sent to incorrect home address.)

I also have been admitted at various times to several lower federal courts, including the United States Court of Appeals for the D.C. Circuit and the United States District Court for the District of Columbia.

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Articles:

The President and the Independent Counsel, 86 Georgetown Law Journal 2133 (1998).

Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings, 99 Yale Law Journal 187 (1989).

Op-eds:

Washington Post, November 15, 1999 (joint op-ed responding to Richard Cohen's column criticizing Judge Starr).

Wall Street Journal, September 27, 1999 (op-ed about Supreme Court case in which I represented an amicus curiae as a client; the Supreme Court agreed 7-2 with the position in the amicus brief).

American Spectator, April 1999 (brief submission describing lessons from independent counsel investigations).

Washington Post, February 26, 1999 (op-ed criticizing the operation of the independent counsel statute in relation to impeachment and the House of Representatives for its "immediate and unscreened release of the referral").

Letters to Editor:

Washington Post, August 31, 1999.
New York Times, August 1, 1999.
Washington Post, July 1, 1999.

Speeches:

I have given remarks on occasion in official and personal capacities. These remarks have most often occurred at legal conferences and on panels. I also have guest-taught classes at various law schools. In the White House Counsel's office, I also spoke to visitors to the White House and on Capitol Hill. I generally have spoken with short written points, which I have not ordinarily retained, rather than prepared speeches. I also have not maintained an ongoing list of remarks, but I have attempted to reconstruct a responsive list for this purpose. I will supplement the list if I become aware of other speeches that fit within this question.

Remarks to Log Cabin Republicans on judicial appointments, 2003.
Remarks to Yale Law School Association of Washington, DC, on judicial appointments, 2003.
Remarks to American Forest and Paper Association on variety of legal issues, 2003.
Remarks to Federalist Society Southern Leadership conference, 2003.
Remarks to groups of historians interested in Presidential records, 2001-03.
Remarks to Iowa State Bar Association on judicial appointments, 2002.
Remarks to National Conference of Women's Bar Associations on judicial appointments, 2002.
Remarks at American Judicature Society panel on judicial appointments, 2002.
Remarks at Republican National Lawyers Association on judges, 2002, 2003.
Participant in Yale Law School panel on judicial appointments, 2002.
Participant in panel on judicial appointments sponsored by Association of the Bar of the City of New York, 2002.
Participant in panel on judicial appointments sponsored by Washington Council of Lawyers, 2002.
Moderator of Federalist Society panel on originalism, 2001.
Remarks at Yale Club of Pittsburgh on independent counsel law and role of White House Counsel's office, 2001.
Moderator of Federalist Society panel on First Amendment, 2000.
Remarks at American Bar Association panel on Internet regulation, 2000.
Participant in symposium sponsored by Georgetown Journal of Legal Ethics, 2000.
Moderator of Federalist Society panel on charitable choice, 2000.
Remarks at Federal Bar Association symposium on federal Sentencing Guidelines, 2000.
Remarks at Duke University Law School panel on independent counsel statute, 1999.
Remarks at tribute dinner for Judge Ken Starr, 1999.
Remarks at Georgetown University Law Center panel on independent counsel law, 1998.

Television Appearances:

CNN The World Today with Wolf Blitzer (2000).
CNN Burden of Proof (in 1999 and 2000).
MSNBC (2000).
ABC 20/20 (1998).

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. June 2003.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

None.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

Not applicable.

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

Appointed by President George W. Bush as Assistant to the President and Staff Secretary, 2003-present.

Appointed by President George W. Bush as Associate Counsel, 2001-2003, and Senior Associate Counsel, 2003.

Appointed by Judge Kenneth W. Starr as Associate Counsel in Office of Independent Counsel, 1994-97, 1998.

Appointed by Justice Anthony M. Kennedy as Law Clerk, 1993-94.

Employed as Attorney, Office of the Solicitor General, 1992-93.

Appointed by Judge Alex Kozinski as Law Clerk, U.S. Court of Appeals for the Ninth Circuit, 1991-92.

Appointed by Judge Walter K. Stapleton as Law Clerk, U.S. Court of Appeals for the Third Circuit, 1990-91.

17. **Legal Career:**

a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

From 1993 to 1994, I served as a law clerk to Justice Anthony M. Kennedy on the Supreme Court of the United States.

From 1991 to 1992, I served as law clerk to Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit.

From 1990 to 1991, I served as a law clerk to Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit.

2. whether you practiced alone, and if so, the addresses and dates;

I have never been a sole practitioner.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

President George W. Bush
Assistant to the President and Staff Secretary, 2003-present
The White House
1600 Pennsylvania Avenue
Washington, DC 20502

President George W. Bush
Office of Counsel to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20502
Senior Associate Counsel, 2003.
Associate Counsel, 2001-2003.

Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005
Partner, 1997-98 and 1999-2001.

Office of Independent Counsel
1001 Pennsylvania Ave., N.W., Suite 490-N
Washington, DC 20004
Associate Counsel, 1994-97 and 1998.

Office of the Solicitor General
United States Department of Justice
950 Pennsylvania Ave.
Washington, DC 20530
Attorney, 1992-93.

Munger Tolles & Olson
355 South Grand Ave., 35th Floor
Los Angeles, CA 90071
Summer Associate, 1992.

Williams & Connolly
725 12th St., N.W.
Washington, DC 20005
Summer Associate, 1990.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I have devoted the bulk of my professional career to public service.

Clerkships:

I served as a law clerk to three appellate judges, including Justice Kennedy on the Supreme Court. My primary responsibilities were: (i) to prepare memos before oral argument that summarized the cases and issues presented; (ii) to prepare and edit draft opinions; and (iii) to analyze and make comments on draft opinions prepared by other judges.

Office of the Solicitor General:

I served for one year as an attorney in this office from 1992 to 1993. I was responsible for preparing briefs in opposition to certiorari petitions and appeal recommendations. In addition, I assisted the Solicitor General and his Deputies and Assistants in preparing briefs and in preparing for oral arguments before the Supreme Court. I also handled two court of appeals cases, writing the brief in both cases and arguing one in the U.S. Court of Appeals for the Fifth Circuit. The government prevailed in both cases.

Office of Independent Counsel:

In the summer of 1994, after my clerkship with Justice Kennedy concluded, I interviewed with law firms. At about the same time, in August 1994, Judge Starr was appointed independent counsel. I had worked briefly for Judge Starr in the Office of the Solicitor General, and he offered me a position in the Office of Independent Counsel.

In that Office, I performed six main functions during the course of my service.

First, I was a line attorney responsible for the Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. This assignment required management and coordination with a number of FBI agents and investigators, FBI laboratory officials, and outside experts

on forensic and psychological issues. I was responsible for conducting and assisting with interviews of a wide variety of witnesses with respect to both the cause of death and Mr. Foster's state of mind. I was responsible for preparing a draft of the report on his death. The investigation and report resolved questions about the cause and manner of Mr. Foster's death, concluding that he committed suicide in Fort Marcy Park, Virginia.

Second, I was one of two line attorneys responsible for conducting the investigation into possible obstruction of justice in the wake of Mr. Foster's death, including whether documents had been unlawfully removed from his office or otherwise concealed from investigators. This was an extensive grand jury investigation. I conducted numerous interviews and grand jury sessions and, with another attorney, prepared a memorandum of more than 300 pages summarizing the matter. At the time, this matter also was being investigated by the Senate. The Office conducted a thorough investigation of the facts and did not seek criminal charges against any individuals.

Third, I was substantially responsible for writing briefs and conducting oral arguments regarding privilege and other legal matters that arose frequently during the investigation. These included cases about the government attorney-client privilege, Secret Service privilege, and private attorney-client privilege. I argued once before the Supreme Court of the United States and twice before the U.S. Court of Appeals for the D.C. Circuit.

Fourth, I served as a legal advisor on a variety of issues facing the Office. I and several other attorneys sometimes served a function roughly equivalent to that of attorneys in the Office of Legal Counsel in the Justice Department. This required analysis of, for example, statutory reporting requirements, Rule 6(e) obligations, FOIA disclosure rules, and issues related to interaction with Congress.

Fifth, I was part of the team that prepared that part of Judge Starr's 1998 report to Congress, submitted pursuant to statute, that outlined information that "may constitute grounds" for impeachment. Although many volumes of evidence were provided to the House of Representatives under seal, the report as publicly released by the House of Representatives was divided into two parts. The first part was a summary of facts known as the "narrative" section. I did not draft that part of the report. The second part was a description of possible grounds for impeachment that identified areas where the President may have made false statements or otherwise obstructed justice. I drafted portions of that part of the report. This is a matter of some continuing controversy. As I have stated publicly before, I

regret that the House of Representatives did not handle the report in a way that would have kept sensitive details in the report from public disclosure (as had occurred with the House's handling of the Special Prosecutor's report in 1974) or, if not, that the report did not further segregate certain sensitive details. The House of Representatives voted to publicly release the report without reviewing it beforehand.

Sixth, I was an attorney primarily responsible for assisting Judge Starr with preparation of his two-hour statement to the House Judiciary Committee, which he submitted in written form and delivered orally on November 19, 1998. The statement identified and discussed the investigation and evidence.

Kirkland & Ellis:

At Kirkland & Ellis, I worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation. My most significant corporate clients were firm clients Verizon, America Online, General Motors, and Morgan Stanley. I represented them in a variety of litigation and administrative matters. I also represented individuals and non-corporate entities in litigation matters. I represented Adat Shalom synagogue pro bono in a case involving Montgomery County zoning regulations. I represented Governor Jeb Bush in his official capacity against a constitutional challenge to Florida's school choice legislation. I represented Elian Gonzalez's American relatives pro bono in their petition for rehearing in the Eleventh Circuit and their petition for certiorari in the Supreme Court. In all of these matters, I was part of a larger litigation team.

Office of Counsel to the President:

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

Assistant to the President and Staff Secretary:

I perform the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of documents for the President, among other responsibilities.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

In private practice, I specialized in constitutional issues, commercial litigation, and appellate practice. My typical former clients are described in the previous answer.

c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

Occasionally. In both public service and private practice, I argued a number of appellate matters and also conducted legal arguments in district court.

2. **Indicate the percentage of these appearances in:**

(A) civil proceedings: approximately 50% (private practice)
(B) criminal proceedings: approximately 50% (government practice)

3. **What percentage of these appearances was in:**
(a) federal courts;
approximately 90%
(b) state courts of record;
approximately 10%
(c) other courts.

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

None, as I have not been a trial lawyer. I have worked on legal issues and appeals in both public service and private practice and argued in court, including the Supreme Court of the United States, the U.S. Court of Appeals for the D.C. Circuit, federal district courts, and state courts.

5. **What percentage of these trials was:**
   (a) jury;
   (b) non-jury.

   Not applicable.

18. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**
    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Swidler & Berlin v. United States, 524 U.S. 399 (1998), reversing 124 F.3d 230 (D.C. Cir. 1997).

I represented the United States and argued and briefed this case in both the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia Circuit. The court of appeals decision was rendered in 1997 and the Supreme Court decision in 1998.

The case presented the question whether the attorney-client privilege continues to apply in federal criminal proceedings when the client is deceased. A federal grand jury issued a subpoena for communications that occurred between Vincent W. Foster, Jr., and his attorney James Hamilton nine days before Mr. Foster's suicide. Mr. Hamilton challenged the subpoena, arguing that the attorney-client privilege continued to apply after the death of the client and that he was not permitted to disclose what Mr. Foster had told him. The United States, represented by the Office of Independent Counsel, sought to enforce the grand jury subpoena, arguing that the attorney-client privilege did not apply with full force in federal criminal proceedings when the client was deceased. Many legal treatises, including the American Law Institute's Restatement of the Law, had agreed with the position advocated by the Office of Independent Counsel. The U.S. Court of Appeals for the D.C. Circuit, in an opinion by Judge Patricia Wald and Judge Stephen Williams, ruled in favor of the Office of Independent Counsel. Judge Tatel dissented. The Supreme Court then granted certiorari and ruled 6-3 in favor of Mr. Hamilton in an opinion by Chief Justice Rehnquist. The dissent written by Justice O'Connor and joined by Justices Scalia and Thomas agreed with the position of the Office of Independent Counsel.

My co-counsel in this case were Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130, and Craig Lerner, now a professor at George Mason University Law School, 3301 N. Fairfax Drive, Arlington, VA 22201, (703) 993-8080. The opposing counsel was James Hamilton of Swidler Berlin Shereff Friedman, 3000 K Street, N.W., Suite 300, Washington, DC 20007, (202) 424-7826. The counsel of record on the primary amicus brief was Mark I. Levy, Howrey & Simon, 1299 Pennsylvania Ave., N.W., Washington, DC 20004, (202) 383-7441.

Concerned Citizens of Carderock v. Hubbard and Adat Shalom Reconstructionist Congregation, 84 F.Supp.2d 668 (D. Md. 2000).

In this case, I represented pro bono Adat Shalom, a synagogue in Bethesda, Maryland, in the United States District Court for the District of Maryland (Judge Andre Davis). The district court decided the case in 2000.

Plaintiffs sued Montgomery County and Adat Shalom, arguing that Montgomery County's zoning ordinance violated the Establishment Clause by granting religious entities an exemption from the county's special exception zoning process. Adat Shalom argued that the ordinance was neutral between religious and non-religious entities and thus constitutional. In particular, Adat Shalom contended that the ordinance exempted several non-religious entities in addition to religious entities and therefore did not reflect a preference for religion. Judge Davis ruled in favor of Adat Shalom and the County. The court found that the ordinance was neutral toward religion and consistent with the Establishment Clause.

My primary co-counsel at Kirkland & Ellis were Jay P. Lefkowitz, now at the White House Domestic Policy Council, 1600 Pennsylvania Ave., N.W., Washington, DC 20502, (202) 456-1473, and John Wood, now at the Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2001. The primary counsel for the plaintiffs was Stanley D. Abrams of Abrams, West & Storm, 4550 Montgomery Ave., Suite 760N, Bethesda, MD 20814, (301) 951-1550. The primary counsel for Montgomery County were Charles W. Thompson and Edward B. Lattner of the County Attorney's Office for Montgomery County, 101 Monroe St., 3rd Floor, Rockville, MD 20850, (240) 777-6700.

America Online 5.0 Litigation (1999-2000).

In these cases, I represented America Online (AOL) in a series of class-action lawsuits. In particular, I filed briefs and conducted oral arguments for AOL in a number of federal district courts around the country. I also argued a proceeding before the Judicial Panel on Multidistrict Litigation and a motion to dismiss in a related case in the Circuit Court for Baltimore City. The complaints in these cases alleged that AOL had engaged in a variety of deceptive tactics and antitrust violations in designing and marketing AOL Version 5.0.

My primary co-counsel at Kirkland & Ellis were Thomas Yannucci and Eugene Assaf, Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5000. The opposing counsel were a large group of attorneys representing different plaintiffs from around the country; many of the attorneys are listed in a reported consolidated case at 168 F.Supp.2d 1359.

In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998), cert. denied, Office of the President v. Office of Independent Counsel, 525 U.S. 996 (1998).

I represented the United States (Office of Independent Counsel) in this case. I briefed and argued the case in the U.S. Court of Appeals for the D.C. Circuit and worked on the brief in opposition to the petition for certiorari in the Supreme Court of the United States. I also had worked on a petition for certiorari before judgment to the Supreme Court.

This case arose out of a federal grand jury subpoena issued to Bruce R. Lindsey, an attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Office of Independent Counsel sought to have the subpoena enforced. The D.C. Circuit (Judges Randolph and Rogers for the majority; Judge Tatel in dissent) ruled in favor of the Office of Independent Counsel. The Office of the President then filed a petition for certiorari in the Supreme Court. The Supreme Court denied the petition.

My co-counsel were Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130, and Joseph Ditkoff, now of the Suffolk County District Attorney's Office in Massachusetts, One Bulfinch Place, Boston, MA 02114, (617) 619-4000. The primary opposing counsel were David Kendall of Williams & Connolly, 725 12th Street, N.W., Washington, DC 20005, (202) 434-5000; Neil Eggleston, Howrey Simon Arnold & White, 1299 Pennsylvania Ave., N.W., Washington, DC 20004, (202) 783-0800; and Douglas Letter, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20005, (202) 514-3301.

Gonzalez v. Reno, 215 F.3d 1243 (11th Cir. 2000) (denying petition for rehearing en banc), cert. denied, 530 U.S. 1270 (2000).

In this case, I represented pro bono the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for stay in the Supreme Court of the United States, and petition for writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing, application for stay, and petition for certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS's decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit's subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS's contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing and rehearing en banc arguing, in essence, that the court's original decision granting an injunction pending appeal had analyzed the issue correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing and rehearing en banc. The Gonzalez family then filed an application for stay and petition for writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

My co-counsel included Jeffrey Clark, then at Kirkland & Ellis and now at the U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-3370; and Kendall Coffey of Coffey & Wright, 2665 South Bayshore Drive, Miami, Florida 33133, (305) 857-9797. The primary opposing counsel was Ed Kneedler, Office of the Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2217.

<u>In re Grand Jury Subpoena Duces Tecum</u>, 112 F.3d 910 (8th Cir.), <u>cert. denied</u>, 521 U.S. 1105 (1997).

I represented the United States (Office of Independent Counsel) in this case. I primarily wrote the brief in the U.S. Court of Appeals for the Eighth Circuit and worked on the brief in opposition to the petition for certiorari in the Supreme Court of the United States. I also briefed the case in the United States District Court for the Eastern District of Arkansas.

This case arose out of a federal grand jury subpoena issued to the White House Office for documents of a government attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Eighth Circuit (Judges Bowman and Wollman for majority; Judge Kopf in partial dissent) ruled in favor of the United States, represented by the Independent Counsel. The Office of the President then filed a petition for certiorari in the Supreme Court. The Supreme Court denied the petition.

My co-counsel were Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130; and John Bates, now of the U.S. District Court for the District of Columbia, 333 Constitution Ave., N.W., Washington, DC 20001, (202)

354-3430. The primary opposing counsel were David Kendall of Williams & Connolly, 725 12th Street, N.W., Washington, DC 20005, (202) 434-5000; Lawrence Robbins, Robbins, Russell, Englert, Orseck & Untereiner, 1801 K Street, N.W., Suite 411, Washington, DC 20006, (202) 775-4500; Andrew Frey, Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000; and Miriam Nemetz, now of Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000.

Good News Club v. Milford Central School, 533 U.S. 98 (2001).

In this Supreme Court case, I represented an amicus curiae, Sally Campbell, and filed an amicus brief.

The case involved a Free Speech Clause and Free Exercise Clause challenge to the community use policy of a school district in New York. The policy excluded religious organizations from using public school facilities after school hours. (Ms. Campbell had challenged a similar policy in Louisiana.) The question in the case was whether the exclusion of religious organizations was permitted under the Religion and Free Speech Clauses of the First Amendment. The amicus brief filed on behalf of Ms. Campbell argued that the policy was neither required nor permitted by the Constitution. The Supreme Court agreed in a 6-3 decision.

The counsel for the plaintiff/petitioner was Thomas Marcelle, 71 Fernbank Ave., Delmar, NY 12054, (518) 475-0806. The primary counsel for other amici were Paul Clement, now Deputy Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2206; and Viet Dinh, now at Georgetown University Law Center, 600 New Jersey Ave., N.W., Washington, DC 20001, (202) 662-2000. The primary counsel for the defendant/respondent was Frank W. Miller, 6296 Fly Road, East Syracuse, NY 13057, (315) 234-9900.

Rubin v. United States, 525 U.S. 990 (1998).

In this case, I represented the United States (Office of Independent Counsel) in the Supreme Court proceedings in which the Office of Independent Counsel opposed a petition for certiorari filed by the Secretary of the Treasury and Director of the Secret Service.

The question presented was whether the federal courts should recognize a new "protective function" privilege in federal criminal proceedings that would prevent Secret Service agents from testifying in the grand jury. The U.S. Court of Appeals for the D.C. Circuit ruled in favor of the Office of Independent Counsel (Judges Williams, D.H. Ginsburg, and Randolph). The Secretary of the Treasury filed a petition for certiorari and sought a stay of enforcement of the subpoena. The Supreme Court denied a stay and then denied the petition for certiorari (over the dissents of Justices Ginsburg and Breyer).

My co-counsel included Ken Starr, now of Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5130. The primary opposing counsel was Ed Kneedler, Office of the Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2217.

General Motors v. Green, 709 A.2d 205 (N.J. Super. Ct. App. Div. 1998).

General Motors was a significant institutional client of my former firm, Kirkland & Ellis. In this particular case, I was asked to represent General Motors and conduct oral argument on its behalf in the Appellate Division of the New Jersey Superior Court before Judges Dreier, Levy, and Wecker. The case was a design defect products liability case involving an alleged roof design defect. At trial, the jury had found General Motors liable and awarded plaintiff $25 million. General Motors appealed on numerous grounds, challenging both the liability judgment and damages award. The Appellate Division affirmed the liability judgment and substantially reduced the damages award.

My primary co-counsel at Kirkland & Ellis was Paul T. Cappuccio, now General Counsel of AOL Time Warner, 75 Rockefeller Plaza, New York, NY 10019, (212) 484-7980; and another co-counsel was Thomas F. Tansey, 521 Green Street, Woodbridge, NJ 07095, (732) 634-7880. The primary opposing counsel was Maurice Donovan, 405 Northfield Ave., West Orange, NJ 07052, (973) 736-8050.

Lewis v. Brunswick, No. 97-288 (Supreme Court of the United States) (dismissed as moot because of settlement after oral argument).

In the Lewis case, I represented General Motors in filing an amicus brief in the Supreme Court. The question presented in the case was whether the Boat Safety Act preempted a state common-law requirement that recreational boats be equipped with propeller guards. Because of the similarity of the question to a question under the National Traffic and Motor Vehicle Safety Act, General Motors filed an amicus brief. The Supreme Court subsequently dismissed the case after oral argument because the parties settled.

My primary co-counsel were Paul T. Cappuccio, now General Counsel of AOL Time Warner, 75 Rockefeller Plaza, New York, NY 10019, (212) 484-7980; and Richard A. Cordray, of counsel at Kirkland & Ellis, 655 15th Street, N.W., Washington, DC 20005, (202) 879-5000. The primary counsel for plaintiff/petitioner was David E. Hudson, 801 Broad Street, Suite 700, Augusta, GA 30901, (706) 722-4481. The primary counsel for defendant/respondent was Kenneth S. Geller, Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000.

19. Legal Activities: **Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

Clerkships:

I served as a law clerk to three appellate judges, including Justice Kennedy on the Supreme Court. My primary responsibilities were: (i) to prepare memos before oral argument that summarized the cases and issues presented; (ii) to prepare and edit draft opinions; and (iii) to analyze and make comments on draft opinions prepared by other judges.

Office of Counsel to the President:

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

Office of Staff Secretary:

I perform the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of documents for the President, among other responsibilities.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   None. I have a government Thrift Savings Plan retirement fund.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   I will faithfully follow all applicable statutes, court decisions, and policies regarding recusal, including 28 U.S.C. 455.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   It is possible in the future that I would want to teach part-time at some point or write articles or books. If so, I would faithfully follow all applicable laws and policies.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

   See attached financial disclosure report.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

   See attached net worth statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

   Lawyers for Bush Cheney, 2000. Regional Coordinator for Pennsylvania, Maryland, Delaware, and District of Columbia. I also went to Daland, Florida, in November 2000 to participate in legal activities related to the recount.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	10k			Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule			
Real estate owned-add schedule				Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property	20k						
Cash value-life insurance							
Other assets itemize:							
TSP account	55k						
				Total liabilities	0		
				Net Worth	85k		
Total Assets	85k			Total liabilities and net worth	85k		
CONTINGENT LIABILITIES	No			GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No		

On leases or contracts				Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

   I have devoted 10 of the 13 years of my legal career to public service for the United States Government in a variety of capacities. In private practice, I represented several clients pro bono, most notably Adat Shalom synagogue and Elian Gonzalez's American relatives. I have participated in community work on occasion, most recently by participating in an all-day playground build in Washington. I contribute to various charities and community organizations, including by way of the Combined Federal Campaign.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

   No, other than my college fraternity and senior society, which were all-male.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

   There was no commission process. In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit. In 2003, he discussed with me a vacancy on the U.S. Court of Appeals for the D.C. Circuit. Later in 2003, Judge Gonzales informed me of the President's intent to nominate me to the D.C. Circuit. I underwent an FBI background investigation and was then nominated.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

   No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

A court of appeals judge should interpret constitutional and statutory provisions without regard to personal or policy views on any issue. Our legal system must ensure equal justice under law for all, and a court of appeals judge should interpret the law as enacted and as subsequently interpreted by the Supreme Court where applicable. A judge should treat parties and colleagues with dignity and respect and should act at all times -- in and out of the courtroom -- with an appropriate judicial temperament. A judge should always remember that the court's decisions will have an enormous impact on the lives and liberties of the individuals involved in the cases, as well as the American people. And a judge should approach the task of judging with humility, recognizing that federal judges are entrusted with a sacred responsibility to the American people.

AO-10
Rev. 1/2001

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2002

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
KAVANAUGH, BRETT M.	NOMINEE TO U.S. COURT OF APPEALS FOR D.C. CIRCUIT	7-29-03
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check appropriate type)	6. Reporting Period
CIRCUIT JUDGE - NOMINEE	✓ Nomination, Date 7-25-03 ___ Initial ___ Annual ___ Final	1-1-2002 7-25-2003
7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
STAFF SECRETARY THE WHITE HOUSE WASHINGTON, DC 20502	Reviewing Officer ______ Date ______	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1	ALUMNI BOARD OF GOVERNORS	GEORGETOWN PREPARATORY SCHOOL ALUMNI ASSOCIATION
2		
3		

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

☒ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1		
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

☒ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1			$
2			$
3			$
4			$
5			$

FINANCIAL DISCLOSURE REPORT | Name of Person Reporting: KAVANAUGH, BRETT M. | Date of Report: 7-29-03

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	NONE (No such reportable reimbursements.)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS.

(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
☐	NONE (No such reportable gifts.)		
1	EXEMPT		$
2			$
3			$
4			$

VI. LIABILITIES.

(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
☐	NONE (No reportable liabilities.)		
1	FIRST USA	CREDIT CARD	J PAID IN FULL
2			
3			
4			
5			

*Value Codes: J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

	Name of Person Reporting	Date of Report
FINANCIAL DISCLOSURE REPORT	KAVANAUGH, BRETT	7-29-03

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure.	Amt. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, (TSP) - EXEMPT									
1 BANK OF AMERICA CHECKING	A	Checking Account	J	T					
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001-$100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001-$100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting KAVANAUGH, BRETT	Date of Report 7-29-03

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Brett M. Kavanaugh Date July 29, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

AFFIDAVIT

I, Brett Kavanaugh, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

September 22, 2003 (DATE)

Brett Kavanaugh (NAME)

[signature] (NOTARY)

Notary Public for the District of Columbia
Commission expires 1/31/08

Chairman HATCH. Well, thank you. Let me begin the questioning. We will have 10-minute rounds, and hopefully we can complete this in a reasonable period of time.

You have served in both the executive and the judicial branches of Government, the Federal Government. You graduated from Yale University, one of the finest law schools in the land. You have clerked for two separate circuit courts, and you have also clerked for the United States Supreme Court. You have tried cases before the Supreme Court. You have tried other appellate cases, so I dispute anybody's argument that you have never tried a case. There are appellate lawyers and there are trial lawyers. Some can do both. Some do do both. But primarily your experience has been on the appellate side, which is generally considered a very sophisticated side of the law.

But let me just ask you this question: How has your education and experience prepared you to be a Federal circuit court of appeals judge?

Mr. KAVANAUGH. Well, Mr. Chairman, I've always had a devotion to public service that I've had since I was young, and it was instilled in me again at Yale Law School, which has a deep commitment to encouraging its students to pursue public service. My mother had been a judge and a State prosecutor. She had instilled that and a lot more in me. And I went to become a law clerk after graduation from law school, and then after that I've chosen a variety of different jobs in public service, in the Independent Counsel's office, in the White House Counsel's office, as Staff Secretary. I've had a range of experience in the judicial branch, in the executive branch, in difficult matters. Senator Schumer raised a couple of them. I've clearly been in the arena for a lot of different types of matters, and I think I've learned a lot from those about the importance of being fair and impartial. And I come to the bench, were I to be confirmed, with a broad range of experiences and I think a commitment to fairness and impartiality in public service.

Chairman HATCH. You have been involved in improving the law, in the administration of the law, and I am interested in your work for the Commission on the Future of Maryland Courts. It is my understanding that this Commission was tasked with discovering ways to coordinate and promote fair and efficient criminal justice and public safety systems. Could you just tell the Committee a little bit about what lessons you have learned from that type of experience and how that might help you in your job as a circuit court judge if you are confirmed?

Mr. KAVANAUGH. In that Commission, I was asked by a lawyer in Rockville, Maryland, whom I knew to participate and help him—he was Chair of the Commission—and to help find ways to improve access to judicial services, access to legal services throughout the State of Maryland, which was my home State. So I helped with that Commission. The idea was that the justice system, while the best in the world, can always be better, and the idea of the Commission was to improve the delivery of legal services and the justice system in the State of Maryland and to look at recommendations of all kinds, whether it was creating a new family court, dealing with drug crimes, or what have you.

Chairman HATCH. As you are aware—I am just going to get into one aspect because that is about all the time I have right now. You are aware that an investigation was conducted by the Senate Sergeant-at-Arms into the downloading of certain Judiciary Committee files by two former Committee staffers. That investigation is complete and has been referred to the Department of Justice, so I want to ask you just a few basic questions about that matter.

Are you generally aware of that incident and that investigation?

Mr. KAVANAUGH. I am.

Chairman HATCH. Okay. I understand that as an Associate Counsel to the President of the United States, among your responsibilities was to advise the President on judicial nominations. Could you briefly outline your responsibilities and procedures you followed in fulfilling that duty?

Mr. KAVANAUGH. I was one of eight Associate Counsels who worked for Judge Gonzales. We had different areas of the country that we would work on and different nominations that we'd work on. I worked on California and Illinois, for example, with Senator Feinstein's office and Senator Durbin's office. I also worked on certain circuit court nominations. There's both the selection side and then the nominations—the confirmation side, working on the confirmation.

On the confirmation side, the idea was to help prepare the nominees for their hearings, to coordinate with our press office and other press offices in the Justice Department and in the Senate, to coordinate with the public liaison in the White House and the Justice Department and the Senate regarding any issues that could arise in connection with hearings or votes on nominees.

Chairman HATCH. As part of that responsibility, you had to meet with various staff members of the Senate Judiciary with regard to the limited work that you did for certain States, your share of the work on judges. And so I think you met with various staff members.

Now, did any staff member of the Senate Judiciary Committee or the Department of Justice ever provide you with information or documents that you were led to believe were obtained or derived from Democratic files or from my files?

Mr. KAVANAUGH. No.

Chairman HATCH. Do you know Manuel Miranda, the former Senate staff member?

Mr. KAVANAUGH. I do know him from his time and service on the Committee staff.

Chairman HATCH. Did you ever meet with him to discuss judicial nominations?

Mr. KAVANAUGH. He was part of the team—yes, he was part of the team that worked in your office and then in Senator Frist's office on judicial nominations.

Chairman HATCH. What were the circumstances of those meetings?

Mr. KAVANAUGH. Those meetings were usually to discuss upcoming hearings or upcoming votes, issues related to press interest in nominations or public liaison activities that outside groups were interested in.

Chairman HATCH. Now, this is an important question. Did Mr. Miranda ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee?

Mr. KAVANAUGH. No, I was not aware of that matter ever until I learned of it in the media late last year.

Chairman HATCH. Did Mr. Miranda ever share, reference, or provide you with information that you believed or were led to believe was obtained or derived from Democratic files?

Mr. KAVANAUGH. No. Again, I was not aware of that matter in any way whatsoever until I learned it in the media.

Chairman HATCH. Do you know if any other Associate White House Counsels had access to these type of materials that were improperly taken?

Mr. KAVANAUGH. I don't know of anyone who was aware of this matter, again, until the media reports late last year.

Chairman HATCH. But you were not?

Mr. KAVANAUGH. I was not aware of it.

Chairman HATCH. Okay. Just one final question. Could you please speak about the significance of judicial temperament and indicate what aspects of judicial temperament you consider to be the most important?

Mr. KAVANAUGH. Well, I think it's critically important, Mr. Chairman, for any judge to exhibit the proper temperament on and off the bench at all times, and what that means is in dealings with one's colleagues on the bench, having an open mind, being respectful of a colleague's views, both at oral argument and in writing opinions. I think it means being respectful of the lawyers who come before the court and not treating them disrespectfully, but to have proper respect for the lawyers in the court. And it means having a proper respect for the law and a humility, understanding that you are just one judge on a panel. There's a reason you wear a black robe. It's because you lose your individual preferences, your individuality when you take a seat on the bench. The black robe signifies that you're part of the judicial system and you're there to interpret the law fairly.

So I think that's all encompassed within judicial temperament, and it's something I've seen firsthand with Justice Kennedy and Judge Stapleton and Judge Kozinski, and it's something that I, were I to be confirmed, would always remember my proper place in the system.

Chairman HATCH. One last question. Would you please explain to the Committee why you want to be a Federal judge?

Mr. KAVANAUGH. I've always had, Mr. Chairman, a commitment to public service since I was young. Since I got out of law school, I've always thought that being a judge was the highest form of public service that a lawyer could render because it helps maintain our constitutional system, which has been in place for over two centuries, and helps protect the rights and liberties of the people.

What the courts do every day—and I think Senator Schumer alluded to this—is not always apparent to the people, but it's critically important, and there's much of what Senator Schumer said about that that I agree wholeheartedly with about how important it is.

And so in terms of commitment to public service, a commitment to our constitutional form of government, and a commitment to protecting rights and liberties of the people, that's why I think I would want to be a judge.

Chairman HATCH. Okay. I have a little bit of time left, but I think I will turn to Senator Schumer at this point.

Senator SCHUMER. Thank you, Mr. Chairman. And thank you, Mr. Kavanaugh.

First, I just want to clear up the questions that Orrin asked. You had said that Mr. Miranda never provided these documents, you know, that were from this.

Mr. KAVANAUGH. Right.

Senator SCHUMER. Had you seen them in any way? Did you ever come across memos from internal files of any Democratic members given to you or provided to you in any way?

Mr. KAVANAUGH. No.

Senator SCHUMER. Thank you.

Okay. Now, as I noted in my opening remarks, you have cited the five criteria the President uses in selecting nominees, and at the same time you have repeatedly denied the President considers ideology when selecting judges. Am I correct to anticipate you stand by that claim?

Mr. KAVANAUGH. Yes, Senator.

Senator SCHUMER. Thank you. Now, you get high marks for consistency, but this claim raises serious credibility concerns.

If ideology doesn't affect the nomination process, how is it possible we have seen so many extreme conservatives and almost no progressives?

Ninth Circuit nominee William Myers thinks the Clean Air Act and the Endangered Species Act have harmed the environment.

District court nominee James Lee Holmes endorsed Booker T. Washington's notion that God brought slaves to America to teach white people how to be more Christ-like.

D.C. Circuit nominee Janice Rogers Brown has praised the Supreme Court's notorious ruling in Lochner, perhaps the most criticized decision of the 20th century, and has said the New Deal is the triumph of America's socialist revolution.

Charles Pickering unethically intervened on behalf of a convicted cross-burner, and William Pryor has spent a career trying to undo Federal laws that have achieved broad consensus in America that protect women, workers, and the disabled.

Carolyn Kuhl has one of the most restrictive views on the right to privacy of any judge in the country, ruling that a woman has no meaningful right to privacy in her own doctor's office.

The list goes on and on, extreme views all from the far right. How do you square the reality of these totally ideological nominations with the lack of any nominations that would be the mirror image or even close to those people when you say with the rhetoric that there is a non-ideological judicial nomination process?

Mr. KAVANAUGH. Senator, I'd like to answer that in a couple ways. First, as you and Senator Leahy pointed out, the vast majority of the President's nominees have been approved by this Committee and confirmed by the Senate. That's point one.

Point two is in terms of court of appeals nominees, we've worked very closely with home State Senators in individual States to find nominees that were consensus nominees in that State. We've worked, including States with two Democratic Senators, we've worked closely with Senator Leahy on the one nomination, and Rena Raggi in New York, Judge Callahan and Judge Bea on the Ninth Circuit in California. We have tried to work closely, and in each of those cases those nominations—

Senator SCHUMER. Did you work closely with the Senators from Michigan on the Sixth Circuit?

Mr. KAVANAUGH. The Sixth Circuit situation in Michigan, Senator, is one that goes back many years. I don't understand that situation to be related to the particular nominees, but to a—

Senator SCHUMER. But you haven't consulted either Senators Levin or Stabenow on that. Is that correct?

Mr. KAVANAUGH. My understanding is that Judge Gonzales has talked often to the two Senators, but they have not reached an accommodation that's—

Senator SCHUMER. What about on the D.C. Circuit? Have you talked to any Senators on this side, Senator Leahy or any of the members of this Committee, about nominees for the D.C. Circuit?

Mr. KAVANAUGH. I don't know who Judge Gonzales talked to before the nominations, the D.C. Circuit nominees. But I know as a general proposition we've been very careful to consult with the home State Senators.

Senator SCHUMER. So you would say ideology has no factor in the nominations you have put forward for circuit court judges? Is that correct? Do you truly stand by that statement?

Mr. KAVANAUGH. We don't—Senator, I appreciate the question, but we don't ask questions about one's personal views on—

Senator SCHUMER. I didn't ask that.

Mr. KAVANAUGH. Well—

Senator SCHUMER. I asked you: Does ideology play a role in who you select? And if it does not, why have there not been hardly any nominees—I mean, the most you could say are one or two, mainly from my circuit, who tend to be a little more moderate. Why are there nominees that are almost exclusively conservative? And we discussed the degrees of conservative. Many of the nominees I have voted for, some of us have voted for, we don't think are down-the-middle. We voted for them because we feel we have to pick our shots and because we give the President some deference. But I don't think anyone in this room, when they look at it fairly, believes that the President is choosing judges without ideology entering into it. And if that is the case, then answer again: Why have there been virtually no progressive nominees to circuit courts of appeals if ideology doesn't play a role?

Mr. KAVANAUGH. Senator, in terms of ideology, what the President is looking for is nominees who have a respect for the law and who understand that the legal system and the role as a judge is different from one's personal views or political views or political affiliation. So you're looking for someone who understands what the judicial function is.

Senator SCHUMER. You don't think there are any liberal people who feel that way?

Mr. KAVANAUGH. I think there are people of all political ideologies, Senator—

Senator SCHUMER. Well, how come no liberals have been nominated? I am not objecting to the President using ideology. Presidents do. I am objecting to the denial. It seems there is a credibility problem, because you know and I know—and my guess is if I was a fly on the wall and you had conversations with your other counsels and other things like that, that ideological considerations of course were part of the vetting process.

Mr. KAVANAUGH. Senator—

Senator SCHUMER. Have you ever used the word to any of the counsels when you were vetting judges, "This one may be too liberal"? Never?

Mr. KAVANAUGH. Senator, the important thing that Judge Gonzales emphasized to us and that the President has emphasized is to find people of experience who have good records and who know—

Senator SCHUMER. Have you ever used the words that someone might be "too liberal" to be a good judge—to be nominated by President Bush?

Mr. KAVANAUGH. I am confident, Senator, that in the course of 3 years I have thought that some people did not understand the proper judicial—

Senator SCHUMER. Did you ever use those words?

Mr. KAVANAUGH. I don't know whether I ever—

Senator SCHUMER. What do you think?

Mr. KAVANAUGH. —used the word "too conservative" or "too liberal" to be a—in the sense that they don't understand the proper judicial function.

Senator SCHUMER. Let me go to the second part of the questioning. It defies belief, in all due respect, sir, for anyone who looks at the broad nature of the nominees, particularly the court of appeals, that ideology didn't play some role as you selected judges.

The second—

Mr. KAVANAUGH. Senator—

Senator SCHUMER. I just want to ask my second, because my time is limited. Now, when Ken Starr started his Independent Counsel investigation, he was tasked with looking into financial improprieties tied to a land deal in Arkansas. When he finished, he produced, with substantial assistance from you, a lengthy report that frequently dwelt on salacious details from President Clinton's personal life. I am not asking did you—I am asking your personal opinion because we have to get your personal opinions here. I am not asking did you serve your client well.

In retrospect, did you go too far?

Mr. KAVANAUGH. Senator Schumer, in terms of the first part of your question, Judge Starr was assigned by Attorney General Reno to look into the Whitewater and Madison-related issues. It was then her decision to add on other investigations to his original jurisdiction, including the Travel Office matter—

Senator SCHUMER. But that is not my question, sir. I am asking your personal opinion. When the Whitewater commission ended up dwelling on the salacious details from President Clinton's personal

life, do you believe personally that that was the correct thing to do or that went too far?

Mr. KAVANAUGH. I have said publicly before, as has Judge Starr, Senator—and I've written this publicly—that the way that the House of Representatives released the report without reviewing it beforehand caused unnecessary harm, combined with the way the report was structured—

Senator SCHUMER. I am not asking you a procedural issue. I am asking—you, as the chief cook and bottle washer here, working for Starr, came up with a report that focused on the salacious details—this is the last chance. Did it go too far? Yes or no.

Mr. KAVANAUGH. I think the way the House of Representatives released the report was a mistake, and I've said so publicly.

Senator SCHUMER. Do you think you are being—do you think you are giving me an answer to my question?

Mr. KAVANAUGH. I think given the public release of the report—

Senator SCHUMER. I am asking your personal views, not on the House of Representatives' procedure. I am asking you, just as a person, an observer, and a nominee to an important court, ended up with a report that focused on personal detail. Was that the correct thing to do?

Mr. KAVANAUGH. Senator, this is an important question, so I want to take a minute to answer this.

Senator SCHUMER. I know, but I would like you to answer your personal view on it, not what the House of Representatives did, not what Ken Starr did, not what Janet Reno did, but what you think now, 4 years later?

Chairman HATCH. Let him answer the question.

Mr. KAVANAUGH. And this is an important question so I want to take a minute to answer this.

First I worked on the grounds section part of the report, which was the part of the report that outlined possible legal grounds consistent with Judge Starr's statutory obligation under Section 595(c), so that is the first point I want to make clear.

Second, I have said publicly, I think I said it in my Committee submission, that I regret that the report was released to the public in the way it was released. I personally regret how that was released because I don't think it put the case in the perspective that Judge Starr thought about it, as he testified later, and you were there, in November of 1998 before the House Judiciary Committee. It was a serious legal matter. I think, Senator, you at the time made some strong statements about the legalities involved, and I regret how the report was released because I think it created a misimpression of what we thought and Judge Starr thought were the important aspects of the investigation, which he subsequently made clear in his House testimony.

So I personally regret how that report was released because I think it was—parts of it that were released were unnecessary to be in the public domain.

Senator SCHUMER. Do you think the President should have been convicted by the Senate? If you were a Senator, would you have voted aye or nay? And you cannot use Scottish law.

[Laughter.]

Senator SCHUMER. How would you have voted, aye or nay?

Mr. KAVANAUGH. Senator, as a—

Senator SCHUMER. Please answer my question.

Mr. KAVANAUGH. That is an important question as well, but I think I need to explain.

Senator SCHUMER. Can you give me a yes or no answer and then explain it, please?

Mr. KAVANAUGH. I cannot, because it was exclusively the Senate's province to make that determination—

Senator SCHUMER. I am asking you as a—

Chairman HATCH. Let him answer.

Senator SCHUMER. He said he cannot answer it, Mr. Chairman.

Chairman HATCH. He said he can answer it. He just cannot answer it the way you want him to.

Senator SCHUMER. Yes or no is a pretty simple way to put it.

Chairman HATCH. This is not a court of law. Let him answer it the way he wants to answer it.

Mr. KAVANAUGH. It would be a simple answer, but it is a complicated question. In our role, in Judge Starr's role as assigned by Attorney General Reno, was to find the facts and to submit any evidence to Congress that may constitute grounds for an impeachment based on history and historical practice. As part of the office that submitted that report, Judge Starr made it very clear in his November testimony—and I have always tried to maintain this as well—that it was not our place to say what the House should do with that or what the Senate should do with that evidence. There is an important reason for that.

Senator SCHUMER. Sir, I am not asking you as a member working for Ken Starr. I am asking you now as an individual who has broad ranges of opinions—we know that—on all sort of things, who is before this Committee, where there is a great deal of doubt whether how you feel about things or whether you can be fair and dispassionate. It is not a question that seals your nomination or guarantees a veto. I am asking you as a person, as a nominee, would you have voted yes or no, or do you refuse to give me a yes or no answer.

Mr. KAVANAUGH. Senator, again, I think that is an important question, and because I worked—

Senator SCHUMER. That is why I asked it.

Mr. KAVANAUGH. Right, I understand. And because I worked in that office, just as a prosecutor works on a criminal case should not be commenting about whether the jury got it wrong or got it right, I do not think it is appropriate for me to say whether the House got it right in impeaching President Clinton or the Senate got it right in declining to convict. I think there was serious legal issues involved, as Judge Starr explained, and there was a debate about what to do about what everyone agreed were serious issues. I know Senator Feinstein authored the censure resolution in the Senate, and that many members of the Committee joined her censure resolution, which used very strong language about President Clinton in that censure resolution. There was a debate about what sanction should be imposed, and having worked in the office that was assigned a narrow legal duty, I just do not think it is appropriate for me to say what my personal view is on that issue.

Chairman HATCH. Certainly not in retrospect.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Welcome to the pit, Mr. Kavanaugh.

Mr. KAVANAUGH. Thank you, in the arena.

Senator SESSIONS. The arena. It is a great country. People have a right to express their views, and I appreciate your willingness and your consistent dedication to public service. I think it is something to be respected and not denigrated. Your legal skills are extraordinary, and I think the way your background and record has been portrayed is not fair, is not accurate, and does not fully reflect your contributions to law and what you would do on the bench.

As a Yale undergraduate, Yale Law School graduate, you came out and clerked for three Court of Appeals Judges. As a law clerk to a Court of Appeals Judge, and you are being nominated to a Court of Appeals position, what do you do? What kind of experience do you have in dealing with the cases and how does that help you take a position that you might take with the D.C. Circuit?

Mr. KAVANAUGH. I think, Senator, I was very fortunate to serve as a law clerk to three outstanding judges, and serve as a law clerk on the Supreme Court.

Senator SESSIONS. That is correct. Two Court of Appeals Judges and one Supreme Court Justice, Anthony Kennedy, you clerked for.

Mr. KAVANAUGH. Right. I learned a lot from each of them about how I should perform my role were I to be confirmed to be a Judge. Judge Stapleton, as Senator Biden knows well, in Delaware, is one of the most widely respected judges in that circuit or in the country because of his judicial temperament, because of his dedication and fairness. I do not think there is anyone who has ever said anything negative about Judge Stapleton. He treats everyone with complete respect. He works hard, and he taught me how to try to get the right answer in every case.

Judge Kazinski has a unbelievable passion for the law, unbelievable passion for getting the right answer, for working and working and working, and for his law clerks working and working and working, to get the right answer. He is someone who I think has proved to be as a judge someone who takes a new angle on a lot of different cases. He does not just see a case and say the accepted wisdom or the conventional wisdom about an issue is right. He is someone who rethinks everything from first principles. That is something I learned from him.

Justice Kennedy has passion for the law, has passion for American history, has devotion to how the Supreme Court fits into our constitutional system. Anyone who has heard Justice Kennedy talk about the role of the Supreme Court or the history of the Supreme Court cannot help but be influenced, and I heard that day in and day out for a year and it just had a profound effect on me.

If I were to be confirmed to be a judge, I would, I think, take lessons from each of those three with me, and I hope I could be like all three of them.

Senator SESSIONS. You were just participating and doing the very thing you would do now. You were participating with those judges and helping them write opinions, to analyze complex legal questions and briefs, and to distill that into a principled decision. I think that is terrific background for you, and I also notice you

were in the Solicitor General's Office of the Department of Justice, where in that position you represent the United States of America in Appellate Courts around the country, which also is extraordinarily good background for an appellate lawyer, and I also notice you served a period of time as a partner with the great law firm of Kirkland and Ellis, one of the best known law firms I guess in the country.

Senator Schumer and I, we have had—I chair the Courts Committee now. For a while he chaired it. We had a different view about this ideology question, and I think he uses the word maybe a little differently, people interpret it differently. Let me tell you what I think we are dealing with.

Is it not appropriate, Mr. Kavanaugh, for the President of the United States, when he appoints someone to a life term appointment on a bench, to know what that person's judicial philosophy is, his approach to the law, how it should be interpreted and how decisions should be made?

Mr. KAVANAUGH. It is important to know that the person is someone who will put aside personal beliefs, prior political affiliations, and will approach the law, follow precedent fairly and impartially, follow the text and the precedent and the history to try to reach the right answer that will come to each case impartially. All of that is very important and people use different labels to describe those factors that I just described, but the President has made clear, and Judge Gonzales to us, those are the things we should be looking at, not an individual's views on any particular issues.

Senator SESSIONS. The President would not be concerned about a person's view on the death penalty or an issue like that. He would be more concerned, in making an appointment, as to how he would interpret the Constitution's injunctions or requirements with regard to the death penalty; is that correct?

Mr. KAVANAUGH. I think the President has spoken publicly many times about how it is important that a judge or a judicial nominee be someone who is going to interpret the Constitution fairly and consistent with precedent, and not superimpose his or her personal beliefs onto any judicial decision, and it is a very critical function of a judge.

Senator SESSIONS. I think ideology is an entirely different matter. Ideology suggests that judges should in fact, according to Senator Schumer's arguments, it seems to me, allow their personal ideological views to affect their judicial decisionmaking processes. Let me ask you, do you believe that? Do you believe that a person's political philosophy, whether or not they think a death penalty is good or bad, should affect their interpretation of existing Supreme Court precedent or the Constitution of the United States when it speaks to the death penalty?

Mr. KAVANAUGH. I do not think one's personal views on that issue or on other policy issues should affect how you go about deciding the cases. I think what Senator Schumer points out on pointing out some differences between judges on the D.C. Circuit is that judges reach different results in different cases, but I think that happens because judges just analyze the cases differently, not because of any partisan affiliations. It is critically important for

judges, when they become judges, to recognize that they are entering a new phase, a new role, and political background has been very common, Government service background has been very common for judges, not because we want the Judiciary to be an extension of the Congress, quite the contrary, but we want the Judiciary to be independent and for the judges on the Judiciary to understand how the Government operates. So that is why political service has been common in judicial nominees' backgrounds in the past. That is why it is important, but it is not because courts are then just an extension of the political differences that may exist elsewhere. It is because of that important Government service gives you a perspective, whether it is Judge Buckley or Judge Mikva on the D.C. Circuit, or Justice Breyer who served on this Committee.

Senator SESSIONS. I agree with that, and I think that is why the American Bar Association, which is certainly a liberal political institution, in my view, has rated you the highest rating, well qualified. They believe that if their members appear before you, your demonstrated record of commitment to following the law as written, whether you agree with it or not, is clear. In fact, let me ask you, is it a deep personal philosophy of yours that a judge should follow the law whether or not he agrees with it, and is that one of the most key points of your personal judicial philosophy?

Mr. KAVANAUGH. It is critical, Senator, for a lower court judge to follow Supreme Court precedent faithfully in all instances. Whether you might agree with it, you might have decided differently, you have to follow that precedent faithfully. It is something I learned when I was a law clerk, and I have seen in practice, and it is something I can commit to this Committee, were I to be confirmed, that I would do.

Senator SESSIONS. We have a difference of views in America today about what judges should be—their philosophy as a judge. There is no doubt about it. A number of members of this Committee and this Senate are determined to see judges appointed that believe—that are activists, as Senator Hatch described it, and he defined very carefully what that word means. It means promoting a political, ideological agenda from the bench, which I believe is incorrect, President Bush believes is incorrect, and I believe overwhelmingly the American people believe it is incorrect. The reason it is incorrect is judges, if you are confirmed, are not accountable to the public. You never stand for election again. You hold your office for life. Many of your decisions are unreviewable ultimately, and it leaves the American people subject to decisions in an antidemocratic forum unless that judge restrains him or herself, and enforces the law as written or the Constitution as declared by the people of the United States. I think that is important. We do not need ideology, and as Lloyd Cutler, the White House Counsel under President Clinton and Carter, really criticized the idea that we should politicize the courts and bring ideology into the courts.

Chairman HATCH. Senator, your time is up.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman HATCH. We will turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Let me shift to a slightly different area. I am sure everybody is going to ask these questions on some of the other areas. I am

thinking back to right after September 11th, back in 2001. On September 20th, a week later, you came to the Hill as a representative of President Bush to offer legislation designed to protect the airline business from having to take responsibility for the death and destruction of the attacks in New York and Pennsylvania and Virginia. That is a bill that ultimately became law. It provided victims compensation in return for immunizing the airlines from liability.

When you brought the bill up, it had no compensation for victims. It had immunization for the airlines, nothing for the victims. It actually had sort of a wish list of tort reforms that the airline industry had punitive damages caps for the airlines, attorney fee limits against victims' lawyers, but not against the airlines' lawyers. It even reduced victim compensation court by disaster payments that may have been in there.

I remember the negotiations on this bill. You vehemently opposed any compensation for the victims' families. You insisted the bill only limit the liability of the airline industry. Now, wisely, we rejected that approach. We established the September 11th Victims Compensation Fund. I happened to write it. And in that bill, while we limited liability for the airlines, we did compensate the victims.

Why were you so opposed to compensating the victims, and why were you so singularly fixed on protecting just the airlines?

Mr. KAVANAUGH. Senator, I do not think the facts as stated in the question are accurate.

Senator LEAHY. How would you state them?

Mr. KAVANAUGH. They are not consistent.

Senator LEAHY. How would you state them? Let me ask you this then. Let me break it down. Did you not come up with a bill that had nothing in it for victims, but did have a list of areas where airline liability would be limited?

Mr. KAVANAUGH. Senator, I think there were two separate issues. One was the airlines, which were going to go bankrupt that Monday.

Senator LEAHY. But I am thinking—I may not have stated my question well. I am just a small-town lawyer from Vermont, but let me try it one more time. Did you not come up with a bill that had a number of different limits of liability for the airlines and nothing for the victims? Yes or no?

Mr. KAVANAUGH. And to answer that question, I need to explain, Senator, and the reason is there were two separate issues that were in play at that time. One was the airline liability issues because the airlines were potentially going to go bankrupt on that Monday unless Congress acted. That is why, as I recall, there was—

Senator LEAHY. They found out afterward they were not going to go bankrupt on that Monday, but did the bill—

Mr. KAVANAUGH. There was bipartisan agreement that the airlines were going to go bankrupt that Monday unless Congress acted and the President signed the bill.

Senator LEAHY. Did you object strongly, or did you object to putting in compensation for victims?

Mr. KAVANAUGH. No. The question was what kind of precedent should be used to compensate the victims.

Senator LEAHY. Mr. Kavanaugh, I was there. You are under oath. I am not. But let me ask you again, did you object on that legislation—you are under oath—to having compensation for the victims?

Chairman HATCH. Senator, let him answer the question.

Senator LEAHY. I will.

Chairman HATCH. He said there were two—

Senator LEAHY. That is why I made sure he understood it.

Chairman HATCH. But let him state it.

Mr. KAVANAUGH. Senator, I was there as a representative of the administration, and there were two separate issues that needed to be addressed, one which needed to be addressed immediately, as I recall, was the question of liability for the airlines. I think there was bipartisan agreement. And I participated in a meeting in the Speaker's Office after the President's speech on Thursday night, the 20th, where the Speaker and Senator Lott, Representative Gephardt, and Senator Daschle were all present, as was the Director of OMB.

The question was there at the airlines' liability. There was a separate question which was important, and the two ultimately got linked in the same bill, of compensation for the victims of September 11th. On that separate question there was an issue, what precedent do we have for compensation for victims of terrorism? There was the Oklahoma City issue, which Senator Nichols raised, that they had not received significant compensation. There was the Police Safety Officers Benefit Legislation. That was a possible precedent. We were looking at those precedents.

Then there were further discussions including with Mr. Pagano and your staff, Senator Leahy, and there was a discussion of if we are going to do the limitations on airlines' liability, we should give the victims the same kind of compensation that they would recover had they been allowed to litigate the matter in court, but to do it more expeditiously.

Senator LEAHY. What position did you take on that?

Mr. KAVANAUGH. On that we were concerned about the fact—

Senator LEAHY. I am not asking what you were concerned about. What position did you take?

Mr. KAVANAUGH. At the ultimate meeting on behalf of the administration, Director Daniels agreed to that.

Senator LEAHY. Did you oppose that initially?

Mr. KAVANAUGH. There were discussions about how to do it and there was concerns about—

Senator LEAHY. Did you oppose that initially?

Mr. KAVANAUGH. The precedent that was on point that we cited initially was the Police Safety Officer's Benefits Fund. That was the most relevant precedent. We had not thought, at least I had not thought of doing a separate litigation model for—essentially a damages model at that point. That was an idea that was raised during the discussions with Senator Lott's staff, as I recall. Senator Lott's staff, I believe, first raised that idea, at least in my presence. And the one concern about that at the time that I recall being discussed with your staff, Senator Leahy, was the fact that that would mean unequal compensation. In other words, the victims of a rel-

atively poor family would get a much smaller amount. The family of a poor victim would get a much smaller amount.

Senator LEAHY. Did you oppose linkage of the two?

Mr. KAVANAUGH. As I recall—

Senator LEAHY. When the proposal was made to you, okay, we will agree on protecting the liability of the airlines—and I was meeting with the heads of all the airlines at that time too—we will do that, but we are going to take care of the victims and get this is. We will Public Service Commission them both. Did you oppose that linkage?

Mr. KAVANAUGH. I remember personally being involved in those discussions and saying that it was important, I thought—at least this was in the fluid negotiations—of compensating each victim's family equally. That was the principle that I had stated at the time.

Senator LEAHY. Did you oppose linking them?

Mr. KAVANAUGH. Linking the two bills?

Senator LEAHY. Yes.

Mr. KAVANAUGH. I do not remember opposing linkage of the two bills. I knew the two had to be—both had to occur. Whether they had to occur together I think was a discussion. It was fluid discussions. I was not speaking for the administration either. It was Director Daniels who was.

Senator LEAHY. So you did not oppose the idea of putting victims' compensation in that airline bill? It is kind of hard to understand your answer with all the caveats, and I realize you have not spent much time in trying cases, but let me assure you that if you had, the judge would be all over you on the way you are answering.

Mr. KAVANAUGH. Senator, I do not recall opposing the linkage of the two. I remember they started as two separate issues and then they got linked. Then the second question, which was important, was what precedent do we look to for compensation? There were precedents out there in terms of Oklahoma City, in terms of the Police Safety Officer Benefit Fund. I remember also being concerned about the administrative time it would take for people to get compensated through the kind of fund.

Now I want to say—

Senator LEAHY. You did not have any problem with the administration trying to wipe out all our liability statutes to help the airlines to make sure that their attorneys were compensated, but to put limits on anybody else's attorneys? That did not bother you.

Mr. KAVANAUGH. Senator, as I recall, there was bipartisan, I think unanimous—

Senator LEAHY. It did not bother you. I do not care what—I was involved in those negotiations, Mr. Kavanaugh. I remember them very well. It did not bother you.

Mr. KAVANAUGH. It was unanimous agreement, as I recall, Senator, that something had to be done for the airlines or they were going to go bankrupt that Monday morning.

Senator LEAHY. Let me go to a different subject because you are not going to answer my question, so let me go to another one.

The question of secrecy in Government, and this administration has shown more secrecy than any administration I have served with from the Ford administration forward. You were the author,

one of the first indicators of this increase in secrecy, Executive Order 13233, that drastically changed the presidential records. It gave former Presidents, their representatives, and even the incumbent President, virtual veto power over what records of theirs would be released, posed a higher burden on researchers petitioning for access to what had been releasable papers in the past. After the order was issued, a number of historians, public interest organizations, opposed the change. The Republican-led House Committee on Government Reform approved a bill to reverse this. A lawsuit to overturn it was filed by Public Citizen, American Historical Association, Organization of American Historians, and a number of others. Why did you favor an increase in the secrecy of presidential records?

Mr. KAVANAUGH. Senator, with respect to President Bush's Executive Order, I think I want to clarify how you described it. It was an order that merely set forth the procedures for assertion of privilege by a former President, and let me explain what that means.

The Supreme Court of the United States in *Nixon* v. *GSA* in 1977, opinion by Justice Brennan, had concluded that a former President still maintains a privilege over his records, even after he leaves office. This was somewhat unusual because there was an argument in the case that those are Government records. But the Court concluded that both the current President and the former President have the right to assert privilege to prevent the release of presidential records. That is obviously a complicated situation. The issue was coming to a head for the first time because there is a 12-year period of repose, so 12 years after President Reagan left office was when this President Bush came into office, and there was a need to establish procedures. How is this going to work, two different Presidents asserting privilege or having the right to review?

No one really had a good idea how this was going to work. The goal of the order was merely to set forth procedures. It specifically says in Section 9 of the order that it is not designed in any way to suggest whether a former President or current President should or should not assert privilege over his records.

You are quite right, Senator Leahy, that there was initial concern by historians about the order. I like to think it was based on a misunderstanding, and Judge Gonzales and I undertook to meet every 6 months or so with a large group of historians first to discuss the order and to explain it, and then after that, to discuss any problems they were having with the order, and to help improve it if they suggested ways for improvement. I think those meetings, I think the historians who come to see us, have found them useful, and I think we helped to explain what we had in mind and what the President's Order meant in terms of the procedure. So that is my explanation of that order.

Senator LEAHY. Thank you, Mr. Chairman. I have other questions for the record, although I suspect they probably will not be answered, but I will still submit them. Thank you.

Chairman HATCH. Thank you, Senator.

Senator Cornyn.

Senator CORNYN. Mr. Kavanaugh, as I understand, the objections to your nomination go like this. First, you do not have the proper

experience. Alternatively, you have the wrong kind of experience. And alternatively, or maybe concurrently, you have represented the wrong clients. Could you explain to the Committee how you view the role of a lawyer as an advocate, which has been your professional career to this point, and how you view the role of Judge, which of course will be your duty and obligation when you are confirmed?

Mr. KAVANAUGH. Senator, every lawyer has ethical obligation to zealously represent his or her client in court or in other matters, regardless of whether the lawyer might agree with the position of the client. That is true as well as a law clerk for a judge or Justice. You have the obligation to give the judge your best advice, but then to do what the judge decides, not what you may think is right. When you are working in public service in the Independent Counsel's Office or in the White House Counsel's Office or in my current role as staff secretary, my job is to give recommendations and advice, but ultimately to carry out the direction of my superiors without regard to whether I might have chosen a different path. And that is an important function of our legal system, the adversary system when I was in private practice, and in Government service, and it is something that I feel strongly about.

As a judge, again, it is not your personal views. It is a similar kind of mindset in some ways. It is not your personal views that are relevant or your past affiliations that are relevant. It is important to follow the law faithfully, the precedent of the Supreme Court, regardless of what those views may be.

Senator CORNYN. I happen to agree with the distinction of a lawyer as an advocate and a judge as an impartial decider of the law and fact as the case may be. Unfortunately, we seem to have—some seem to be engaging in what I think is a very dangerous tendency to associate a lawyer, who is a professional advocate, with the views of their client as if they were always inseparable and as if they were always one.

I don't have any doubt that if you were a criminal defense lawyer and represented those accused of crime in courts on a daily basis, members of this Committee and others would surely have no trouble distinguished between the views of your client and your duties as a criminal defense lawyer to represent that client in court. But somehow when it comes to the administration's policies or lawyers representing the President or the Department of Defense in the case of Mr. Haynes, who has been nominated to the Fourth Circuit, people have trouble making that distinction. But I believe it is a very important one, and I appreciate your answer.

And I have to say that Senator Schumer said no one in the room disagrees with him about the role of ideology in judicial selection, and I just want to say "me, too" to Senator Sessions who said he had disagreed with Senator Schumer on that.

But as I understand the role of the Committee and the advise and consent role under the Constitution, it is to explore qualifications and judicial philosophy, that is, whether you are willing to subjugate any personal views that you may have, whether they be political, ideological, or otherwise, to what the law is and to faithfully enforce the law as written by the Congress or as determined by precedents of the United States Supreme Court.

Do you have a similar understanding of what the role is of a judge and how that is different from any personal opinions, philosophical or ideological or others that you may have?

Mr. KAVANAUGH. Well, I think, Senator, the Founders established an independent judiciary, discussed it in the Federalist Papers, because they wanted people who would be independent of the legislative and executive branches to decide cases fairly and impartially, without regard to their personal preferences.

There was discussion at the time, I think Federalist 81 discusses making the judiciary an extension of the legislature, or somehow having review by the legislature. But there was a decision made to have an independent judiciary, and that is the foundation of our system of rule of law.

The Founders also recognized, I think necessarily and certainly at the time, that people with Government service who had served in the legislative branch or served in the executive branch would become judges—Chief Justice Marshall, for example—would have backgrounds that involved Government service or political service. But they also had confidence in the ability of people in our system, once they became judges and put on the black robes, to decide cases fairly and impartially. And that's the way that system has worked for more than two centuries. And I know there has been some discussion about that, but that's the way the system has worked in terms of deciding cases fairly and impartially and not based on political of personal views.

Senator CORNYN. In your opinion, did Justice Kennedy in your experience, was he able to make the transition from lawyer to judge and make that sort of transition you described?

Mr. KAVANAUGH. Justice Kennedy always decided cases fairly and impartially and taught a lot to his law clerks about how to do the same.

Senator CORNYN. And in my introductory comments, I pointed out that you are not the only person to come before the Court who has represented a client in the arena, for example, Justice Ruth Bader Ginsburg. In your opinion, has she been able to successfully distinguish between her role as general counsel for the American Civil Liberties Union and her role as a judge?

Mr. KAVANAUGH. In my observation, she's—yes, she's an excellent Justice on the Supreme Court. It's not for me to be commenting too much on Supreme Court Justices, but I think she obviously decides cases fairly and impartially and was a judge on the D.C. Circuit before that who was widely respected, as she is on the Supreme Court.

Senator CORNYN. And Justice Breyer, who was the Democrats' chief counsel on the Senate Judiciary Committee, do you think he has been able to successfully make the change between that job and the role as judge, a circuit judge first and then now as a member of the United States Supreme Court?

Mr. KAVANAUGH. Yes.

Senator CORNYN. And Byron White, who was a political appointee at the Justice Department under President Kennedy, Abner Mikva, I guess the list could go on and on. But in your experience and in your observation, have others that have had perhaps not the same but a similar experience, either in the political arena

or representing clients who were, been able to successfully make the transition from advocate to impartial judge?

Mr. KAVANAUGH. Yes, Senator, absolutely.

Senator CORNYN. And I guess the problem is, in some instances, there are those who just don't simply believe that is true, that anyone can actually make that transition. There are those, I guess, who think that those who come to the bench continue to be advocates for an ideology or political persuasion or see it as appropriate to issue judicial edicts or decisions that satisfy only their own sense of justice and not what the law is.

I don't know how anyone can truly believe that and still say that we are Nation of laws and not individuals. Do you have any thoughts on that?

Mr. KAVANAUGH. I agree with that, Senator, very much, and I guess I firmly disagree with the notion that there are Republican judges and Democrats judges. There is one kind of judge. There is an independent judge under our Constitution. And the fact that they may have been a Republican or Democrat of an independent in a past life is completely irrelevant to how they conduct themselves as judges. And I think two centuries of experience has shown us that that ideal which the Founders established can be realized and has been realized and will continue to be realized.

Senator CORNYN. And I know for all the attempts made during the confirmation process to try to predict how an Article III judge will act once they have a life-tenured position and have the responsibility of being a judge, we don't have a particularly good track record of making that prediction. I point out Harry Blackmun, who I believe was appointed by President Nixon; Justice Souter, appointed by President Bush; and Earl Warren, appointed by President Eisenhower.

Have you observed judges consciously or unconsciously make that transition of judge in your experience, in your clerking experience? Or have you discussed that with Justice Kennedy or Judge Kozinski or any other judges you have worked with?

Mr. KAVANAUGH. I believe that the judges for whom I've worked and all the judges I've observed in my experience understand the importance of putting on the robe and understand the importance of sitting in the courtroom as a fair and impartial arbiter of cases, and I think they all have understood that and helped pass it along.

Chairman HATCH. Senator, your time is up. Thank you.

Senator Feinstein? Then we will go to Senator Kennedy and finally Senator Durbin.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Kavanaugh, while you worked for Mr. Starr in the Office of the Independent Counsel, you argued to the D.C. Circuit in an opinion entitled *In re Bruce Lindsey*. There you convinced the D.C. Circuit that the Deputy White House Counsel Bruce Lindsey must testify to a grand jury despite his claims that the information sought was protected by attorney-client privilege.

Since then, you yourself have worked in the White House Counsel's Office. There you drafted Executive Order 13233. That order significantly limits which documents the administration releases to the public.

Do you see any contradiction between the arguments you made in the D.C. Circuit in the *Lindsey* case, which weakened Presidential privilege, and your work on the Executive Order, which strengthened Presidential privilege?

Mr. KAVANAUGH. Senator Feinstein, let me explain that in two ways.

First, in both instances, I was representing a client, in the first in Judge Starr's office, and the second working in the White House.

But, second, let me answer the heart of the question, which is, I think, the two positions are consistent in that the *Lindsey* case arose in the context of a criminal investigation, and the Supreme Court had said years ago in the *U.S.* v. *Nixon* case that the needs of a criminal investigation trump any governmental interest in confidentiality, whether it be Everything privilege—and the question in the *Lindsey* case was whether that *Nixon* case also extended to Government attorney-client privilege. And the court concluded that it would.

The Executive Order, as I explained to Senator Leahy in some part, was merely designed to set up procedures for the assertion of privilege. The order itself didn't assert any privileges. President Bush wasn't asserting any privileges there. It merely set up the procedures to implement the assertion of privilege by a former President. And so that's what the order was designed to do. It didn't address the context of the criminal investigation at all.

So I think the two are, in fact, consistent.

Senator FEINSTEIN. Okay. In response to a question by Senator Schumer, you indicated that ideology is not—and you were rather definite—any kind of a test for a Bush judge. Let me read you from a Patriot News editorial. This is a Pennsylvania newspaper, and the date is April 30, 2003. The editorial stated, "Only two things apparently guided Bush's selection: first, that the candidate be sure of Senate confirmation; and, second, that he be opposed to abortion."

The article goes on to add, "What we find perplexing and more than just a little disturbing is that the abortion issue was put forward by the Bush administration as the sole litmus test."

I would like you to respond to that.

Mr. KAVANAUGH. Senator, as Judge Gonzales has said before publicly, as have I, we don't ask judicial nominees or candidates their positions on issues like that. We don't know in the vast, vast majority of cases, unless there has been a public record before—

Senator FEINSTEIN. You say you don't know?

Mr. KAVANAUGH. Don't know, correct. We don't know what someone's position is.

Senator FEINSTEIN. Well, let me ask you this: Could you identify five pro-choice judges that the White House sent to the Hill?

Mr. KAVANAUGH. I don't know whether the nominees are pro-choice or pro-life unless—

Senator FEINSTEIN. Four? Three? Two? One?

Mr. KAVANAUGH. Senator, I'm sure there are many. I don't know what someone's—I don't know and we don't ask what someone's position on issues like that is. So I don't know if there are some, many, of any particular viewpoint on any particular issue like that. So we don't ask, and that's an important part of the process.

Senator FEINSTEIN. Well, let me ask this question: Would you agree, then, that most nominees that come up here are politically conservative?

Mr. KAVANAUGH. This goes to a question that Senator Schumer asked, and I'm going to answer you directly. Most of the nominees of any President share the same political affiliation as the President. That's been a tradition in our country going back two centuries. Most of President Clinton's nominees were Democrats. Now, that didn't mean they couldn't be independent and fair judges. It just meant that their prior political affiliation was Democrat. So, too, most of President Bush's nominees—not all by any stretch, but most are Republicans. Again, that's part of the tradition.

Again, as with President Clinton's nominees, it doesn't mean that they won't be—because they will be—fair and impartial judges. It's a difference between political affiliation and political beliefs and being a fair and impartial judge. And I believe firmly in the notion that there is a strong difference in those two things, and I think our system has reflected that for two centuries.

So they might be mostly Republican, just as President Clinton's might be mostly Democrat. But they'll be all good judges.

Senator FEINSTEIN. Well, we take that for a given and that isn't the problem. The problem is where they are on the political spectrum and whether their ideology is so strong that they can't separate themselves from that ideology to be a fair and impartial judge on major questions that come up before an appellate court. And what I'm trying to find out is if you're willing to do that, and thus far the indicators are that you are not.

Mr. KAVANAUGH. Willing to be a fair—

Senator FEINSTEIN. Willing to separate yourself from the ideology. I think to say that ideology is not any kind of a test, it is just that somebody belongs to the Republican Party, really I find dismaying because the evidence of the people that come before us doesn't really display that in any way, shape, or form.

Mr. KAVANAUGH. I understand the question, Senator—

Senator FEINSTEIN. And what I had hoped you would be is up front and direct with this Committee.

Mr. KAVANAUGH. Well, Senator Feinstein, it's important that a judge understand the proper role of a judge to decide cases based on the law before him or her. In terms of the judges that have come before the Committee, I know there have been a few that have been raised here today and discussed publicly, but the vast majority have been approved by the Committee. We've worked closely with your office and Senator Boxer's office. In California, a commission has been set up. The district court judges have moved through, Judge Bea and Judge Callahan, Consuelo Callahan and Carlos Bea. I talked to your office and Senator Boxer's office about those two nominees, and they were approved.

So there have been some that have been highlighted, I understand, but I think the vast majority have been approved, and I think we've worked—tried to work well with the home State Senators.

Senator FEINSTEIN. Well, let me just set the record straight. I don't review nominees to the district court. We have a screening committee, three Republicans, three Democrats, non-partisan. All

the nominees go there. They review them and they make recommendations. I don't believe Senator Boxer—and I know do not interfere in that process.

With respect to the circuit court, what has happened is, on occasion, I would receive a call from Judge Gonzales. Now, if this is conferring, so be it. But it is, "Do you have an objection to Carlos Bea?" That is the specific question. It really isn't conferring in the traditional sense.

However, I must tell you, I welcome even that phone call. So, you know, I am not being critical about it. But, you know, for me—and I can only speak for myself as to how I judge a nominee. It is my interest—because I happen to know that everybody coming out here is conservative. Do I believe they can be a fair and impartial judge? Do I believe they can interpret the law without a particular political bias of any kind?

Mr. KAVANAUGH. And I agree that should be—

Senator FEINSTEIN. Now, say something that gives me some assurance that you can do that, because the questions that Senator Schumer asked to detect just that you wouldn't respond to.

Mr. KAVANAUGH. Senator, I have throughout my career committed myself to public service. When I work in the independent counsel's office, I thought deeply about the issues raised by that investigation and raised by the statute. I wrote an article in the Georgetown Law Journal trying to outline a new approach for independent counsel investigations, and I hope, you know, you have it. And it's important because it shows that I took what I thought was a fresh look, an independent look at an issue raised by the investigation. I talked about how reports were a problem, how they were inevitably perceived as political acts. I wrote that in 1997. I talked about some of the problems in the investigation in terms of the statute afterwards. I think I was trying to—what I was trying to do there was taken an independent look at an issue that I had personally been involved in. When I've written other matters—when I wrote on Batson procedures when I was in law school, about the hearings for *Batson* v. *Kentucky*, I tried to take a fresh look at an issue on how procedures should work.

When I was in law practice, I tried to—I represented clients of the firm, but I also made sure to do pro bono cases. And I got a range of pro bono clients that I worked on for the firm.

When I was in public service in the Starr office, before the Lewinsky matter came to the office, one of the important things that I worked on was what was known as the Foster documents investigation. And we received a referral from the Committee about a few people, and we concluded in that office not to seek charges against any of the individuals named in those referrals from the Senate.

When I was in the Starr office, we prepared a report under Section 595(c)—and Judge Starr has talked about this before publicly—a report on the Whitewater-Madison matter outlining whether there were grounds for an impeachment. And we looked at that report, and we decided the evidence was not sufficient under the statute to send it to the Senate.

When I worked for Justice Kennedy—and he knows—I gave him my independent advice on matters that probably didn't always fit a pre-existing impression of what I would say.

When I worked in the Justice Department, I represented clients on—I represented the United States on a variety of issues, and I think the people who worked with me in the Solicitor General's office know I took an independent looks. The judges I clerked for on the court of appeals, the same.

I think throughout my career in the White House as Staff Secretary, one of my jobs is to be the honest broker for competing views that come in on memos to the President. Will those views be reflected accurately in the memo? One of my jobs is to make sure not to let the memo get slanted, not to let one person dominate the memo, to make sure the President is getting the best advice from all sides, regardless of what I think is the right answer or the right policy position the President should take in a particular case. I was selected for that job to be the honest broker for the President in making sure he got competing views.

In the counsel's office, so too I tried to work very closely with home State Senators in Illinois and in California. I might not have always agreed with particular recommendations that came from Senators. I tried to work closely to do the best job I could for the President.

So I think my record is replete with examples where I've been independent, where I've tried to take a fresh look, where I've done something because I'm an honest broker. And I think that's how I would serve as a judge as well.

Chairman HATCH. Senator, your time is up.

Senator FEINSTEIN. Thank you. My time is up.

Chairman HATCH. Senator Kyl?

Senator KYL. Mr. Kavanaugh, I want to get back to the privilege issue. You have been criticized on the one hand for attacking the Clinton administration's assertions of various privileges during your work in the Office of Independent Counsel, and on the other hand helping to draft Executive Order 13233, which establishes policies and procedures to govern the processing of requests for Presidential records and the assertion of constitutionally based privileges.

Does this Executive Order set forth those circumstances under which an assertion of Executive privilege should be made or would be successful? Or does anything in the Executive Order purport to block prosecutors or grand juries from gaining access to Presidential records in a criminal investigation?

Mr. KAVANAUGH. Senator, nothing in the order purports to assert a privilege at all. It's up to the individual President, former President or current President, to assert a privilege following the procedures in the order. So nothing blocks anything from a criminal or grand jury investigator. And, again, there have been some misimpressions about the order when it first came out. Some historians were concerned, and we took proactive steps. Judge Gonzales and I met with historians to try to allay their concerns and explain the order. We met with people on the Hill also who had questions about it, and over time I think we've explained what the order was designed to do, which is merely to set up procedures.

Senator KYL. And with regard to the criminal aspect, does it block prosecutors or grand juries from gaining access to Presidential records in a criminal proceeding?

Mr. KAVANAUGH. It does not block any access.

Senator KYL. And your arguments on behalf of the Office of Independent Counsel regarding privilege was that Government attorneys in the Clinton administration could not invoke the attorney-client privilege to block the production of information relevant to a Federal criminal investigation, right?

Mr. KAVANAUGH. The court ruled that the Government could not assert a privilege to block it from a criminal investigation under *Nixon*. It said that it would—yes, that's correct.

Senator KYL. So I don't understand where the inconsistency is here. I know some of my colleagues may have tried to assert it, but I don't see it. And correct me if I'm wrong or if I'm missing something here. But the key issue is the assertion of privileges in the context of Federal criminal investigations. In fact, you referred to your Georgetown Law article in 1998 which was authored during the Clinton administration, and didn't you there specifically recognize the difference between asserting Executive privilege in the criminal context versus outside of the criminal context?

Mr. KAVANAUGH. I did recognize the difference in that article. That was a difference that had been also recognized in the cases.

Senator KYL. And isn't it further the case that you actually acknowledged or argued a presumptive privilege for Presidential communications—and I have a quotation here that was supplied to me by the staff—and that "it may well be absolute in civil, Congressional, and FOIA proceedings"?

Mr. KAVANAUGH. That's correct. That's from my Georgetown article.

Senator KYL. And entirely consistent with this statement, doesn't the Executive Order that I referred to specifically recognize that there are situations where a party seeking access to Presidential records may overcome the assertion of constitutionally based privileges?

Mr. KAVANAUGH. Yes.

Senator KYL. Okay. A few more points here.

During your service as Associate White House Counsel, have you ever worked on a matter where the President invoked or threatened to invoke Executive privilege in a criminal context?

Mr. KAVANAUGH. Senator, I'd like to answer that question, but I don't think it's my place to talk about internal discussions of privilege claims.

Senator KYL. Okay.

Mr. KAVANAUGH. I just want to be careful not to go down a road—

Senator KYL. All right. Well, let me ask you—

Mr. KAVANAUGH. There's been no public assertion. I just don't want to go down that road.

Senator KYL. I appreciate your desire to treat that with confidentiality.

Did you work on the Bush administration's assertion of Executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his Presidency and to withhold from Con-

gress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton administration?

Mr. KAVANAUGH. I was involved in that matter working for Judge Gonzales, who in turn was providing advice to the President, yes.

Senator KYL. So it seemed, at least I would assert, Mr. Chairman, that Mr. Kavanaugh has been evenhanded and hardly partisan with respect to the privilege issue. And if I have just a little bit more time—

Chairman HATCH. You do.

Senator KYL. One of the last questions had to do with the Starr Report. I understand you were one of several authors for that report, and that that report was actually required as a matter of Federal law. Is that correct?

Mr. KAVANAUGH. That report was required as a matter of Federal law based on the jurisdiction that Attorney General Reno had given Judge Starr.

Senator KYL. And what part of the report did you help draft?

Mr. KAVANAUGH. I helped on the grounds section of the report, which outlined possible grounds for an impeachment, which was the standard specifically in the statute.

Senator KYL. Did the independent counsel's report ever state that President Clinton should be impeached?

Mr. KAVANAUGH. It never did.

Senator KYL. Now, of course, majorities in the House of Representatives determined that information presented by the independent counsel constituted grounds for impeachment, but that report did not state that conclusion. Is that correct?

Mr. KAVANAUGH. That is correct. And Judge Starr in his November testimony before the House Judiciary Committee emphasized over and over again that it was for the House solely to decide whether to impeach, that he was making no recommendation.

Senator KYL. And the House concluded that the evidence was sufficient to impeach, and 50 members of the Senate found the evidence compelling enough and acted accordingly. Much of the report was criticized for containing extensive details of certain activities which some considered sensational.

What part, if any, did you have in the authorship of that section of the report?

Mr. KAVANAUGH. On the narrative section of the report, I did not write or work on the grounds section of the report. I worked on, again, how the report was released, I think was an issue I've discussed publicly before, and said how it was released by the House turned out to be a mistake, but—and I've said that publicly before.

Senator KYL. Is it fair to ask you whether you had an opinion on whether or not some of the details in the narrative part of the report should have been included?

Mr. KAVANAUGH. They were relevant to the facts in the case, but I've said that how the report was released publicly was a mistake because some of those facts should not have been necessarily released publicly.

Senator KYL. Well, again, Mr. Chairman, it seems to me that in looking at the entirety of Mr. Kavanaugh's record and the activities

in which some of have criticized him for participating, in fact, the record reveals a very evenhanded, straightforward, honest, forthright, and very non-partisan approach to these issues. And I would hope that my colleagues, unhappy about certain historical events, would not transfer that unhappiness to a candidate here who is obviously extraordinarily well qualified, has served in a variety of public capacities, and in my view would make a tremendous addition to the bench. I hope that they wouldn't transfer that unhappiness with certain things that occurred in the past to Mr. Kavanaugh, who I think has demonstrated that he would not be the source of any of the unhappiness if the issue were carefully considered.

Chairman HATCH. I certainly agree. Would the Senator yield his last 2 minutes to me?

Senator KYL. I am happy to do that.

Chairman HATCH. Because I just want to clarify a few things. The editorial referred to by Senator Feinstein, that was not a White House statement.

Mr. KAVANAUGH. I am not sure where that came from.

Chairman HATCH. I am not either, but let me just say this. The Committee questionnaire asks judicial nominees if any specific case, legal issue, or question has been discussed in a manner that could reasonably be interpreted as asking how a nominee would rule on such a case, question, or issue. So I think the question is this: Is it a practice of the White House to discuss particular issues, like abortion, with the nominees?

Mr. KAVANAUGH. No, it's—

Chairman HATCH. I know that that's true. You don't. And one reason you don't is because of the Committee's requisite there, plus it is just you know darn well somebody would make a fuss about it if you did up here. Is that right? I may have said it in more blunt terms than you would with your finesse, but—

Mr. KAVANAUGH. Mr. Chairman, the President has said and Judge Gonzales has said that one's personal views on particular policy issues is not relevant to how one goes about being a fair and impartial judge.

Chairman HATCH. I agree with that.

Mr. KAVANAUGH. And so we don't ask questions about personal views on policy issues.

Chairman HATCH. Or on litmus test issues that have become litmus test issues up here, apparently.

Mr. KAVANAUGH. We don't ask questions on that and don't know the answers.

Chairman HATCH. Now, with regard to the airlines, as I understand it, the proposed legislation did not provide immunity to the airlines; rather, it limited their liability to their insurance policy limits. Is that correct?

Mr. KAVANAUGH. That is correct, Senator.

Chairman HATCH. Okay. Now, the administration did not oppose the principle of victim compensation, but wanted to get that issue right. The airline liability issue was a more urgent matter in that they were facing bankruptcy. And that is why these issues were not originally linked. Isn't that a fair appraisal?

Mr. KAVANAUGH. That's absolutely right, Mr. Chairman. The two issues were separate.

Chairman HATCH. I just wanted to clarify that because if you just listen to one side up here, you might get the wrong impression. But that is actually what happened, isn't it?

Mr. KAVANAUGH. That's correct, Mr. Chairman.

Chairman HATCH. I stated it correctly.

Mr. KAVANAUGH. They're two separate issues. The question—ultimately in the discussions, the two became part of the same bill, and there were discussions then about what kind of compensation fund, we were looking at precedents that were already in place, and then ultimately the administration supported the proposal that was discussed on the night of September 20th, after the President's speech.

Chairman HATCH. Senator Kyl was kind enough to give his time to me. I appreciate it. My time is up.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Kavanaugh, thank you for joining us today.

Mr. KAVANAUGH. Thank you.

Senator DURBIN. You have many friends in this room, but you certainly do not have as many as your mother and father who have many friends in Washington on Capitol Hill and many of them have contacted me. And it is a testament to your family, and I am sure you are very proud of them and the support that they give you.

I listen to the questions that have been asked, and no one has questioned your honesty, nor should they. There is no indication on the record of any reason to question, but it comes down to two areas, repeatedly: your skill and talent, whether you are up to this job and, second, whether you can be fair and objective. That is really, all of the questions focus on those two areas.

I have been a fan of baseball since I was a little kid. If the owner of the Chicago Cubs called me and said, "Listen, we know you follow baseball very closely, and we would like you to be the starting pitcher tonight in Arizona," I would say, "Stop. I know my limitations. I am flattered that you would even consider me."

Did that thought ever cross your mind when they said it is time for the D.C. Circuit Court of Appeals, that it was a flattering offer, but frankly your resume just was not strong enough? When you listen to what Senator Schumer says about the people serving on that court, Republicans and Democrats, when you consider the fact that despite your commitment to public service, you have limited experience when it comes to litigation, and trial work, and things that may be very important in decisions that you make, did it ever just dawn on you at some point to say, "Stop. I am flattered, but in all honesty, I am not ready to be the starting pitcher on that team"?

Mr. KAVANAUGH. Senator, when it was mentioned to me, I was humbled and honored to be considered, but I also, based on my record and experience, am ready to hit the ground running, were I to be confirmed to be a judge, based on my experience as a law clerk, in the Justice Department, performing grand jury work, working on matters in litigation, arguing before the Supreme Court, private practice for major clients, for pro bono clients, work-

ing in the White House Counsel's Office on difficult matters, several of which we have discussed here today that were difficult matters, working now as staff secretary for the President and anticipating a lot of conversations with senior staff and with the President at the White House.

Senator DURBIN. But, Mr. Kavanaugh—

Mr. KAVANAUGH. I think that record means that I think I can hit the ground running.

Senator DURBIN. It is a good record. It is a great record, but it does not avoid the obvious, and that is that you come to this position, the second-highest court in America, the second-highest court in America, the training ground for the U.S. Supreme Court, with less legal experience than virtually any Republican or Democratic nominee in more than 30 years. Of the 54 judges appointed to this court in 111 years, only one—Kenneth Starr—had less legal experience. That is a fact.

And you have made it your professional life now, for some time now, to look closely at the qualifications of nominees. Were you able to look at your own qualifications in this context? Would it not have been better for you to have started off at a District Court or some other appointment and work your way up? But to start at this level is—I do not think it is warranted.

Mr. KAVANAUGH. Senator, I think the President made the decision to nominate me. I know the American Bar Association, which many in this Committee have relied on for years, rated me well-qualified for a seat on this bench at this time. And so I look to other evaluations of me—the American Bar Association conclusion—and based on my own record in appellate law, and my experience in a wide range of difficult issues, which I have not shied away, but have tackled the best I could, I think I am prepared to be a judge on the circuit.

Senator DURBIN. Let us talk about that wide range of issues. Of course, the fear is, if you hit the ground running, are you only going to be running to the right, and that is a legitimate fear.

As I look through all of the different issues that you have been involved in as an attorney in public service and the private sector, it seems that you are the Zelig or Forrest Gump of Republican politics. You show up at every scene of the crime. You are somehow or another deeply involved, whether it is Elian Gonzalez or the Starr Report, you are there.

And it strikes me as worrisome, as Senator Schumer and others have noted, that you have been in this position consistently and raises the question in my mind, would you not understand that an attorney coming before the D.C. Circuit Court, looking at your resume, has to assume—just assume—where you are going to end up. There are so few exceptions, if any, in your legal career that point to objectivity.

Give me a good example of where you just flat out disagreed with the Republican Party and leadership and said, "I am going to do the right thing, even if my party elders do not agree with me on this." Give me an example of that.

Mr. KAVANAUGH. Well, Senator, my background has not been in party politics. I have been a lawyer for clients, working for judges, Justice Kennedy, working in the Justice Department, working in

the Independent Counsel's Office. I guess I cited to Senator Feinstein an example where the Senate had referred some people over for possible violations. We declined to seek charges in those cases. In private practice, again, my clients were not Republican clients or Democratic clients. They were just clients, whether institutional clients of the firm or pro bono clients that I worked on at the firm.

So my background and experience is one where I have been in the law, primarily. And then in the White House Counsel's Office and as staff secretary, as in any White House, there is the mix of law and policy that goes with it to be sure, but my background has been one where I have been involved in legal issues.

Senator DURBIN. Well, I would disagree. I think your high-profile work has all been on one side, but I want to go to one area that is particularly personal to me.

I was victimized by Manny Miranda and the computer theft more than any other member of this Committee. We believe over 2,000 documents were stolen from my computer. At the time, Mr. Miranda served first on the Republican staff of the Senate Judiciary Committee and then in Senator Frist's office, involved in judicial nominees. And, clearly, you had a working relationship with him. You have conceded that point.

He, also, we believe, distributed the memoranda, which he stole from my computer and other computers, to organizations such as C. Boyden Gray's operation—I am going to get these names wrong, so I better read them—something called the Committee for Justice, a fellow named Sean Rushton. Do you happen to know Sean Rushton?

Mr. KAVANAUGH. I have met him, yes.

Senator DURBIN. In what context did you meet him?

Mr. KAVANAUGH. I think I met him where the people from the administration and from the Senate would speak to outside groups who were supporting the President's nominees, and he is a member of a group that supports the President's nominees. I think I have met him at those meetings.

Senator DURBIN. And so the horror that has been expressed by the right-wing press about members of the Senate meeting with outside groups to speak of nominees turns out to be a sin committed by the administration, as well.

Mr. KAVANAUGH. I think it is quite proper, and certainly we did it, and appropriate for anyone to speak to members of the public who are interested in public issues. That is one of the important functions of anyone in Government, and we certainly do it.

Senator DURBIN. How about Kay R. Daly, president of a group called the Coalition for a Fair Judiciary, do you know her?

Mr. KAVANAUGH. I have met her as well and do know her.

Senator DURBIN. In what context?

Mr. KAVANAUGH. Same context.

Senator DURBIN. She published on her website the stolen memos. Were you aware of that?

Mr. KAVANAUGH. I was not aware of that until I read it in some stories in the media or on the Internet, I guess.

Senator DURBIN. I guess what it boils down to is this. Since you've worked up here for so long. You had to be able to spot things that were being said that looked revealing. When Manny Miranda

has a revelation about questions that might be asked of a nominee or what the schedule is going to be under a Democratic Chairman, did that ever come up, and did it ever raise a question in your mind that perhaps he knew just a little bit too much for a staffer on Capitol Hill?

Mr. KAVANAUGH. There was—I have thought about this, Senator—there was nothing out of the ordinary of what Senate staffs would tell us or what we would hear from our Legislative Affairs folks. That said, I cannot tell you whether something that he said at some point, directly or indirectly, derived from his knowledge that may have come from these documents. I just cannot speak to that at all. I can say, in direct response to your question, that, no, I never suspected anything untoward. Had I suspected something untoward, I would have talked to Judge Gonzalez about it, who I know would have talked to Senator Hatch about it, but I never did suspect anything untoward.

Senator DURBIN. One last brief question. One percent of the lawyers in America are members of the Federalist Society, a third of the Circuit Court nominees you have sent to the Judiciary Committee have been members of that society. Coincidence?

Mr. KAVANAUGH. I think the Federalist Society is a group that brings together lawyers for conferences and legal panels. I guess others would have to make a judgment about that. The Federalist Society does not take position on issues. It does not have a platform. It brings together people of divergent views. Many of them may share a political affiliation, I do not know that, but they do not take a platform on particular issues.

Senator DURBIN. Just a coincidence.

Mr. KAVANAUGH. I think a lot of them are members of the American Bar Association and of the Federalist Society because—and I have been a member of both—because, for me at least, both organizations put on conferences and panels that you can attend or speak at to learn more about legal issues you are interested in and meet some of your colleagues. So I have always found both organizations helpful to me in my legal practice.

Senator DURBIN. Thank you, sir.

Chairman HATCH. Senator, your time is up.

Senator Kennedy?

Senator KENNEDY. Thank you very much.

There is a very definite philosophical common view with regard to members of the Federalist Society, is there not, though, Mr. Kavanaugh? You are not trying to suggest that this is just some social group that they are getting together.

Mr. KAVANAUGH. No. And I agree with that, Senator Kennedy. I do think there is wide disparity in views, for example, on some might call it libertarian versus conservative, whether the text of the Eleventh Amendment or the sovereign immunity principle behind the Eleventh Amendment should govern, I have heard debates on that by people who are members of the Federalist Society. So I think that within the group that are members, there are wide views.

And the panels they put on, and the ones I have worked on, are designed to bring together divergent views. I was responsible for putting on a Federalist Society panel one time on First Amendment

cases. And on it, I recruited the people to be on the panel, and it was Judge Starr, Mr. Dellinger and Nadine Strossen, the head of the ACLU, to talk about the Supreme Court's First Amendment jurisprudence. I thought that was a representative panel of diverse views to discuss the Supreme Court. That is what the—

Senator KENNEDY. Well, I had not planned to go down this, but, as I understand, you were co-chair of one of the practice groups?

Mr. KAVANAUGH. Yes, I was co-chair of the School Choice Practice Group.

Senator KENNEDY. And do you agree with the following statement from the Federalist Society's mission statement that "law schools and the legal professions are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society"?

Mr. KAVANAUGH. I can only speak to Yale Law School, where I attended, and the professors I attended there—

Senator KENNEDY. Well, that is not what I am asking you. That is in the, that is part of the—

Mr. KAVANAUGH. But I cannot—

Senator KENNEDY. You can answer the question in any other way, but I am just telling you what we are trying to find out here. You can say anything you want to, but I mean that is the—you have the right, obviously, to do it.

But I am just asking you whether you agree. That is the mission statement. If you want to answer what happened at Yale, that is fine, too, but if you want to answer it with regard to that question, that is what I would like to hear.

Mr. KAVANAUGH. There is a common perception that law school faculties are more Democratic than the population as a whole, but I do not know if that is—I have not done my own survey at Yale Law School. My mentors, and the people I looked up to, and the people who wrote my recommendations were Harold Koh, Paul Gewirtz, and George Priest, three people with different views, who recommended me for my initial clerkships out of law school. I think I will leave it at that, Senator.

Senator KENNEDY. I am going to come back. I just wanted—I am sorry Senator Cornyn is not here because I want to make a brief comment. He mentioned about Byron White being a political appointee. Of course, Byron White was a Rhodes Scholar. Byron White was the leading law partner at one of the prestigious law firms in Denver. Byron White was a deputy attorney general. Byron White was a Silver Star winner. I know that some are disparaging about people who fought in wars recently, but he was a hero in World War II, in the Navy. Plus, he was a leading groundgainer when he was in his first year at Yale Law School, and he served with great distinction in the Justice Department.

So I resent, very deeply—I am sorry Senator Cornyn is not here. I will make sure he knows. I did not have a chance because others wanted to question—and I will just talk about Byron and about Judge Breyer was probably one of the leading antitrust and deregulation professors in the country. And to somehow, I guess it is meant to be in a disparaging way, that they are nominated by political individuals to serve in this part, and was extraordinarily thoughtful, and his record can speak for itself.

Mr. KAVANAUGH. Senator, can I say one thing there?

Senator KENNEDY. Yes.

Mr. KAVANAUGH. I think the question there was about prior Government service in the administration with Justice White, and I just want to say—

Senator KENNEDY. It was generally about the, the question about legal experience. I mean, the fact is, on the average, judges appointed to the D.C. Circuit in the past three decades have over 20 years of experience—Justice Scalia, 22 years; Rogers, 30 years; Tatel, 28 years.

You have had just over 13 years of legal, counting your service as a law clerk. You have been a practicing attorney for only 10 years, and you have never tried a case.

Mr. KAVANAUGH. I have been—

Senator KENNEDY. I think the record is, when people were talking about or characterizing some of the concerns that people have up here about that background and experience and comparing them to the others, I just wanted to make—you can make whatever comment you want to make.

Mr. KAVANAUGH. I was going to say that Justice White is one of the justices—and people who know me know this well—who I have the most admiration for, in terms of his background, and his record, and how he conducted himself as a Supreme Court justice. He is one of the ones, maybe with Chief Justice Marshall, if you put aside the current Court, that I really think did a tremendous service to the Court.

And so when you mentioned Justice White, I just wanted to underscore that people who have known me for years know how much I talk about him, and I have read a lot of his—

Senator KENNEDY. Well, I appreciate that. I appreciate that. He was an extraordinary individual.

Let me come at this in a somewhat different way, and that is about the District Court, the D.C. Circuit Court and its importance to the millions of Americans. This court draws the opinions on the air we breathe, and the water, the cleanliness of the water the children are going to drink, whether workers will be safe on the job, can join unions without fear of reprisal, minorities will be free to work in the workplace without harassment.

So, for me, the nominees to this important Court must demonstrate a commitment to the core constitutional issues, but also to the statutory principles that protect these basic rights. Many of us have worked long and hard to get these rights, and we are not going to support, at least this Senator is not going to support someone that is going to undo them or vote to undo these parts.

And as you are familiar, in the sixties and seventies, the D.C. Circuit expanded public access to administrative proceedings, protected the interests of the public against big business. The Court enabled more plaintiffs to challenge agency decisions. It held that a religious group, as a member of the listening public, could oppose the license renewal of a television station accused of racial and religious discrimination. It held that an organization of welfare recipients was entitled to intervene in proceedings before Federal agencies, and these decisions empowered, at least from this Senator's

point of view, individuals and organizations to shine a brighter light on the governmental agencies.

Then, we have over the same period of time, for example, with the NLRB, which, as you know, guarantees a worker's right to join a union without discrimination or reprisal from employers, and the NLRB interprets the act, and those are appealable to the Circuit Court.

As a result, the D.C. Circuit is available as a forum to challenge the decision. In 1980, the D.C. Court fully enforced the Board's decision 83 percent of the time, at least partly enforced the Board's decision in all other cases. By the year 2000, when the Court had a 5–4 Republican majority, including a solid majority of Reagan and Bush appointees, the D.C. enforced it only 57 percent of the time and enforced at least part of the Board's decision just 70 percent of the time.

These enforcement statistics puts the D.C. Circuit significantly below the national average of 83-percent enforcement for the Board in all of the Courts of Appeals.

Now, I am concerned about your own kind of background, experience, commitment in these areas that affect working families and the national labor protections that are protected in this, and ask you what is your experience involving labor law?

Mr. KAVANAUGH. Senator, if I were to be confirmed as a judge, I would follow and enforce the laws passed by the Congress, signed by the President, faithfully, regardless of what position they took, faithfully enforce the environmental laws of this country and the workers' rights laws of this country, absolutely.

In terms of my background, it has been primarily in public service, in Government positions. In those positions, I have tried to work for the benefit of all of the people. I have had specific assignments in those and tried to do them to the best of my ability.

In private practice, I have represented a few institutional clients of the firm and also made sure that I did pro bono work and also did outside activities.

So I have not been involved in some of the areas that you have mentioned, but I have a range of experience, and I can commit to you that I will faithfully interpret all of the laws passed by this Congress.

Senator KENNEDY. Well, this is important. I mean, we passed the Americans With Disabilities Act. It took a long time to get there, a long time to make progress.

Mr. KAVANAUGH. That is right.

Senator KENNEDY. And we are seeing, at least for many of us who were very much involved in the passage of that, the gradually whittling away in terms of the rights and protections and this kind of—as someone who was very much involved in the shaping of that legislation, interpretations that are far beyond what was—in restricting these rights.

This is a very deep concern, since this is the Court. The Supreme Court, obviously, number one. This is the number one court in terms of interpreting Americans With Disability, the wide range of environmental acts. Many of us are deeply concerned by judgments, and decisions, and orders that this administration has taken with

regards to environmental, and these are going to be directly appealed to the District Court.

I see this red light on.

And the real concern that many of us have is what, in your background and experience, could give us at least some indication or show some sensitivity to these kinds of concerns, to these interests, to the issues on clean air and clean water, to the issues in terms of affecting the disabled in the society, to the concerns in terms of working families that they are going to get a fair shake. And that is, with all respect to it, I give great respect to a brilliant background, academic background, and I admire your commitment to public service, but this is something that is of concern.

My red light is on.

Mr. KAVANAUGH. I appreciate that, Senator. What the Committee is entitled to expect from a judge on the D.C. Circuit or any court is that that judge will follow the law passed by the Congress and signed by the President faithfully, and independently, and impartially. And I can commit to you, my public service has been in different areas than the few that you have mentioned, but I can commit to you that I will faithfully follow the law, and enforce the law in all respects were I to be confirmed to sit as a judge. And I think, although it has been in different areas, I have background with a wide range of experiences that I could bring, and it shows that I would do that, but I commit to you that I would.

Chairman HATCH. Thank you, Senator.

Senator Schumer, we will turn to you.

Senator SCHUMER. Thank you, Mr. Chairman. I appreciate the witness staying for a second round.

First, Senator Sessions described you as nonpartisan. Do you believe you are nonpartisan?

Mr. KAVANAUGH. I am a—

Senator SCHUMER. I do not mean how you will be as a judge. I mean, in your life, up to now, have you been nonpartisan?

Mr. KAVANAUGH. Let me explain that. I am a registered Republican. I have been a Republican. I have supported Democrats for office. I have contributed to Democrats for office. My background, family background, shows bipartisanship, I would say. But anyway, in my personal life, I have supported Democrats.

Senator SCHUMER. I am asking you do you consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself someone who, as a judge, would be independent—

Senator SCHUMER. I am not asking that.

Mr. KAVANAUGH. I know, and I am going to answer the question.

Senator SCHUMER. You are never answering my questions, sir, I have to tell you.

Mr. KAVANAUGH. Senator—

Chairman HATCH. I think he does. I mean, he said he is a Republican.

Senator SCHUMER. We will have to disagree.

I asked him if he considered—Jeff Sessions, Senator Sessions described as nonpartisan. I think that defies, I mean, we are in "Alice in Wonderland" here. I do not think anybody, I would say even you,

yourself, do not consider yourself nonpartisan. You treat the two parties equally. You are not involved.

I mean, let us talk, frankly.

Mr. KAVANAUGH. I am a Republican, and I work for President Bush—

Senator SCHUMER. You consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself—

Senator SCHUMER. If you are a Republican, and you have worked mainly for Republican causes, 99,999 people out of 100,000 would say you cannot consider yourself nonpartisan. Now, why is it so hard for you to say that?

Mr. KAVANAUGH. I guess I am concerned with how the term is being used. I am a Republican—

Senator SCHUMER. I am not asking are you unfair or fair. I am asking are you nonpartisan? Most of the judges we have voted for I doubt would say that they are or some of them, at least—you cannot go through all of them—would say some of them are partisan. You have had a more partisan record than any single nominee who has come before us, Democrat or Republican. You have been more active in more political causes, hot-button issues than anyone. Now, I am asking you to be, you know, to give a straight answer with this Committee. Do you consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself a Republican, and I support President Bush, and I have worked for him, and others can attach labels to it.

Senator SCHUMER. Let me ask another question.

The Committee for Justice, Boyden Gray's group, which very few consider nonpartisan, they have a distinct point of view; is that correct?

Mr. KAVANAUGH. I know that they support the President's judicial nominees. Beyond that, I do not know what they might do.

Senator SCHUMER. How often—did you go to a fund-raiser for them?

Mr. KAVANAUGH. I attended it was a party where I think it cost, and it might have been a fund-raiser, I do not know, but I think it cost $20 or something.

Senator SCHUMER. Did you make a contribution?

Mr. KAVANAUGH. I do not think I did. I think I just went.

Senator SCHUMER. You just went, okay.

Mr. KAVANAUGH. It was a—

Senator SCHUMER. Do you think that was, if somebody is trying to be down the middle—

Mr. KAVANAUGH. Senator, can I say I will try to check on that, but I am pretty sure I just went to that. It was a Friday afternoon.

Senator SCHUMER. How often do you speak to Boyden Gray?

Mr. KAVANAUGH. I—

Senator SCHUMER. Once every 6 months? More than that?

Mr. KAVANAUGH. Less than that.

Senator SCHUMER. Less than that.

Mr. KAVANAUGH. He is, since—

Senator SCHUMER. How about Sean Rushton.

Mr. KAVANAUGH. Since I have been staff secretary, he would come—Boyden Gray—would come at times to meetings where

members of the administration would talk to outside groups, and he would be there at times.

Senator SCHUMER. How often have you—you have had a conversation with him less than once every 6 months?

Mr. KAVANAUGH. Well, since I have been staff secretary, I do not think I have talked to him at all, not since July of last year.

Senator SCHUMER. How about Sean Rushton?

Mr. KAVANAUGH. I am pretty sure I have not talked to him since July of last year either, and I—

Senator SCHUMER. How about before that?

Mr. KAVANAUGH. I do not think I talked to him much. I think, again, he was in the groups sometimes, but not often. He would come to those meetings where we would talk about the President's judicial nominees. There were people who would come, and we would provide information about them.

Senator SCHUMER. How often, over the 4 years, say, you have been in the White House?

Mr. KAVANAUGH. On the phone or in person?

Senator SCHUMER. Either one. I did not qualify it.

Mr. KAVANAUGH. Very rarely.

Senator SCHUMER. Even by signals. Signals would be included.

[Laughter.]

Mr. KAVANAUGH. Rarely. I think the one thing I want to be careful, the one caveat I will say, is I think he has a mass e-mail list or had one that would sent out these mass e-mails of newsletters. So, if those are counted, then that would be more, but not in terms of personal communication.

Senator SCHUMER. Now, I asked you another question, and you are under oath, I asked you had you ever in your course in vetting judges used the word "too liberal." You said you could not recall. Have you ever heard others use the word "too liberal" who were White House employees?

Mr. KAVANAUGH. Senator, I think with respect to discussions of nominees, it is not my place to go into internal discussions of character—

Senator SCHUMER. You do not want to answer the question?

Mr. KAVANAUGH. I do not think it is my place to talk about—

Senator SCHUMER. Why not? You have maintained—

Mr. KAVANAUGH. I think it is Judge Gonzalez's—

Senator SCHUMER. —and we have heard maintained that ideology does not enter into any discussions or vetting. So, counselor, you have opened this line of questioning up. I am asking you something that would prove that one way or the other, and that is because liberal is an ideological term.

Have you heard people use the term "too liberal," yes, no or you do not want to answer?

Mr. KAVANAUGH. I think that is—I am going to answer that in part—but I think it is a question that is not my place to answer, but it should be directed to Judge Gonzalez. But in terms of—I want to say this, though.

Senator SCHUMER. You are the nominee, not Judge Gonzalez.

This is the first time that you are sort of stepping out on your own, in a certain sense, you know, except when you did maybe those pro bono activities that you volunteered for. So we want to

know your views, not Judge Gonzalez's, not George Bush's. You are going to have a lifetime appointment should you get this nomination, okay? So I am not asking—if Judge Gonzalez were here, I would ask him the same question. You are the nominee. Now, have you heard the words used?

Mr. KAVANAUGH. Senator, it is not my place to disclose the internal communications—

Senator SCHUMER. Okay. You do not want to answer.

Mr. KAVANAUGH. —but there are people who have been too political in the judgment—

Senator SCHUMER. I did not ask that question. I asked you have you heard the term used by others or used yourself "too liberal"?

Mr. KAVANAUGH. And I was going to say I have heard, and I know that there have been people who have been judged to be, who could not shed, in the judgment of people there, personal beliefs to be fair and impartial judges, and shorthand could have been used to describe those—

Senator SCHUMER. Did you ever use it?

Mr. KAVANAUGH. —on either way.

I do not recall using it.

Senator SCHUMER. Next question: We have talked about judicial activism here. Would you like to define what you think is judicial activism?

Mr. KAVANAUGH. Yes, Senator. I think judicial activism is when a judge does not follow the law before him or her, but instead superimposes his personal beliefs on the decisionmaking process.

Senator SCHUMER. Fair enough. When Judge Brown says that she believes *Lochner* was correctly decided and when she says that San Francisco should not have any zoning laws, is she being an activist?

Mr. KAVANAUGH. I am not familiar with all of her statements, but I will say—

Senator SCHUMER. You said you vetted judges for California. You didn't vet her?

Mr. KAVANAUGH. I wasn't involved in—

Senator SCHUMER. Well, let me tell you she said repeatedly both in court decisions and in conversation that *Lochner* was correctly decided. I think it is about 70 years ago that that doctrine was discarded. It meant you couldn't pass any kinds of labor laws because—is that being an activist, yes or no?

Mr. KAVANAUGH. Can I take a minute to answer the question?

Senator SCHUMER. Yes, surely.

Mr. KAVANAUGH. Senator, first of all, I want to clarify that I am familiar with Judge Brown's judicial record. I am not familiar with her speeches. So I just want to clarify that.

Senator SCHUMER. It was in one of the decisions—I don't remember the name of the decision—it was in one of the decisions she dissented from. You are not familiar with it?

Mr. KAVANAUGH. I don't remember that phrasing. I am familiar with her judicial record, although it has been a while, but I am familiar with some of her judicial record.

As to your question of examples of judicial activism, I think *Lochner* is often cited as a classic example of judges superimposing their personal views on the decisionmaking process in an improper

manner. The case has been discredited. The case isn't followed any longer.

Senator SCHUMER. So that means it would seem that that is being an activist to want to undo *Lochner*, undo zoning laws.

Now, I want to ask you this. I don't like activists on either side.

Mr. KAVANAUGH. Right.

Senator SCHUMER. Your administration and you in this process seem to say that activism on the right is just fine. After all, Judge Brown was sent here. And activism on the left is activism. How can you discourage us from believing that?

Clearly, many of the judges you have set forward do not believe in what is established law. And, again, it is not that they wouldn't as judges—every judge who comes before us says, I will be fair. We all have to take that with a grain of salt, obviously. We have to make our own judgment, not just their assertion.

Yet, we see a nominating process skewed hard to the right. And then when Jeff Sessions, whom I enjoy bouting with here, says, well, I am talking about activist judges, activist means nothing more than conservative because Judge Brown is as activist as they come. She wants to turn the clock back a hundred years.

Did you have any dissent in the office when they nominated her? How do you square the view that it is okay to nominate Justice Brown and she is okay, but others are activists whose views are more to the left? I mean, I would just like some understanding here because I think it is code words. Activist means liberal; strict interpretation means conservative. The nominees we have had before us are clearly not interpreting the law. They believe they should interpret the law as it was 100 years ago or 200 years ago.

I will give you a few minutes to elucidate on this. It seems to me the whole process is a subterfuge, basically.

Mr. KAVANAUGH. Senator, the President's nominees, the majority of them, the vast majority, have been approved by this Committee and supported by both sides of this Committee, and confirmed by the Senate. There have been some examples where that hasn't occurred and there have been debates about their records. But in terms of the description of the nominees as a general class, it is important to make that point.

They are also, as I understand it, the highest rated nominees ever under the ABA's rating standards.

Senator SCHUMER. Do they look at activism or non-activism when the ABA judges? No. You know that.

Mr. KAVANAUGH. They look at the traditional criteria for—

Senator SCHUMER. Right, law school, right. Many of us have broken with that tradition. The President has forced us to because he has nominated judges through an ideological prism. It is obvious.

So I want to ask you again, why is it, if ideology doesn't matter and the President is just—do you think Democrats or liberals are less likely to interpret the law fairly—just interpret the law, than conservatives?

Mr. KAVANAUGH. Senator, I think this is an important question. And I mentioned earlier, but I am not sure you were here, it is tradition since the founding of our country for Presidents to select judicial nominees from the party of the President.

Senator SCHUMER. That is not the question I asked.

Mr. KAVANAUGH. But I want to help explain. And so President Bush—most of his nominees, not all by any stretch, are Republicans. President Clinton—most of them were Democrats, their backgrounds, their political affiliations. That has been the way. It doesn't have to be that way, but it has always been that way, and that is the tradition that has—

Senator SCHUMER. And do you think there were ideological differences as a whole between the Clinton nominees and the Bush nominees?

Mr. KAVANAUGH. I think there were policy differences in their backgrounds. I don't know in terms of ruling on the bench. I do know on the Ninth Circuit, for example—

Senator SCHUMER. Well, have you seen Cass Sunstein's study? You don't know that study?

Mr. KAVANAUGH. I do.

Senator SCHUMER. Okay. Doesn't it show that Democratic nominees, particularly on economic and environmental and other issues, decide things quite differently than Republicans, and that the difference is stark?

Mr. KAVANAUGH. Senator, I know that that study has been challenged as to its accuracy, as well.

Senator SCHUMER. Can you give me a yes or no answer to any question? I apologize, but you haven't answered it. I asked you simply is that what Sunstein's study shows?

Mr. KAVANAUGH. I am told—

Senator SCHUMER. If you said, yes, but let me say that it has been challenged, I would appreciate that a lot more than refusing to answer just about a single question that any of us have asked.

Mr. KAVANAUGH. Yes, but it has been challenged.

Senator SCHUMER. Thank you.

Mr. KAVANAUGH. And it has been challenged because the sample was under-representative, and I think the Ninth Circuit is a good example, Senator. My understanding—and I am familiar only at the margins with this now—is that the range of President Clinton's nominees, for example—there is a wide range of views represented in his nominees and in President Reagan's nominees on that court, and that some of President Reagan's nominees joined with some of President Clinton's nominees.

And the reason for that, Senator—and it is something I firmly believe and I think it is important—is there should be no such thing, and there hasn't been such a thing as a Republican judge or a Democrat judge. And I think it is very important that we maintain that in our system.

Senator SCHUMER. So why do we see virtually very few—if ideology doesn't matter and if we are just nominating people on legal qualifications and their ability to interpret the law—and when I asked you the question, you basically acknowledged that Democrats and Republicans could interpret the law equally.

Mr. KAVANAUGH. Yes, I agree firmly with that.

Senator SCHUMER. Why is it that one-third of the nominees here are from the Federalist Society, one of the most conservative groups in town? And everyone knows that. You are telling me Judge Scalia is no more conservative than Justice Ginsburg if you

don't acknowledge that the Federalist Society is an extremely conservative group.

Chairman HATCH. Senator, I have been very lenient on the time.

Senator SCHUMER. Yes, you have, Mr. Chairman.

Chairman HATCH. You are way over.

Answer that question, and then we will turn to Senator Kennedy and then I will sum up.

Mr. KAVANAUGH. Well, I think there were two questions there. One, in terms of why most of the nominees of a President are of the same party, that is the tradition.

Senator SCHUMER. I didn't ask party; I asked ideology.

Mr. KAVANAUGH. Okay, but then the study refers to Democrat judges and Republican judges, which is party. So I think the study you cited as evidence of ideology actually is party.

Senator SCHUMER. So you don't think ideology enters into President Bush's selection of judges, particularly at the court of appeals level, at all?

Mr. KAVANAUGH. I think it is critical to have people who have demonstrated experience and—

Senator SCHUMER. I didn't ask that question. Can you answer yes or no?

Chairman HATCH. Senator, this isn't a court of law. He ought to be able answer the question.

Senator SCHUMER. He ought to be able to.

Chairman HATCH. And if you don't like the answer, rephrase another question.

Senator SCHUMER. Okay, I will.

Mr. KAVANAUGH. It is important that the judge or judicial candidate demonstrate both in the interview process and in his or her record an ability to follow the law fairly, and you judge that based on an assessment of the entire record.

Senator SCHUMER. And so ideology has not entered one iota into President Bush's selection of court of appeals nominees. Is that correct? Do you believe that?

Mr. KAVANAUGH. I am not sure how you are defining ideology.

Senator SCHUMER. I am not asking you whether people can judge the law fairly. We have been through that part of this discussion. I am asking you as someone intimately involved with the process, has ideology at all entered into the nomination of judges by President George Bush to the court of appeals?

Mr. KAVANAUGH. Can I ask you how you are defining ideology in that question?

Senator SCHUMER. I am defining ideology by their predispositions on the issues that face the day. And I am not asking you whether you asked them or not. It is plain as the nose on your face, sir, that the nominees don't come from across the political spectrum; they come from one side of the political spectrum. Everyone in this room would admit that.

Chairman HATCH. Not I. That isn't true. That is not true.

Senator SCHUMER. How many ACLU members have been nominated by President Bush?

Chairman HATCH. There have been a few, I have got to say.

Senator SCHUMER. I disagree with the ACLU on a whole lot of things.

Chairman HATCH. Well, so do I.

Senator SCHUMER. But the Federalist Society has one-third and the ACLU probably has none. You are denying the obvious, I guess is what I have said.

Chairman HATCH. Senator, come on. We have got a conservative President. He naturally is trying to find people who agree with his philosophy.

Senator SCHUMER. Orrin, thank you. I was trying to get Mr. Kavanaugh to say that for the last 15 minutes.

Chairman HATCH. I think he has been saying it. He just hasn't said it in the words you want to hear. That is all.

Senator SCHUMER. Okay.

Mr. KAVANAUGH. But in terms of judges who will apply the law without their personal predisposition on the issues, that is exactly what the President has said he is looking for, and that is your definition.

Senator SCHUMER. It seems to me—and I will conclude, Orrin, thank you.

Chairman HATCH. Okay.

Senator SCHUMER. It seems to me and to just about everyone else, not judging whether they would apply the law despite their predisposition on the issues, that predisposition on the issues, for one reason or another, has greatly influenced who the nominees are because they come from a rather narrow band of political thinking by and large.

With that, Mr. Chairman—

Chairman HATCH. Well, with that, I just have to make this comment before I turn to Senator Kennedy. I have been here for the Carter judges, for the Reagan judges, the Bush I judges, the Clinton judges, and now George W. Bush's judges. Every one of those Presidents tried to find people who shared their philosophy.

I have got to say Carter appointed basically all Democrats, with very few exceptions. Reagan basically appointed all Republicans, very few exceptions, and the same with the others. The fact of the matter is, of course, they are trying to find people who share their philosophy. That is why they ran for President.

This is the third of the separated powers of Government. It is one of the biggest issues there is, whether we are going to have liberals on the courts throughout the country or conservatives, or a mixture of both.

Having sat here through all of the George W. Bush's 173 confirmed judges, 29 that are on the executive calendar reported out of this Committee sitting there vegetating, I have to say that there is a wide variety—yes, more on the moderate to conservative side, but a wide variety of judges.

Now, look, I think where you have had trouble is with the word "partisan," and I would, too, if I were in your shoes.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Just quickly, I will mention, since this topic has come up, President Clinton nominated several individuals to both the circuit and district courts with no close ties to him or other Democrats who were championed by Republican Senators because they were either

registered Republicans or close friends of Senators of the other party.

For example, Richard Talman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator Slade Gorton. Judge Barry Silverman was nominated to the Ninth Circuit and confirmed at the request of Jon Kyl. Judge William Traxler was put on the district court by President Reagan and was nominated to the Fourth Circuit and confirmed at the request of Republican Senator Strom Thurmond. Judge Stanley Marcus was nominated to the Eleventh Circuit and confirmed at the urging of Connie Mack.

Did you ever consider that some nominees who were Democrats should be nominated?

Mr. KAVANAUGH. I think, Senator, President Bush has chosen to nominate some Democrats for a variety of seats, as I understand it. I know in his first group of nominees, Roger Gregory was nominated, along with others. I know that in Pennsylvania—I just know more of the States that I worked on at the district court level—there were several Democrats, and some very strong Democrats, nominated for district court seats in Pennsylvania that I worked on and helped through the process. So there have been some Democrats. I am sure there are others, but I can't recall them all here.

Senator KENNEDY. Let me, if I could, ask you about your role in the vetting process, and particularly with regard to William Pryor. The requirement that appellate judges follow the Supreme Court is a bedrock principle, but Mr. Pryor repeatedly criticized decisions of the Supreme Court in ways that raise serious questions about whether he would follow those decisions.

He called *Roe* v. *Wade* the worst abomination of constitutional law in our history. He criticized the Supreme Court's decision in *Miranda* v. *Arizona*. He referred to the members of the Supreme Court as nine octogenarian lawyers.

When you recommended Mr. Pryor for nomination to the Eleventh Circuit, were you aware that he had made these extreme statements? And if so, do they cause you any concern?

Mr. KAVANAUGH. Senator Kennedy, I know President Bush nominated Mr. Pryor. And Judge Gonzales, of course, chairs the judicial selection committee. That was not one of the people that was assigned to me. I am familiar generally with Mr. Pryor, but that was not one that I worked on personally.

Senator KENNEDY. Well, did you know those remarks had been made prior to the time that he appeared before the Judiciary Committee?

Mr. KAVANAUGH. Senator, can I answer that this way? It is not my place to discuss our internal deliberations, but it is safe to assume that we have done a thorough vet of the nominee's records.

Senator KENNEDY. Well, if you agree it is important that judges obey the precedent, why didn't you recommend against Pryor's nomination? Why take the chance that he might seek to undo an important legal precedent such as *Roe* v. *Wade*?

Mr. KAVANAUGH. Senator, again, the President nominated Bill Pryor. I know he has got a lot of Democrat and Republican support in Alabama, support in his home State community. In terms of in-

ternal discussions, I don't think it is my place to talk about those here.

Senator KENNEDY. Well, I know you are talking here about the background discussions, but once you have the nominee and you are involved in the process where he calls a case the worse abomination of constitutional law in our history, criticizes the *Miranda* case and refers to the Supreme Court as nine octogenarian lawyers—you are involved in the vetting process. Whether you did anything at all about it, I gather you say that you did not.

Mr. KAVANAUGH. No, I was not involved in handling his nomination. I do know he explained that in his hearing, and I will leave it at that.

Senator KENNEDY. After the Supreme Court decision of five-to-four in *Bush* v. *Gore*, Mr. Pryor said that he—this is Mr. Pryor—wanted the decision to be decided five-four so that President Bush would have a full appreciation of the judiciary and judicial selection so that we can have no more appointments like Justice Souter.

Did you know about Pryor's criticism of Souter?

Mr. KAVANAUGH. Senator, again I think it is safe to assume that the record was fully vetted and fully known.

Senator KENNEDY. So you weren't involved in any of the vetting, as I understand it, of Mr. Pryor. Is that right?

Mr. KAVANAUGH. No. I know him and I have met him before, but it wasn't one of the—the way the work is divvied up, that wasn't one of the ones I—

Senator KENNEDY. Well, did you know about his involvement with the Republican Attorney Generals Association?

Mr. KAVANAUGH. I actually—I think I heard that for the first time the day before his hearing, but that doesn't mean it wasn't known. I am just talking about what I—you asked me about my personal knowledge.

Senator KENNEDY. Did you ever discuss that subject with Mr. Pryor or anyone before his hearing?

Mr. KAVANAUGH. Again, Senator, it is not my place, I think, here to disclose internal communications, but the background record of someone is vetted before nomination.

Senator KENNEDY. So your response with regard to the Attorney Generals Association is that you didn't know anything about it prior to the time of the hearing?

Mr. KAVANAUGH. Yes. Again, it is not for me to discuss internal deliberations. The record, I am sure, was fully known. Someone's background is fully vetted before nomination, and so it is safe to assume that people knew about involvement in various organizations.

Senator KENNEDY. Well, did you prepare him for his testimony on that subject?

Mr. KAVANAUGH. I don't remember preparing for his testimony on that subject. I might have attended a moot court session, but I don't know—that subject might—I don't know. I might have attended a moot court session. Oftentimes, we will go to moot courts to prepare nominees for hearings to prepare them for this process.

Senator KENNEDY. Well, I think you just said that you didn't know about this until the day before his testimony. Did that come up during the moot court session?

Mr. KAVANAUGH. I think there were news articles, I think, if I recall. But I want to be careful, Senator. I don't recall precisely when—

Senator KENNEDY. Well, I am just wondering whether this did come up during the preparation of the nominee.

Mr. KAVANAUGH. Again, Senator, it is not for me here, I think, to disclose internal discussions and deliberations. Someone's record is thoroughly vetted before nomination. In terms of internal discussions, what I was referring to by that is I remember a news article at some point reading, but I can't place it in time. If I saw the news article in relation to his hearing, I might be able to place it better.

Senator KENNEDY. Well, the Washington Post had reported that RAGA was founded by Pryor and the Republican National Committee, with the explicit aim of soliciting funds from the firearms, tobacco and paint industries and other industries facing State lawsuits over cancer deaths, lead poisoning, gunshot wounds and consumer complaints, according to statements by Pryor and other officials. That was in the newspaper.

I am trying to find out, if you knew about this, what you did about it, if you did anything about it. And if you didn't do anything about it, then you didn't do anything about it, but once you found out about it, whether you thought that it was important enough to do anything about it. Did you ask the FBI to check it out or do anything further about it? Did you ask the FBI to investigate, or did you discuss it with Pryor or anyone else? That is what we are trying to find out. These are serious charges, obviously.

Mr. KAVANAUGH. Senator, I think that issue was explored at his hearing, as I recall, and that probably would be the best record of the issue.

Senator KENNEDY. Well, I know he was here, but I am just trying to find out the information that you all had about it. He was asked if he ever solicited funds from corporations with business before the State and he replied he did not think so. He told the Committee that the RNC had all the records regarding corporate contributions raised by RAGA.

So the question is you must have had, or someone or prepped him must have had the conversation and know about those records before he came to the Committee. The evidence received by the Committee indicated that Mr. Pryor had repeatedly been assigned to make RAGA fundraising solicitations of the type he denied making. That is the issue.

So did you or anyone you were working with receive copies of the evidence before it was leaked to an Alabama columnist friendly to Mr. Pryor? And did you or anyone you were working with leak any of the material, or do you know of anyone who did?

Mr. KAVANAUGH. Senator, I know very little about this. You know far more than I do about it, and I think it was explored at the hearing. I don't know enough to give you much of an answer on that. I don't know much of anything specific about that.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman HATCH. Well, let me just say with regard to that the materials were leaked by a former employee of the organization who basically, according to the record, stole the materials. By the way, the Democrats set up their own Democrat Attorney Generals

Association to compete with the Republican one. So, you know, you can find fault on both sides as far as I am concerned.

I think what you have had trouble with here is the word "partisan" and the word "ideology." I wouldn't have answered those questions either, to be honest with you. What bothers me about this hearing is that much of the hearing has been spent attacking other Republican nominees, not you, other Republican nominees. And in every case, I think their records have been distorted.

When General Pryor was asked why he said the *Roe* v. *Wade* case was an abomination, I mean he answered it very forthrightly. He said, if I recall it, because of the millions of unborn children who were killed. Now, people may not agree with that assessment, but it was a sincere statement and certainly a matter of fact, whether you agree with the nature of it.

With regard to *Lochner* and Janice Rogers Brown, I certainly don't remember it the way Senator Schumer does. As a matter of fact, she gave a speech and it was tremendously distorted here in this Committee. It bothered me a great deal, to be honest with you.

Now, let me just say a few other things here with regard to ideology, and Professor Sunstein's study has been brought up. Let me just make a few basic observations. First, there is no doubt that in the vast majority of cases there is a unanimous result from the court throughout the country.

You agree with that, don't you?

Mr. KAVANAUGH. And especially in the D.C. Circuit.

Chairman HATCH. Well, that is right. The law is clear and the application of the law is straightforward. Professor Sunstein attempts to explain the context in which Democratic and Republican appointees largely agree by noting that in many areas the law is clear and binding, and that judges appointed by different Presidents largely agree on the appropriate principles. Ideology apparently doesn't matter in those cases.

We don't hear much about these cases, probably, because they don't lend themselves very well to charged political speeches or questions, or emotional fundraising appeals from the usual suspects. But the fact remains that these cases make up the lion's share of Federal court jurisprudence.

Do you agree with that?

Mr. KAVANAUGH. Excuse me, Senator?

Chairman HATCH. The cases that basically both sides agree on?

Mr. KAVANAUGH. Absolutely, Senator. In the D.C. Circuit, I think, in response to the Sunstein article, there were some responsive articles that both, number one, attacked the methodology that Mr. Sunstein used, and, number two, pointed out how many cases were unanimous in the D.C. Circuit. And I think that is because the culture of the D.C. Circuit and the people who are on that court are outstanding judges.

Chairman HATCH. That collegially work together.

Mr. KAVANAUGH. Right.

Chairman HATCH. Which you would do, as well, once confirmed.

Mr. KAVANAUGH. Absolutely.

Chairman HATCH. Now, Professor Sunstein is a brilliant professor. I have a lot of respect for him, but there is no question he is a brilliant liberal professor. His study does not examine large

areas of case law, including torts, bankruptcy, labor law and civil procedure. Those are serious liabilities to the study, and I think anybody who is fair would say that.

Second of all, it is difficult to understand several of the methods used in Professor Sunstein's study. For example, he counts a vote as pro-life if the judge voted at all to support the pro-life position. Why this is done is certainly not clear.

Thus, if a judge votes to strike down part of an injunction against demonstrations near an abortion clinic, his or her vote is pro-life. Well, we know there are different issues there. Of course, a judge casting such a vote is likely relying on First Amendment principles of free speech, but the study takes no apparent accounting of that fact. Instead, it simply counts as pro-life. I would suggest that such a vote may be better counted as pro-free speech or pro-civil liberties, but that isn't the way he did it.

Third, it may come as a surprise to some that Professor Sunstein's study reports that ideology does not matter where some might like to see it. For those who would like to argue that ideology, which Professor Sunstein's study crudely, and I think simplistically derives from, the political party of the appointing President, is especially important in the D.C. Circuit because of the types of cases it hears.

The study shows something else. We hear a great deal from the liberal interest groups about Republican appointees casting extremist anti-environmental votes in taking cases. Unfortunately, Professor Sunstein's study shows no differences between Republican- and Democratic-appointed judges in terms of how their votes are cast.

We also hear so much about how Republican appointees threaten to, quote, "roll back the clock," unquote, or, quote, "take us back to the 19th century," unquote, on civil liberties. But I don't expect these groups to cite Professor Sunstein's study on this point. He examined criminal appeals cases in the D.C. Circuit, the Third Circuit and the Fourth Circuit. Again, there was no difference in how Republican-and Democratic-appointed judges cast their votes either for the Government or for the criminal defendant. And I suspect there is not going to be much more difference when you get on the court.

I also don't expect the usual interest groups to cite Professor Sunstein's study to argue that Republican appointees are striking down Federal statutes on federalism grounds left and right, day and night. Again, there was no difference in Republican- and Democratic-appointed judges in the way that they voted. Both groups have upheld challenged statutes against federalism or Commerce Clause challenges more than 90 percent of the time.

You are aware of that; I know you are.

Those who would like to argue that Republican- and Democratic-appointed judges vote differently in race discrimination cases will also be severely disappointed by Professor Sunstein's study. There is no such evidence. It seems that ideology matters, except when it doesn't.

So I don't blame you for being wary of questions that say yes or no on ideology. Give me a break.

Mr. KAVANAUGH. Mr. Chairman—

Chairman HATCH. Now, let me just finish here because I want to make a couple of these points before we finish here today because I don't think you have been treated very fairly with some of the questions. In fact, I think you have been treated anything but fairly, and you have had patience, have showed good judicial temperament. You have taken all this stuff and answered as best you can back, and I think you have answered very well.

Now, objections to your nomination based on a supposed lack of experience ring pretty hollow to anybody who is fair. First, there is no doubt in my mind that if you had worked in the Clinton White House defending the former President in the various legal battles surrounding the impeachment proceedings, you would be the toast of the national media. And, of course, my Democratic colleagues would be falling all over themselves to support your nomination. That is just a matter of fact.

They would point out that Mr. Kavanaugh has achieved their, quote, "gold standard," unquote. They were the ones who said the ABA rating was the gold standard, the "well qualified" highest rating by the American Bar Association standard given to you.

They might observe that Mr. Kavanaugh has argued both civil and criminal matters before the United States Supreme Court—something that almost none of these other judges that have been put on the bench have done, in both civil and criminal matters before the Supreme Court and appellate courts throughout the country. You have had that experience.

I would just further note your extensive experience in the appellate courts both as a clerk and as a counsel. Those are important positions. Very few people have that opportunity to serve in those areas. You have got to be really somebody special to get those positions. I know it, you know it, my colleagues know it.

They would say that it is remarkable that Mr. Kavanaugh served as a law clerk to not one, but two Federal judges—Judge Walter Stapleton, of the U.S. Court of Appeals for the Third Circuit, and Judge Alex Kozinski, of the U.S. Court of Appeals for the Ninth Circuit.

And then I think any respectful, honest person would praise you, Mr. Kavanaugh, for your service as a law clerk to the United States Supreme Court for Justice Anthony Kennedy, the author of last year's *Lawrence* v. *Texas* decision, with which I am sure most all of our Democrat friends agreed.

Now, if any Republicans were to question Mr. Kavanaugh's qualifications for the D.C. Circuit, if you were their nominee and you had worked in the Clinton White House, they would certainly point out that only 3 of the 18 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.

You have had more judicial experience than them by having been a clerk on major courts, having watched how judges operate, having helped them write the opinions, having done the research for them. Democrat-appointed D.C. Circuit judges with no prior judicial experience include Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel and Patricia Wald.

Judge Edwards, by the way, was 39 years of age when I helped to confirm him, the same age as you. He didn't have quite the same

experience as you do, but he is a fine man and he has been a good judge there. And I don't think any of us can really legitimately find a lot of fault. We may disagree with some of his decisions, but he is a good man.

Also, the current Chief Judge of the Ninth Circuit, Judge Mary Schroeder, was nominated by President Carter and confirmed at the age of 38. So let's not pretend that the expressed concerns about Mr. Kavanaugh's age or experience are anything more than thin pretexts veiling purely political objections. Democrats would never raise such concerns about a nominee of similar age and experience if he or she had litigated across the courtroom aisles from Mr. Kavanaugh.

Finally, let me just point out that President Clinton nominated and the Senate confirmed without a single filibuster, which is what we are putting up with right now—I know; I was Chairman during much of President Clinton's term—a total of 32 lawyers with any prior judicial experience to the Federal appellate courts. Some of these have turned out to be very good judges, and I would be the first to say it.

I have to admit that I get tired of the partisanship in this body. The very people who are trying to use the terms "partisanship" and "ideology" are the ones who are filled with it. Frankly, they have a right to be. I don't have any problem with that. But to try and impose that on you just because you belong to the Federalist Society—I do, too. I am on the board of whatever it is, and all I can say is that I know that it puts on the best seminars in the country right now.

The Board of Advisers. I guess I had better be clean on this. I might be held to account to that someday.

Senator SCHUMER. Only if you are nominated.

Chairman HATCH. Don't worry. I am not so stupid that I would go through this.

See how dumb you are? I just can't believe it.

My point is this: Every President tries to appoint persons who share that President's political philosophy. That is why these presidential elections are so important. Frankly, those who are very liberal naturally will want a liberal President. Those who are conservative are going to naturally want a conservative President in this country.

And you can expect when you get that liberal President that that liberal President, as was the case with Jimmy Carter, in particular, and in the case of President Clinton, will nominate primarily people who agree with his liberal philosophy. And that is going to be true of President Reagan, President Bush I and President Bush II. They are going to try and nominate people of quality, hopefully people like you who have "well qualified" ratings or "qualified" ratings, which is no small thing, who then will serve with distinction on the bench.

Now, let me just close with this final remark. I think you have handled yourself very well here, when you consider some of the tough questions. And my colleagues have a right to ask these questions. I am not finding fault with them. I disagree with the way some of these questions have been asked and I disagree with some of the fairness, because I think some of it was not fair.

I disagree with Senator Kennedy when he brings up Justice White. We all know Justice White was a great Justice. Nobody was saying that he wasn't a great Justice, or not qualified. It is just that he didn't have some of the experience that they claim you don't have, although you have had a lot of experience in the courts that I don't think they are giving you much credit for.

Take Ruth Bader Ginsburg, or take Justice Breyer. Yes, he was one of the leading authorities on antitrust in the country. He served as chief counsel of this Committee when Senator Kennedy was Chairman. I recommended him to President Clinton, but I don't think he had ever tried a case in his life. I am not sure he would know how to try one, had he had a chance. He is smart enough and I am sure he would have figured it out, but he hadn't had any experience in that area.

I happen to really admire him. I happen to think he is a great man; I thought he was when he was chief of staff. He was fair, he was honest, he was decent. That is one of the reasons why I recommended him to President Clinton, and everybody knows that who knows anything about it.

The point is some of these straw issues are brought for only one reason, to try and make nominees look bad or to try and make nominees look like they are not qualified, when, in fact, you are eminently qualified. The fact that you are 39 years of age—you know, that is not exactly young anymore in the eyes of some people. In my eyes, it is very young. In Senator Kennedy's eyes, it is very young. But to other young members of the Senate, you are pretty old.

Hardly anybody who has been nominated to these courts has had the experience that you have had. Now, to sit here and say that you have got to have every aspect of experience to serve on the courts that nobody really has had is a little bit unfair and smacks a little bit of, should I use the word "partisanship?"

I want to say I think you have done very well. I hope my colleagues on the other side will give you a fair shake. If they will, they will pass you out of this Committee and they will confirm you to the Circuit Court of Appeals for the District of Columbia, where I suspect you will become one of the great judges. I suspect that they will find that you will be one of the most fair judges ever to sit on that court, and I suspect you will be one of those judges who will understand those very complex and difficult issues that Senator Kennedy has so eloquently described.

If I didn't think that, I wouldn't be for you. It is just that simple. I wouldn't, because this is in one respect the most important court in the country because it does hear cases that the Supreme Court will never hear, thousands of cases the Supreme Court will never hear, because of the limited number of cases the Supreme Court takes.

The Supreme Court naturally is the more important court, but the fact of the matter is this court is extremely important. And I have every confidence, knowing you—and I have known you for a long time—that not only can you do this job, but you can do it in an honest, fair way, and that you know the difference between an activist judge, one who just ignores the law and does whatever his or her personal predilections dictate, and a real judge who does

what is right and who looks at the law and lives within the law, as defined by the legislative body, and perhaps through executive orders of the President and, of course, by prior decisions by the United States Supreme Court.

I admire my colleagues on this Committee. They are a tough bunch. I love my friend from New York. There is no question about it. He gets on my nerves terribly from time to time with some of this stuff that he comes up with, but the fact of the matter is I care a great deal for him. And he is sincere on this; he really believes in what his position is. He is nuts, but he believes it.

[Laughter.]

Chairman HATCH. All I can say is that I respect him and I respect the other members of this Committee, but I hope they will be fair and give you this shot that you really deserve. And I will guarantee you I will be watching just like they will to make sure that you are one of the best judges in the country, and I believe you will be.

With that, we will adjourn until further notice.

[Whereupon, at 1:22 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Brett M. Kavanaugh
3633 M Street, N.W., #3A
Washington, DC 20007

November 19, 2004

The Honorable Orrin G. Hatch
Chairman of the Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

Attached please find responses to written questions from Members of the Committee.

Sincerely yours,

Brett M. Kavanaugh

Brett M. Kavanaugh

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Leahy

1. In your testimony before the Senate Judiciary Committee, you indicated that the work on judicial nominations was divided in the Office of White House Counsel among several Associate Counsels. You testified that you had "different areas of the country that we would work on and different nominations that we'd work on." You mentioned that California and Illinois were among the states you worked on, and that you "worked on certain circuit court nominations." A) Could you please list your particular geographic areas of responsibility, whether you covered just district or circuit court nominations or both within those areas, and the names of all of the circuit court nominees you worked on? B) What percentage of your time in the office would you say was devoted to judicial nominations? C) What other matters did you work on during your time in the Office of White House Counsel?

Response: I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

The time I devoted to the judicial nomination and confirmation process varied but probably was about half my time when I worked in the Counsel's office. I also worked on a variety of ethics issues, legal policy matters such as victim compensation and liability issues, separation of powers issues, and records issues, among other matters.

2. A) Now that the ABA is no longer involved in the decision about whether or not to nominate someone for federal court vacancies, are there any other individuals or groups with whom the nominees are asked to meet as these choices are being made? B) In particular, have potential nominees been or are they now advised or sent to meet with or interview with individuals or groups outside of the government as part of the judicial selection process?

Response: No.

3. Did you or anyone else in the Office of White House Counsel seek advice or information or receive advice or information from any individuals or groups outside of the government when deciding on a judicial nominee? A) Were any White House officials from outside the Office of the White House Counsel involved in decisions on judicial selection? B) If so, who and from what offices? C) In particular, was Karl Rove involved in the judicial selection process, and if so, can you describe in detail his involvement?

Response: Outside groups and individuals – including Senators, Representatives, Governors, other state and local officials, local bar officials and lawyers, and members of interest groups – would often support or recommend candidates. That is traditional and appropriate. In addition, the Department of Justice conducts a thorough vetting process during which many individuals familiar with the candidate provide input regarding a candidate's qualifications and suitability for the federal bench. As Judge Gonzales previously has explained, judicial nomination recommendations are provided to the President by the judicial selection committee, which is chaired by Judge Gonzales and includes individuals from the White House and the Department of Justice. The President himself makes the decision in all cases to submit a particular judicial nomination to the Senate.

4. Did you work with others inside the government, including the Department of Justice and Senate Republicans and their staffs, to determine how to prepare the nominees or work to secure their confirmation?

Response: Yes, that is an important part of the work of the Counsel's office and the Department of Justice.

5. In your hearing testimony, you indicated that part of your responsibilities included "public liaison" work. That means working with groups from outside of the government. A) Did you have a regular meeting set up with outside groups or individuals? B) If so, please list the names of the outside groups or individuals with whom you regularly met, how often the meetings took place, and the nature of those meetings. C) If not, did you meet at any time with any outside groups or individuals about judicial nominations? D) Apart from groups or individuals involved in regular meetings, with which other outside groups or individuals have you met about judicial nominations? E) For each of these groups or individuals, please tell me how often you would meet with them and the nature of those meetings.

Response: We met with members of a wide variety of groups that were interested in the judicial nomination and confirmation process. That is traditional and appropriate. Beyond that, it would not be appropriate in this context for me to provide information regarding the Administration's judicial nomination and confirmation strategy and meetings.

6. In your hearing testimony you indicated there was a "team" that worked in Senator Hatch's office and Senator Frist's office on nominations. A) Who was on that team during the time you worked in the Office of the White House Counsel? B) How often would that team meet? C) Where did that team meet? D) What specifically was the work of that team?

Response: The people who worked on issues relating to judicial confirmations included the White House Counsel's office lawyers, staff of the White House Office of Legislative Affairs, other White House staff, Department of Justice lawyers and personnel, Members and staffs of the Senate Judiciary Committee, and Senate leadership Members and staffs, among others. As I understand it, previous Administrations of both parties operated in the same manner with respect to judicial nominations and confirmations. The White House and Department of Justice met often with Senate staffers in order to maintain communications regarding the status of individual judicial nominations and to discuss upcoming hearings, votes, or other issues. Meetings would occur in a variety of government rooms depending on convenience and availability.

7. At your hearing the subject of consulting on nominations to the D.C. Circuit came up. Did you or anyone involved in the judicial nominations process for President Bush ever discuss nominations to the D.C. District Court or the D.C. Circuit with any elected officials from the District of Columbia?

Response: I am aware that the Administration consults with Mayor Williams on a variety of issues affecting the District of Columbia, including local judges. I do not know whether he or other local elected officials have been consulted for vacancies on the D.C. Circuit Court of Appeals. I believe there has been consultation on certain D.C. District Court nominations.

8. President Clinton nominated several individuals to the circuit and district courts with no close ties to him or other Democrats but who were championed by Republican Senators because they were either registered Republicans or close friends of the Senator of the other party. For example, Judge Richard Tallman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator Slade Gordon; Judge Barry Silverman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator John Kyl, who struck the names of Democratic candidates; Judge William Traxler, who was put on the district court by President Reagan, was nominated to the Fourth Circuit and confirmed at the request of Republican Senator Strom Thurmond; Judge Stanley Marcus was nominated to the Eleventh Circuit and confirmed at the urging of Republican Senator Connie Mack. Please list the names of all of the circuit court nominations President Bush has made who were first recommended to you by a Democratic Senator.

Response: Recommendations for district and circuit nominees come to the Administration from many sources, and it is often difficult to identify the "first" recommendation of a particular candidate. I can say that there are numerous court of appeals nominees of President Bush who had the support of home-state Democratic Senators, including: Edith Brown Clement, Consuelo Callahan, Allyson Duncan, Dennis Shedd, Reena Raggi, Barrington Parker, Lavenski Smith, Steve Colloton, Michael Melloy, Carlos Bea, Richard Clifton, and Jay Bybee. We are proud of the strong support these court of appeals nominees received from the Democratic Senators in their home states.

9. I detailed the excellent credentials and experiences of Allen Snyder and Elena Kagan at your hearing. Why do you think you should be confirmed for a seat on the D.C. Circuit when Mr. Snyder and Ms. Kagan, about whom no objections of any substance were ever raised, were rejected by this Committee for that same position?

Response: I have met and think very highly of Mr. Snyder and Dean Kagan. The President has consistently stated that every judicial nominee deserves an up or down vote in the Senate, regardless of who is President. It is the Senate's decision whether to confirm or reject any individual nominee.

10. As you know there has been a lot of controversy surrounding the appointment of members to certain statutorily created bi-partisan boards and commissions. The White House gives a tortured interpretation to the statutes governing these bodies, claiming they permit the President to name not only the members of his political party, but also the members not of his political party, insisting that there is no requirement that the leadership of the political party opposite the President make these choices. Frankly, we find these contentions absurd and contrary to the letter and spirit of the law. A) Do you agree with the President's interpretation? B) What was your role in helping the President reach the conclusion that Democrats are not to pick nominees for Democratic seats?

Response: I am not familiar with any ongoing dispute of this sort.

11. Historian Richard Reeves said about Executive Order 13233 that, "[w]ith a stroke of the pen on November 1, President Bush stabbed history in the back and blocked Americans' right to know how Presidents [and Vice Presidents] have made decisions," and that the Order "ended more than 30 years of increasing openness in government." You testified at your hearing that you believed the "initial concern" by historians and archivists about Executive Order 13233 was "based on a misunderstanding." You indicated there were meetings with historians to discuss and explain the Order and that historians have found them useful. With which historians have you met and when did you meet with them?

Response: I do not have a full list of the individuals who attended such meetings. Professor Martha Kumar organized the groups that attended the meetings. They occurred about every six months while I was in the Counsel's office.

12. As you know, after Executive Order 13233 was promulgated, numbers of prominent historians and the major associations of historians, including the American Historical Association, and the Organization of American Historians, filed suit in federal court challenging the validity of the Order. Even after the meeting or meetings you held with them, they continued with the lawsuit. Indeed, one major plaintiff, the American Political Science Association, joined the suit after your meetings began. Their criticism continued as well. While the historians were complimentary of your personal demeanor in the initial meeting you had with them, they continued to be seriously concerned. For example, Robert Spitzer, president of the Presidency Research Group of the American Political Science Association said, "Kavanaugh's promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . the situation continues to be deeply troubling." The late Hugh Graham, a Reagan historian and professor emeritus at Vanderbilt University, described the Executive Order as "a victory for secrecy in government" that is "so total that it would make Nixon jealous in his grave." Your testimony about the historians seemed calculated to brush off this sort of criticism. A) Do you deny that the Order continues to be unacceptable to most historians? B) How can you reconcile what you told us at your hearing with the very real concerns that America's historians continue to have?

Response: I know some historians are not satisfied with the rules that apply to Presidential records. I believe their concern stems from the Presidential Records Act and the Supreme Court decision authored by Justice Brennan in Nixon v. GSA. I know some of them have expressed and continue to express concerns about the Order, but we respectfully believe that any continuing concerns in fact stem from the Act itself and the Supreme Court decision, not from the Order.

13. At your hearing, you testified that the Bush Administration's Executive Order 13233 ("Bush Order"), which you authored, was nothing more than an order that set forth "procedures" for complying with the Presidential Records Act ("PRA"). In fact, according to many scholars, journalists, and others, the Bush Order goes far beyond mere "procedures" and in effect significantly impedes the release of presidential records intended to be released under the PRA and in effect eviscerates important parts of the PRA, increasing government secrecy. Specifically they are concerned about the "demonstrated, specific need" language, even after the end of the 12-year period, about Sections 3(a)-(d) of the Bush Order which effectively provide both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public, about Sections 3(d) and 4 of the Bush Order, which require the incumbent president to "concur in" and support in court an assertion of privilege by the former president, regardless of whether it is legally valid, unless there are compelling circumstances, about Section 3(d)(2) of the Bush Order which empowers the incumbent president to order the Archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national

security would be affected by public release, about Section 10 of the Executive Order which permits a former president (or his family) to designate a "representative" to assert constitutionally based executive privileges in the event of the former president's death or disability, about Section 11 of the Bush Order which allows a former vice president to assert constitutionally based privileges to bar release of records after the end of the 12-year restriction period applicable to records under the PRA, and about Section 2(a) of the Executive Order states that the former president's constitutional privileges include not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client privilege and attorney work product privileges, and the deliberative process privilege. In light of these specific concerns, can you explain in detail the basis for your claim that the Order is procedural in nature, and is merely complying with the PRA?

Response: The Order faithfully implements the Presidential Records Act and Supreme Court case law. It establishes procedures to govern release of records consistent with the statute and the Supreme Court precedent. The Order does not set forth the circumstances under which an assertion of privilege should be made or would be successful. The issues identified in this question are either procedural or stem from the Act itself or court decisions on executive privilege.

14. At your hearing, you also testified that there was a "need" for the Bush Order to "establish procedures" under the PRA because the end of the 12-year period of repose for former President Reagan's records was coming to an end, that both the current president and the former president could assert privilege with respect to the records under Nixon v. GSA, and that "[n]o one really had a good idea how this was going to work." But the Congress specifically delegated to the National Archives and Records Administration ("the Archivist") the authority to adopt regulations, and after notice and comment, to adopt all rules necessary to carry out the PRA's provisions, which the Archivist did. A) In light of the existing regulations under the PRA, why did you and others at the White House deem it necessary to adopt the Bush Order, which occurred without any opportunity for public notice and comment? B) During the period of more than 6 months when the Bush White House was notified about the Reagan records but before the Bush Order, please describe what if any consultation occurred with the Archivist concerning any alleged need for additional regulations.

Response: As you noted, the 12-year period was coming to an end as President Bush took office. This was the first time that the Act's 12-year period had expired for records subject to the Act. The Order itself provides that it was issued to establish procedures to govern review of the records. We consulted often with the National Archives and Records Administration (NARA) during the drafting process, and Archivist Carlin testified to the Congress that NARA had unprecedented access and opportunity to share their experiences and views.

15. In his introduction at your hearing, Senator Cornyn mentioned that the two of you had worked on a case together. A) What was the case? B) In what capacity were you involved in it? C) How did you come to be involved in the case? D) Why did you choose to be involved? E) Have you helped prepare others for Supreme Court argument? F) If so, who, and for what cases? G) For each one, please explain how you became involved and why.

Response: He was counsel in Santa Fe Independent School District v. Doe, and I participated in a moot court session when he prepared for oral argument. I also submitted an amicus brief on behalf of my clients, Congressmen Largent and Watts. It is very common for lawyers who will be appearing before the Supreme Court to participate in moot court sessions prior to their arguments. Often, attorneys who have submitted amicus briefs are especially knowledgeable about the issues and will therefore participate in such moots. While I have participated in dozens of moot courts over many years, I do not have a list.

16. In your hearing testimony you mentioned pro bono work you had done, and that it proved you would not be a partisan or ideological judge. Please list all of the pro bono legal work you did while you were in private practice and explain how each project demonstrates your ability to be fair to all litigants.

Response: I have worked in public service for 11 of the 14 years since I graduated from law school. During the years I was in private practice, I worked for several institutional clients of my law firm and also made time to do pro bono and reduced-fee work, including on the Elian Gonzales, Santa Fe, Good News Club, and Adat Shalom cases, as well as on a Florida school choice litigation matter. I believe the breadth of my experiences in public service and private practice, in the Judicial Branch and the Executive Branch, in criminal law and civil law, as an appellate litigator and a government advisor, as a law clerk on the Supreme Court and as a White House lawyer and advisor, has demonstrated my ability to be balanced and fair. The American Bar Association evaluates the fairness of judicial nominees, among other considerations, and rated me "well-qualified" to be a judge on the D.C. Circuit.

17. On September 20, 2001, did you and others in the Administration present a proposal to Congressional staff that called for liability protection for the airline carriers involved in the September 11, 2001 attacks, including limitations on punitive damages against the air carriers, attorney fee caps on victims' attorneys and offsets of victim awards in court for any emergency or disaster relief payments to these victims?

Response: In the aftermath of September the 11th, many of the lawyers in the Counsel's Office were assigned to the myriad legal issues that arose out of the attack. Among other matters, I worked on liability and compensation issues involving the airlines and the victims of the attack and their families. I was involved in presenting an Administration

proposal on the liability issues. I believe the Administration proposal in many respects resembled the final legislation with respect to liability issues.

18. Did this proposal from the Administration, presented on September 20, 2001, to provide liability protection for the airline carriers involved in the September 11, 2001, attacks also contain any compensation program for the victims of the September 11, 2001 attacks?

Response: I believe the issue of victim compensation was initially separate from the issues of airline solvency and liability. The two issues were both addressed in the final bill.

19. During subsequent negotiations on this proposal to provide liability protection for the airline carriers involved in the September 11, 2001, attacks, did you initially oppose providing any compensation program for the victims of the September 11, 2001 attacks?

Response: On behalf of the Administration, Director Daniels expressed support for the final bill in a meeting in the Speaker's office on the night of September 20. I was present for that meeting. The Administration (and I as a representative of the Administration) supported compensation for the victims and families of the victims of the September 11th attacks. The Administration's general position was and has been that victims of terrorism should receive equal compensation and that families of wealthy victims usually should not receive more money than families of poor victims. The Administration has wanted these programs to be consistent with other federal compensation programs and has sought to ensure that they can be administered in a fair and expeditious manner.

20. In your hearing testimony, you explained that one of the reasons you want to be a judge is because you have a "commitment to protecting rights and liberties of the people." What in your record demonstrates a commitment to protecting the rights and liberties of all people?

Response: I have a strong commitment to public service and have spent 11 of the 14 years since I graduated from law school in public service. During the years I was in private practice, I worked for several institutional clients of my law firm and also made time to do pro bono and reduced-fee work. I believe the breadth of my experiences in public service and private practice, in the Judicial Branch and the Executive Branch, in criminal law and civil law, as an appellate litigator and a government advisor, as a law clerk on the Supreme Court and as a White House lawyer and advisor, has demonstrated my ability to protect the rights and liberties of the people. The American Bar Association assesses the commitment to protecting the rights and liberties of all people when it evaluates judicial nominees, and the ABA concluded that I was "well-qualified" to be a judge on the D.C. Circuit. I have always tried to work hard and do my best for the public good, and I would continue to do so should I be confirmed to serve on the court of appeals.

21. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Charles Pickering. Pickering has called the fundamental "one-person one-vote" principle recognized by the Supreme Court under the Fourteenth Amendment "obtrusive." Fairley v. Forrest County, 814 F.Supp. 1327, 1330 (S.D. Miss. 1993). In order to redress serious problems of discrimination against African American voters in some cases, the courts (including the Supreme Court and the Fifth Circuit) have clearly recognized the propriety and importance of creating majority-black districts as a remedy under appropriate circumstances. Judge Pickering, however, has severely criticized this significant form of discrimination relief. In one opinion, he called it "affirmative segregation." Bryant v. Lawrence County, 814 F. Supp. 1346, 1351 (S.D. Miss. 1993). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? C) If so, did you express those concerns to your colleagues or to your superiors? D) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on voting rights. Was that your view? E) Why would you want to have someone with those views on the Fifth Circuit? F) Do you agree with Judge Pickering's views on voting rights as expressed above?

Response: It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I believe that Judge Pickering addressed these questions at his hearings. I know that Judge Pickering received a well-qualified rating from the American Bar Association and is supported by many prominent African-Americans and Democrats in Mississippi. He has the strong support of both home-state Senators.

22. In two cases dismissing claims of race discrimination in employment, Pickering used identical language striking a similar theme. He wrote in both that "this case has all the hallmarks of a case that is filed simply because an adverse employment decision was made in regard to a protected minority" and that the courts "are not super personnel managers charged with second guessing every employment decision made regarding minorities." See Seeley v. City of Hattiesburg, No.2:96-CV-327PG (S.D. Miss., Feb. 17, 1998) (slip op. at 12); Johnson v. South Mississippi Home Health, No. 2:95-CV-367PG (S.D. Miss., Sept. 4, 1996) (slip op. at 10). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on employment discrimination. Was that your view? D) Why would you want to have someone with those views on the Fifth

Circuit? E) Do you agree with Judge Pickering's views on employment discrimination cases as expressed above?

Response: See response to question 21.

23. In a 1994 case in his courtroom, U.S. v. Swann, Judge Pickering has admitted that he engaged in *ex parte* communication with the Department of Justice, including one high-ranking official who was a personal friend, in order to reduce the sentence of a convicted cross-burner. It has been argued that Judge Pickering was just trying to address the disparate sentences received by the three defendants in the case, and that he believed Mr. Swann, who says [he] was not the "ringleader" in the cross burning, was being unfairly punished. In fact, all three of the defendants were found guilty, and it was Mr. Swann's wood, gasoline, truck and lighter that were used to build, douse, transport and ignite the cross on the lawn of an interracial couple. Mr. Swann, the only competent adult of the trio of perpetrators, was also the only defendant who rejected the plea offered by the government. He was convicted by a jury of his peers of all three counts brought by the Department of Justice, including one that required a five-year mandatory minimum sentence. This sentence was legislated by Congress and the judge had no discretion to depart from it. A) Were you or anyone else involved in his selection, nomination or hearing preparation aware of Judge Pickering's conduct in this case before he was nominated? B) If so, did you still recommend his nomination? If not, when did you become aware of it, and once you became aware of it did you recommend that he withdraw his nomination? C) Do you think it is in the public interest to have a judge on the bench who engaged in what several legal ethics experts have agreed was unethical behavior?

Response: See response to question 21.

24. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Priscilla Owen. She was the target of criticism from her conservative Republican colleagues. In FM Properties v. City of Austin, the majority calls her dissent "nothing more than inflammatory rhetoric." In Montgomery Independent School District v. Davis, the majority (which included your former boss, then-Justice Alberto Gonzales and two other Bush appointees) is quite explicit about its view that Owen's position disregards the law, saying that "nothing in the statute requires" what she says it does, and that, "the dissenting opinion's misconception . . . stems from its disregard of the procedural elements the Legislature established," and that the "dissenting opinion not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for by the board. . ." In In re Jane Doe, the majority includes an extremely unusual section explaining its view of the proper role of judges, admonishing the dissent joined by Justice Owen for going beyond its duty to interpret the law in an attempt to fashion policy, and in a separate concurrence, Justice Gonzales says that to the construe law as the dissent did "would be an unconscionable act of judicial activism." A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone who had been criticized by her own colleagues for misconstruing the law and engaging in judicial activism to

the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Owen, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit. Was that your view? D) Why would you want to have such an activist judge on the Fifth Circuit?

Response: It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I believe that Justice Owen addressed these questions at her hearing. I know that Justice Owen received a unanimous well-qualified rating from the American Bar Association and is supported by three former Democrat Justices on the Texas Supreme Court, as well as more than a dozen past Presidents of the Texas State Bar. She has the strong support of both home-state Senators.

25. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Janice Rogers Brown. According to her questionnaire, her contact with the office began in the spring of 2001. Among the views that have made her nomination controversial was her statement that the Supreme Court's decisions 65 years ago to uphold humanitarian New Deal reforms – what she calls the "Revolution of 1937" – constituted a "disaster of epic proportions." Those 1937 decisions included rulings that upheld minimum wage laws, unemployment compensation laws, federal guarantees for collective bargaining, and the federal social security program. [Minimum wage laws – West Coast Hotel v. Parrish, 300 U.S. 379 (1937); federal unemployment compensation laws – Steward Machine Company v. Davis, 301 U.S. 548 (1937); collective bargaining guarantees – Jones and Laughlin Steel v. NLRB, 301 U.S. 1 (1937); federal social security system – Helvering v. Davis, 301 U.S. 619 (1937)] A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Brown, and I include you in that group, must have considered it in the public interest to have someone with those views on the D.C. Circuit, where she would be in a strong position to affect all of those programs. Was that your view? D) Why would you want to have someone with those views on the D.C. Circuit? E) Do you view the Supreme Court decisions she discussed as "disasters?"

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. Justice Brown and I were nominated at the same time for the same court. I also believe that Justice Brown addressed these questions at her hearing.

26. Justice Brown ruled in a dissenting opinion that any regulation constitutes a regulatory "taking" – hence requiring compensation – if it "benefit[s] one class of citizens [in that case, low income tenants] at the expense of another [in that case, landlords]." San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 126 (2002). Under that standard, virtually any law to protect certain citizens, such as environmental, health and safety, consumer protection, nursing home reform, or antidiscrimination standards, could be challenged. This of course was not just a

speech by Justice Brown; it was a dissenting opinion and a purported interpretation of the law. A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the DC Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

Response: See response to question 25.

27. Justice Brown has made some very radical statements in her opinions, dissents and speeches. For each of the statements below, please answer the following questions: A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the D.C. Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

> **"Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much 'free' stuff as the political system permits them to extract...Big government is...[t]he drug of choice for multinational corporations and single moms, for regulated industries and rugged Midwestern farmers, and militant senior citizens."**
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> **"Some things are apparent. Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible." "A Whiter Shade of Pale," Speech to Federalist Society (April 20. 2000) ("Federalist speech").**
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> **"[W]e no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens." "Fifty Ways to Lose Your Freedom," Speech to Institute of Justice (Aug. 12, 2000)("IFJ speech").**
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> **"[P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco...I would find the HCO [San Francisco Residential Hotel Unit Conversion and Demolition Ordinance] preempted by the Ellis Act and facially unconstitutional....Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the**

legitimacy of the government.... The right to express one's individuality and essential human dignity through the free use of property is just as important as the right to do so through speech, the press, or the free exercise of religion." [Dissenting opinion in San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 120, 128-9 (Cal. 2002).]

Response: See response to question 25.

28. One of the nominees submitted during your tenure, recently given a recess appointment after his nomination failed on the Senate floor, is William Pryor. Among many other remarkable statements, Mr. Pryor praised as "sublime" and "brilliant" a 2001 Federal District Court decision, West Side Mothers v. Havemann, later reversed on appeal, that would deny patients a day in court to enforce their right to treatment in accord with Federal Medicaid standards – a right that has clearly existed dating back to the earliest days of the Medicaid program. That would include, for example, a large proportion of all Americans who must now reside in nursing homes. A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on this program. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you view the district court decision in West Side Mothers to be "sublime" or "brilliant?"

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. I believe that Judge Pryor addressed these questions at his hearing. I know that Judge Pryor received a qualified rating from the American Bar Association, has been elected and respected as Attorney General in Alabama, and is strongly supported by many Democrats in Alabama. He also has the strong support of both home-state Senators.

29. In a July 2000 speech Pryor stated: "I will end with my prayer for the next administration: Please God, no more Souters." Bill Pryor, "The Supreme Court as Guardian of Federalism," before the Federalist Society and Heritage Foundation (July 11, 2000). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you agree with Mr. Pryor that no more Supreme Court Justices like David Souter should be appointed? If not, why not?

Response: See response to question 28.

30. Mr. Pryor has criticized the Supreme Court's 7-1 ruling that the denial of admission to women by the Virginia Military Institute, a state-supported public university, violated the Equal Protection Clause. He said "[t]he Court ruled that the people of Virginia were somehow prohibited by the fourteenth amendment from maintaining an all male military academy. Even the Chief Justice concurred. Never mind that for more than a century after the fourteenth amendment was enacted both the federal government and many state governments maintained all male military academies. Never mind that the people of the United States did not ratify the Equal Rights Amendment. We now have new rules of political correctness for decisionmaking in the equal protection area." Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on equal protection. Was that your view? D) Why would you want to have someone with those views on equal protection and equal treatment of women on the Eleventh Circuit? E) Do you agree with Mr. Pryor that the Supreme Court's decision in the VMI case represented the triumph of political correction over Constitutional principles?

Response: See response to question 28.

31. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Carolyn Kuhl. An *amicus curiae* brief that Kuhl co-authored when she served as Deputy Assistant Attorney General urged the Supreme Court to overturn Roe v. Wade, stating that: "the textual, historical and doctrinal basis of that decision is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided." Brief for the United States as *Amicus Curiae* in Support of Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, at 10 (July 15, 1985) (LEXIS pagination). The brief also asserted that the important principle of stare decisis should not stop the Court from overturning Roe. The brief claimed that "*[s]tare decisis* is a principle of stability. A decision as flawed as we believe *Roe v. Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment." Id. at 10 (emphasis added). A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the Ninth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Kuhl, and I

include you in that group, must have considered it in the public interest to have someone with those views on the Ninth Circuit, where she would be in a strong position to affect the law on privacy and reproductive rights. Was that your view? D) Why would you want to have someone with those views on the Ninth Circuit? E) Do you agree with the views Judge Kuhl expressed in that brief? F) Do you believe Roe v. Wade is so flawed that it ought to be overturned?

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. I believe that Judge Kuhl addressed these questions at her hearing. I know that Judge Kuhl received a well-qualified rating from the American Bar Association and is supported by many prominent Democrats in California, such as Vilma Martinez. She also has the strong support of a very large number of prominent women judges and women lawyers in California, many of whom are Democrats.

32. Mr. Kavanaugh, in your work on judicial nominations in the White House Counsel's Office, I am sure you recall the February 2003 letter from the White House asserting that there was no "persuasive support in the history and precedent of judicial appointments" for our request for memos written by Mr. Estrada at the Justice Department. I found that letter to be completely inconsistent with the level of cooperation shown by other administrations toward such requests of Members of this co-equal branch. I also put into the Congressional Record excerpts of correspondence between President Reagan's Justice Department and the Senate Judiciary Committee demonstrating that the administration agreed to share legal memos written by and to Robert Bork and William Rehnquist during their judicial nominations—even though they had served for years as judges--and I also noted other examples in which legal memos were shared during nominations for lifetime or short-term posts, such as Brad Reynolds's nomination. A) Did you ever look at the correspondence between the Department of Justice and the Senate in the Bork, Rehnquist, Reynolds or other nominations? B) If you did examine that correspondence, then you must be aware that past administrations provided the Senate with numerous legal memos of nominees while your administration provided not a single one by Mr. Estrada. Even your administration provided the Senate EPW Committee with legal memoranda of Jeffrey Olmstead in connection with his short-term appointment. Please explain why the legal memos of an attorney in the White House Counsel's Office could be shared with the Senate but your administration refused to provide any legal memos by Mr. Estrada. C) We know that legal memos written by Carolyn Kuhl, when she was a legal advisor to the Attorney General and recommended that Bob Jones University be given tax exempt status despite its express policy of racial discrimination, were provided to Congress in the aftermath of that failed initiative. Please explain why her legal memos and those of her colleagues at the Justice Department could be shared with Congress but not any of the memos of Mr. Estrada. D) I am sure you will cite the letter from former Solicitors General. As you know, their policy preference to provide absolute protection to deliberations in their former office is not embodied in any statute or in the Constitution and, in fact, the disclosure to the Senate of numerous memos

written to Robert Bork and by him in the Solicitor General's Office (as well as other past disclosures) did not chill deliberations. As the Supreme Court noted in the Nixon tapes case, it is quite *unlikely* "that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure." U.S. v. Nixon, 418 U.S. 683 at 712 (1974); see also Clark v. United States, 289 U.S. 1, 16 (1933); McGrain v. Daugherty, 273 U.S. 135 (1927). The interest in candid deliberation does not create an absolute privilege against disclosure in response to a request of Members of a co-equal branch. What can you say to assure the Senate that you would give due respect to the prerogatives of the Senate and not just continue to favor maximizing this Administration's penchant for secrecy if you were confirmed?

Response: I believe that the Administration has addressed this issue in many letters to the Committee. Beyond that, it would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I know that Miguel Estrada received a unanimous well-qualified rating from the American Bar Association and was supported by many prominent Democrats and Hispanic organizations. I would faithfully follow the relevant Supreme Court precedent on the separation of powers and the prerogatives of the Executive Branch and the Senate.

33. Mr. Kavanaugh, you had significant responsibilities on judicial nominations in the White House Counsel's Office during much of the same period that Manuel Miranda worked for Senate Majority Leader Bill Frist's lead attorney on nominations and when Mr. Miranda worked as counsel to Senator Hatch on the Senate Judiciary Committee. You testified that during the years you worked on judicial nominations you met with Mr. Miranda and others on the Republican team "to discuss upcoming hearings or upcoming votes, issues related to press interest in nominations or public liaison activities that outside groups were interested in." Mr. Miranda has asserted publicly that he took Democratic memos in part to find "information about when confirmation hearings would be held." A) From December 2001 through December 2002, did Mr. Miranda ever tell you when he thought Democrats would schedule hearings on the President's judicial nominees in advance of the public notice of hearings? B) Did he ever tell members of the White House team when he thought hearings would be scheduled or the likely timing of hearings throughout the year? C) Did other Republican Senate staffers provide you or your colleagues with such information or speculation? D) Did you ever inquire about the source of such speculation? How accurate was the speculation?

Response: See the response to questions 33-58 after question 58 below.

34. A) How often did you speak with Mr. Miranda from the time Senator Frist became the Majority Leader in late 2002 through May 2003, when you became staff secretary to the President? B) How often did you receive e-mail communications from him during this period? C) How often did you see him at meetings, either on the Hill or at the White House? Please provide the same information for the period December 2001 through December 2002.

35. You testified that Mr. Miranda did not ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee or any information that you believed or were led to believe was obtained or derived from Democratic files. A) Did Mr. Miranda ever discuss with you what the Democratic strategy on nominations was during the spring of 2003? B) Did he suggest to you or to others on your team that Democrats would filibuster any of the President's judicial nominees? C) Did you or your team have confidence that his speculations were accurate? D) Did you find, perhaps even in retrospect, that his intelligence was untoward or dubious?

36. One of Mr. Miranda's responsibilities during the period when your responsibilities overlapped was managing the Republican strategy during the floor fight on the nomination of Miguel Estrada to the court to which you are now nominated. A) Were you in daily contact with Mr. Miranda during this period? B) If you were not, which members of your team were responsible for or assisted with communications with him about the strategy for winning the confirmation of Mr. Estrada?

37. A) Did Mr. Miranda ever convey to you or any member of the White House staff the allegation that Mr. Estrada was being opposed because he was Latino, or similar words? B) Did you ever discuss this issue or allegation with Mr. Miranda or any other Senate staffer, including Senator McConnell's aide John Abegg, who was mentioned in the SAA report as providing at least one of the stolen computer files to Senator Hatch's chief nominations counsel, Rena Comisac, according to her statement? C) Did you ever discuss this issue or allegation with any Republican senate staffer or Senator?

38. A) Prior to the Bob Novak column published on February 9, 2003, did you hear that Democratic Senators had met in January regarding the decision to filibuster the nomination of Miguel Estrada? Mr. Novak has admitted writing a column published that day based on computer files that were stolen by others. B) Did you ever discuss the issue of Mr. Estrada's nomination or the filibuster with Mr. Novak? C) Did he ever indicate to you that he had a source or had seen a purported Democratic strategy memo on the Estrada filibuster? D) Did Mr. Novak ever speak with you or any of your colleagues in advance of the date that column was published about the decision to filibuster the Estrada nomination?

39. A) At any time from January 30th until November 14, 2003, did you ever hear that such a meeting occurred? B) Prior to November 14, 2003, did you hear that there was a computer file about any such meeting? According to reports, Senator Kyl's counsel Joe Matal received copies of some of the Democratic computer files from the Wall Street Journal on November 14, 2003. C) Were you or anyone at the

White House given copies of the purported Democratic computer files on November 14 or November 13 by staff of the Wall Street Journal or any other person?

40. A) Did you or anyone at the White House receive copies of any purported Democratic computer file, electronically or in hard copy, prior to November 14, 2003 or at any time since then? B) If your answer is "no," how do you know that no one on the White House staff saw such a memo? Mr. Gonzales wrote a letter in response to a letter of inquiry from Senator Leahy stating that the White House would not conduct an internal investigation to determine whether any of the stolen computer files were given to White House aides. C) Did you personally conduct any inquiry into whether any attorney or staff member of the White House received any of the stolen memos?

41. A) Please provide a list of the names of every staff member who worked on judicial nominations at the White House from December 2001 through December 2003, during the period that Mr. Miranda worked at the Senate and was stealing and reading Democratic computer files. Also, please indicate who from the Justice Department worked with you on nominations during this period.

42. According to the SAA report, Mr. Miranda directed that Jason Lundell provide computer files to the Executive Director of the Committee for Justice, Sean Rushton. You testified that you thought you "met him where the people from the administration and from the Senate would speak to outside groups who were supporting the President's nominees, and he is a member of a group that supports the President's nominees." A) Please describe how you first met Mr. Rushton, how often you have met with him or spoken with him about nominations, and how often you have received e-mail communications from him about judicial nominations.

43. A) How often did you speak or meet with, or receive e-mail communications from, the leader of Committee for Justice, C. Boyden Gray, about judicial nominations issues? B) How often did you or members of the White House nominations team meet with or speak with either Mr. Rushton or Mr. Gray during 2003? The Committee for Justice has been a strong defender of Mr. Miranda's role in taking Democratic computer files, which is understandable I suppose since they received computer files at Mr. Miranda's direction according to Mr. Lundell. C) Please describe for the Committee any contacts you had with Mr. Gray, Mr. Rushton, or Mr. Lundell by phone, by e-mail, or in person during your work on judicial nominations.

44. A) Did you keep a telephone log, appointment book or any other document that makes any reference to Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Kay Daly (whose organization published some of the purported stolen computer files)?

45. Mr. Gray and Mr. Rushton's group, Committee for Justice, has held fundraisers with White House insiders like Karl Rove as well as members of the

Bush family, including the President's nephew. You testified that you had attended one of their fundraisers but you were not sure if you made a donation. A) Which fundraiser or fundraisers of theirs did you attend? B) Did you ever donate any money to this organization? C) Have you ever attended any other event sponsored or co-sponsored by this organization? Please be specific.

46. During the spring of 2003, the Committee for Justice began an attack ad campaign basically accusing Senate Democrats of opposing Mr. Estrada because he is Latino, an accusation that seems to be premised on Mr. Miranda's claims. A) Were you involved in any way in the creation of that ad or in any discussion about the benefits of any such ad campaign? B) Did you preview that ad before it was first aired? C) Did you ever discuss that ad, orally or in writing, with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? Did you ever discuss that ad with any other Republican Senate staffer or Senator?

47. During the spring of 2003 did you ever discuss the nomination of Priscilla Owen of Texas with Mr. Miranda? B) Did you ever discuss the Democratic or likely Democratic strategy with him on this nomination that was so important to the President, because she's from Texas, and to Mr. Rove, who was her state judicial election campaign strategist and fundraiser in the 1990s? C) Did you have any meetings with Mr. Miranda about this nomination? D) Did you have any e-mail communication about this nomination with him? E) Did you have any telephone conversations with him? F) Who on the White House staff was involved in the Owen nomination and floor strategy? G) Did you ever discuss, orally or in writing, Senator Kennedy's views on Justice Owen with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? With Mr. Novak? With Mr. Rove? Did you ever discuss this issue with any Republican in the Senate?

48. A) In April 2003, did you ever speak with any Republican in the Senate or any outside group or press about the issue of Democratic filibusters based on "substance as opposed to process?" B) Did you hear that or any similar phrase used by Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Rushton, Mr. Gray, or Ms. Daly?

49. A) Did you work with Mr. Miranda in his role in getting Majority Leader Frist to schedule a day of "constitutional debate" on the filibuster in March of 2003, when Vice President Cheney presided as President of the Senate? B) Did you discuss with Mr.Miranda, Mr. Abegg or any other Republican staffer strategies for overcoming the Democratic filibuster last spring? C) Were any outside organizations present at or involved in those discussions? D) Did you or any of your colleagues discuss that issue, orally or in writing, with Ms. Comisac or Mr. Dahl?

50. A) Were you involved in any way in the decision of Mr. Frist to hire Mr. Miranda as his chief aide on judicial nominations? B) Were you asked about

whether you thought he would do a good job by anyone on his staff ? C) Did you recommend him? D) Did Mr. Gray, Ms. Daly or any other leader of conservative groups commend Mr. Miranda's work on judicial nominations to you?

51. A) In the year 2002, when Mr. Miranda worked on the Judiciary Committee, did you have any communication with Mr. Miranda in 2002 about the nomination of Judge Dennis Shedd to the Fourth Circuit? B) Who on the White House staff was involved in the Shedd nomination, during the Committee consideration and the floor consideration? C) Which Senate staffers did you or White House staff work with on this nomination? D) Who worked on this nomination at the Justice Department? E) Did Mr. Miranda ever mention to you his views on the pace of consideration of the Shedd nomination? F) Did you ever have any communication, orally or in writing, about this matter with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly? G) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? H) Did you ever see any proposed questions for Judge Shedd that might be asked by Senate Democrats in advance of that hearing? I) Were you aware prior to Judge Shedd's hearing that there were concerns about Judge Shedd's civil rights record? How so?

52. A) From December 2001 through November 14, 2003, did you ever hear or learn that any Republican staffer claimed to have a Democratic mole or source or a "conscience stricken" Democrat who was providing Mr. Miranda or any other staffer with information about the hearing schedule or Democratic strategy? B) During this period did you ever hear a claim that there was a supposed computer glitch or security weakness that allowed Democratic computer files to be spied upon, read, stolen, printed or downloaded, prior to November 14, 2003?

53. A) Did you attend the nomination hearing for Miguel Estrada? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Who in the White House and at Justice worked on that nomination at that stage? E) Did any of them get that information? How do you know? F) Did you ever see or hear about any possible questions from Senate Democrats for Mr. Estrada that might be asked, in advance of that hearing?

54. A) Did you attend the first nomination hearing for Priscilla Owen? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Justice Owen that Senate Democrats might ask her in advance of that hearing?

55. A) Did you attend the nomination hearing for D. Brooks Smith? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Judge Smith that Senate Democrats might ask him in advance of that hearing?

56. During the winter of 2001 through the spring of 2002, did it come to your attention that Judge Charles Pickering's nomination was facing difficulty due to his legislative voting record on civil rights matters or his connection to the Mississippi Sovereignty Commission or his partner Carroll Gartin's ties to that Commission?

57. Mr. Miranda told the Los Angeles Times in a March 4 story that he believed that there was nothing wrong with him accessing the computer files of his opposing counsels on nominations and using them to help win what he calls the "judicial nominations war." In that story, he also noted that that trove of Democratic computer files he and Mr. Lundell located "was valuable information." In a March 5, 2004 Washington Times story, Mr. Miranda noted that he spied on and read the stolen computer files because he "had an obligation to learn everything [he] could possibly learn to defend [his] clients." He himself or through one of his proxies shared some of this valuable information with Mr. Novak and other columnists, as one of his primary responsibilities in Frist's office was dealing with the media and outreach to conservative groups and working with the White House, yet you are prepared to state unequivocally that you never saw or heard that Mr. Miranda had obtained Democratic computer files prior to his public admissions that he had done so?

58. Have you spoken with Mr. Miranda or received any written communication from him directly or through a third party about judicial nominations or the improper access of Democratic computer files between November 14, 2003 and today? B) Has the White House been approached or lobbied to hire him, as the Senate has?

Response to questions 33-58:

Before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files. I was informed that I am not a target or subject of the investigation into this matter.

I knew Mr. Miranda, as he and many other Senate staffers were part of regular meetings, telephone calls, and emails about the judicial confirmation process. These meetings, calls, and emails were typical of how judicial confirmations have been handled in past Administrations. I never knew or suspected that he or others had obtained information from Democratic computer files. I know of no one in the Administration or elsewhere who had any such knowledge or suspicions. I assumed that he, like many staffers and

legislative affairs personnel in the Administration and on the Committee, talked often to the staffs of Democratic members to appropriately obtain as much information as possible about hearings, questions, concerns, individual nominees, and the like. Such inquiries and conversations are standard and appropriate on both sides, and they tend to generate and reveal a great deal of relevant information that is shared by both sides of the Committee with the other side and with the Administration. In my experience, the Senators on the Committee and their staffs have been open about likely questions and general concerns, and many Senators and staffers on both sides have provided helpful information with respect to timing of hearings, specific concerns about nominees, and overall plans and strategy. Usually, for example, Senators on both sides would explain any areas of concern to the Administration and often directly to the nominees well before any individual hearings. As I explained to Senator Durbin at my hearing, I cannot be sure which of the information imparted orally or in writing by Senate staffers or others may have been derived in whole or in part from information obtained from Democratic computer files. To reiterate, before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files.

Beyond this, it would not be appropriate in this context to provide further information about Executive Branch communications relating to judicial nominations and confirmations.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Kennedy

I. FOLLOW-UP ON QUESTIONS AT THE HEARING

A. THE DEMOCRATIC COMPUTER FILES

As you know, the questions surrounding the improper access to and dissemination of the Senate Democratic computer files have been referred for investigation by a special prosecutor. Since your office worked directly with both a key perpetrator and with other individuals and groups who appear to have received materials from the files, on the very subject of most of the files known to have been downloaded, it is to be expected that you and your office will be subjects of this investigation. We therefore need to be as sure as we can, before processing your nomination, that we have all of the information regarding your possible involvement in or knowledge of the matters under investigation.

You were asked a number of questions regarding this matter by Senators from both parties (see, e.g., pages 35-37, 97-100, 112-114 of the Transcript of the Hearing on the Nomination of Brett M. Kavanaugh, "hearing transcript"). In some cases the questions as asked were framed, or your answers were framed, in ways that restricted or limited them in some way, either by time frame (e.g., past, present, at, before or after a certain time), particular person (e.g., Rushton, Gray, Daly), a qualifier (e.g., "usually," "documents" vs. "information") or an ambiguous description (e.g., "that matter"), or otherwise. In some cases your answers were unresponsive even to the questions as asked.

Would you kindly review all of your testimony on this subject, and amplify each of your answers to provide and make clear that you are providing all of the information you have on the entire subject without regard to any restrictions or limitations or qualifiers in the original questions or your answers. In addition, where, on review you see that your answers were not fully responsive or were misleading in any way in view of your entire knowledge of the subject at any point in time, please provide fully responsive answers.

For example, when you were asked about the circumstances of your meetings with Manuel Miranda, you responded with what they "usually" were. In such a case, you should provide what the circumstances were in all instances, whether usual or unusual.

Similarly, you were asked two questions about whether you received documents or information that "appeared" to come from or that "you believed or were led to believe" came from Democratic files. Both answers were in the negative but were explained by almost identical statements, not responsive to the questions, that you were "not aware of that matter until I learned of it in the media." For present

purposes you should consider that you were asked: "Did Mr. Miranda (or anyone else) ever share, reference or provide you with any documents (or other facts, schedules, positions, plans or other information) that appeared to you (then or at any subsequent time, especially after you had become aware of the Republican access to Democratic files and had seen the files posted on the web or provided to the media and to groups or persons with whom you were in touch) to have been drafted or prepared by (or obtained or derived from the files, emails or other communications of) Democratic staff members of the Senate Judiciary Committee?

Similarly, you should re-frame your answer to the second question on page 37 of the hearing transcript to read its reference to "Associate White House Counsels" as including any interested White House staff, such as those in the Public Liaison or Legislative Affairs offices, to remove your own limitation to whether they were "aware" of the source of the materials and instead respond to the question asked, i.e., did they have access to the materials (or information), whether or not they were "aware" of the source.

As another example, you should review your answers to the questions regarding Boyden Gray on pages 113-114 of the hearing transcript, and remove your repeated limitation to "since I have been staff secretary," providing detailed information on your relationship to Mr. Gray throughout your White House employment.

In short, whether or not you believe the questions as asked should have elicited this information at the hearing, please fully disclose now, without standing on semantic limitations in the original questions or in this submission, everything you know, or in retrospect now realize or believe, about the circumstances surrounding the access to the Democratic files, the use and dissemination of the content or information derived from these files, and the availability of that content or information to you or anyone else in the White House, the Justice Department, the groups supporting the President's nominations, or anyone else outside the Democratic offices of the Judiciary Committee.

If this request is any way unclear, or leaves open any basis on which you might think that you need not provide everything you know on the entire subject, please let us know promptly, and we will clarify the request.

Response: Before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files. Also, to clarify one statement in your questions, I was informed that I am not a target or subject of the investigation into this matter.

I knew Mr. Miranda, as he and many other Senate staffers were part of regular meetings, telephone calls, and emails about the judicial confirmation process. These meetings, calls, and emails were typical of how judicial confirmations have been handled in past

Administrations. I never knew or suspected that he or others had obtained information from Democratic computer files. I know of no one in the Administration or elsewhere who had any such knowledge or suspicions. I assumed that he, like many staffers and legislative affairs personnel in the Administration and on the Committee, talked often to the staffs of Democratic members to appropriately obtain as much information as possible about hearings, questions, concerns, individual nominees, and the like. Such inquiries and conversations are standard and appropriate on both sides, and they tend to generate and reveal a great deal of relevant information that is shared by both sides of the Committee with the other side and with the Administration. In my experience, the Senators on the Committee and their staffs have been open about likely questions and general concerns, and many Senators and staffers on both sides have provided helpful information with respect to timing of hearings, specific concerns about nominees, and overall plans and strategy. Usually, for example, Senators on both sides would explain any areas of concern to the Administration and often directly to the nominees well before any individual hearings. As I explained to Senator Durbin at my hearing, I cannot be sure which of the information imparted orally or in writing by Senate staffers or others may have been derived in whole or in part from information obtained from Democratic computer files. To reiterate, before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files.

Beyond this, it would not be appropriate in this context to provide further information about Executive Branch communications relating to judicial nominations and confirmations.

In addition to the above:

1. **Please provide your own conclusions as to the validity of Mr. Miranda's public statements as to his justification for his actions, their compliance with his ethical obligations, and the fact that he was operating in the interests of those who supported the nominations.**

Response: I am not familiar with all of Mr. Miranda's public statements regarding this issue, and it would not be appropriate in this context to comment on a matter under investigation.

2. **Since Boyden Gray has been publicly identified as a supporter of and spokesman for the White House on subjects relating to judicial nominations, please state whether you agree with his public defenses of Mr. Miranda, whether you or anyone at the White House have indicated to him that since he is so identified with the White House, he should desist from defending Mr. Miranda.**

Response: Mr. Gray is not an employee of the White House and does not speak on behalf of the White House. I am not familiar with particular public statements Mr. Gray may have made relating to Mr. Miranda.

3. **In view of Mr. Gonzales' refusal to investigate the subject, please state whether your (expanded) answer to the question on page 37 about whether "any other Associate White House Counsels had access" to the materials at issue is based on your own affirmative knowledge of what other White House staff knew or on your lack of knowledge of what other staff knew.**

Response: See my response to IA.

4. **Please state whether Mr. Miranda was ever involved in any of the moot courts or other meetings, conference calls, or conversations to prepare nominees for their hearings. If so, which ones?**

   a. **Did you ever meet with a nominee together with Mr. Miranda to prepare the nominee to testify before the Senate Judiciary Committee? If so, please describe that preparation and Mr. Miranda's role in it.**

   b. **Did Mr. Miranda ever directly or indirectly convey to any nominee, or to anyone involved in preparing any nominee, whether orally or in writing, any questions or areas of questioning that he suggested the nominee might be asked by any member of the Senate Judiciary Committee? If so, please describe the circumstances in which this occurred, and identify each nominee as to whose nomination Mr. Miranda's suggestion was made.**

Response: See my response to IA.

5. **Please describe any efforts you made, before or after your hearing, to review the materials and information you received from Mr. Miranda, other White House staff, the Justice Department, Mr. Gray, Mr. Rushton, Ms. Daly, or anyone else involved in judicial nominations, to determine whether anything they provided may have derived from the accessed Democratic files.**

Response: See my response to IA.

6. **Did Mr. Miranda ever tell you, suggest, or hint in any manner that he had a "source" or "mole" or other means of obtaining non-public information from the Democratic side? Did you ever hear that there was a disaffected Democratic staffer member or similar source providing such information?**

Response: See my response to IA.

B. FEDERALIST SOCIETY

In response to questions about the heavy tilt toward Federalist Society members on the Administration's judicial nominations, you characterized the Society as "a group that brings together lawyers for conferences and legal panels. The Federalist Society does not take a position on issues. It does not have a platform." You said you were a member because it puts on "conferences and panels" where you can learn about issues and meet colleagues.

No reasonable person could think the Society is just a meeting place for lawyers. The Society's own website is much more candid than you were, describing it as "a group of conservatives and libertarians interested in the current state of the legal order." The Society decries, without attributing it to anyone in particular, the "orthodox liberal ideology which advocates a centralized and uniform society" and in pursuit of its goals has "created a conservative and libertarian intellectual network that extends to all levels of the legal community."

If, as a judge, your opinions merely followed and implemented the goals of the Society, would you still assert that you would not be "taking a position on issues" and not pursuing "a platform"?

Response: A judge should never attempt to follow or implement the goals of any organization. If confirmed as a judge, I would fairly and impartially interpret and apply the law.

C. PRYOR NOMINATION

Since responding to the questions on the Republican Attorneys General Association issue, have you reviewed your records and refreshed your recollections as to your role in preparing the nominee for questions on that subject? Please describe your role in more detail.

1. **You did not answer the questions I asked you on pages 134-135 of the hearing transcript, as to what if anything was done after the revelations in the media about the RAGA issue. Please do so in full now. Did you or anyone else in the White House or Justice Department check the issue out in more detail, have it investigated further, question the nominee about it, or otherwise follow up on the issue? Did any of you check with the RNC to determine who had the records that the nominee said they had? Please provide details on what was done, the results of any inquiry, and who received those results.**

Response: I believe Judge Pryor addressed these questions at his hearing. It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications.

2. **At any time before February 20, 2004, were you aware that Mr. Pryor was being considered for a recess appointment to the 11th Circuit? Were you aware that the recess which was going to be used was an intra-session recess of five business days surrounding a three-day holiday weekend? Were you aware that the appointment was to be made on the afternoon of the last business day of the recess? Were you aware that the shortest prior recess used for appointment of an Article III judge during an intra-session recess was a recess of 35 days? Did you express an opinion to anyone at the White House as to the validity or advisability of making such an unprecedented appointment? If so, without asking what your advice was, is there any reason we cannot assume that your advice had to have been either (a) that the appointment should be attempted, or (b) not followed.**

Response: It would not be appropriate in this context for me to discuss any internal Executive Branch communications on this matter. The United States Court of Appeals for the Eleventh Circuit has upheld the appointment of Judge Pryor.

3. **At your nomination hearing, I asked whether you assisted in preparing William Pryor to testify before the Senate Judiciary Committee. At that time, you indicated that you may have participated in a "moot court" session to prepare Mr. Pryor, but that you could not recall. Now that you have had additional time to review your work on nominations matters, please clarify whether you did in fact participate in a moot court preparation of Mr. Pryor.**

Response: I participated in moot court preparation for Judge Pryor.

4. **As you know, after William Pryor was nominated to the U.S. Court of Appeals for the Eleventh Circuit, several members of the Senate and the public expressed concern about extreme statements that Mr. Pryor had made, including his description of Roe v. Wade as "the worst abomination of constitutional law in our history." Do you agree with Mr. Pryor that Roe v. Wade is an "abomination of constitutional law"?**

Response: It would not be appropriate in this context for me to comment on the records of other nominees. Roe v. Wade is binding Supreme Court precedent. If confirmed, I would fairly and faithfully follow and apply all binding Supreme Court precedent, including Roe v. Wade.

5. **The Constitution gave the Senate a co-equal role in appointing federal judges to guarantee that the judiciary is independent, and does not simply reflect the political views of a particular President. The idea that federal judges should be independent of the other two branches of government is one of the most important aspects of our democracy. As I mentioned during your confirmation hearing, after the Supreme Court's 5 to 4 decision in Bush v. Gore, William Pryor stated that he had wanted the decision to be decided 5 to 4, so that President Bush "would have a full appreciation of the judiciary and judicial selection, so we can have no more appointments like Justice Souter." If all judges followed Mr. Pryor's view, the courts would be little more than an arm of the Executive Branch. Do you believe this is an appropriate view for a nominee to a federal court? Do you agree with Mr. Pryor's view about the role of federal judges?**

Response: I understand, respect, and fully appreciate the need for an independent Judiciary. I know how important an independent Judiciary is to our system of government, to the rule of law, and to the American people. It would not be appropriate in this context for me to comment on the records or statements of other nominees.

D. LEGAL EXPERIENCE AND ROLE IN JUDICIAL NOMINATIONS

1. During your April 27, 2004, nomination hearing, you testified about your role in judicial nominations during the current Bush Administration and stated that you focused on "certain circuit court nominations" and on nominees from particular parts of the country.

a. Please note the month and year when you first began working on matters related to judicial nominations and, if you no longer have any role in matters related to nominations, the date on which your involvement in such matters ceased.

b. Which nominees did you work on, in any capacity?

c. With respect to each of the nominees listed in response, above, please describe your role in selecting, vetting, or recommending them for nomination to the federal courts of appeals, and please describe the role you played in their preparation for testimony or responses to written questions.

Response: I began working in the White House Counsel's Office in January 2001 and became Staff Secretary in July 2003. I began working on judicial nominations in January 2001. When I became Staff Secretary, I usually did not work on judicial nominations except to handle certain paperwork for the President.

I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

On occasion, I would review the drafts of written answers by nominees, although the Department of Justice had the primary role in reviewing nominees' written answers, as has been the case in prior Administrations as well.

2. **During the hearing on your nomination, I asked what experience if any you have in labor law matters. Your answer noted that you have held several government positions, but did not identify whether you have any experience in labor law. Please clarify whether you worked on any cases or legal matters involving labor law claims, and if so, please identify the case and describe the nature of your work.**

Response: As I stated at my hearing, I have spent the majority of my professional career in public service. My primary experience in labor law has been with respect to cases I worked on as a law clerk, including for Justice Kennedy, and as a lawyer in the Solicitor General's office.

3. **Please describe any legal experience you have involving the Americans with Disabilities Act. Please also describe any legal experience you may have involving the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act or any aspect of environmental law. In responding to this question, please identify the cases or legal matters on which you worked, and any role you played in drafting submissions or presenting oral argument to a court on these issues.**

Response: As I stated at my hearing, I have spent the majority of my professional career in public service. My primary experience in disability and environmental law has been in cases I worked on as a law clerk, including for Justice Kennedy, and as a lawyer in the Solicitor General's office.

4. **In response to a question from Senator Schumer during the hearing on your nomination, you stated that you believed that you had attended a fundraiser for the Committee for Justice on at least one occasion. You could not recall whether you made a donation at that event, but indicated that you would check to confirm this fact.**

   a. **Please indicate whether you have ever attended a fundraiser for the Committee for Justice, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.**

   b. **Please state whether you have attended a fundraiser for the Coalition for a Fair Judiciary, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.**

Response: I attended one Friday happy hour hosted by the Committee for Justice in Washington, D.C. in the summer of 2003. Several hundred people attended. I believe I may have spent about $20 at the happy hour. Other than that, I have not attended any events for the Coalition for a Fair Judiciary or the Committee for Justice or contributed to them.

5. **You have testified that, as part of your work on judicial nominations, you coordinated with the White House Press Office and with outside organizations regarding nominees. As you know, Democrats who raised concerns about some of the Administration's most controversial nominees have been called anti-Black, anti-Latino, anti-Southern and anti-Catholic by some of these outside organizations.**

   a. **Did you play any role in encouraging conservative organizations and conservative media in these characterizations of Senators who opposed judicial nominees?**

   b. **Do you agree that such characterizations are unacceptable and mislead the public about the judicial nominations process?**

   c. **What if anything did you do to stop these White House supported organizations and surrogates from continuing to make these changes?**

Response: I spoke to and met with members of outside organizations who were interested in the judicial nomination and confirmation process. I have never encouraged anyone to portray Senators in the ways described in this question. No one in the Administration to my knowledge has ever made, suggested, or countenanced such charges.

II. OTHER ISSUES

The Office of the Counsel to the President plays a major role in decision-making with respect to access to Executive Branch materials and inquiries into allegations of improper activities by White House staff. Please provide a detailed description of your role in those activities, and specific responses to the questions below, answering any "yes" or "no" questions with a "yes" or "no" before providing any explanations. If any of your answers are classified, please separate the classified portions to the maximum extent possible, and provide a classified and unclassified version of such answers.

A. CIA LEAK INVESTIGATION

1. Did you have any role in any activity relating in any way to the leak of information regarding Valerie Plame? If so, please detail your role.

Response: No

2. Did you personally question staff members or receive, review, or become familiar with evidence relating in any way to this matter? If so, please provide the details of what you did.

Response: No

3. Have you been questioned by the Special Prosecutor, the FBI, or anyone else about this matter?

Response: No

4. Were you involved in any internal investigation within the Executive Branch as to this matter? If so, please provide the details of what you did.

Response: No

5. As a result of anything you did, saw, read or heard, do you know who the person(s) was (were) who communicated information about Ms. Plame to the media? If so please provide the details of what you know.

Response: No

6. To the best of your knowledge, what efforts were made by your office or any other office in the White House to determine who disclosed the Plame information? Were you satisfied that all possible efforts were made to discover the facts? What other steps could have been taken that were not taken? Did you attempt to take those steps?

Response: I do not have knowledge of this matter and these issues.

7. Did you participate in the screening process conducted by the Counsel's office before materials on this subject requested by the Department of Justice were provided to the Department? Please describe that process and your role in detail.

Response: No. I assumed my position as Staff Secretary in July 2003.

8. **What steps do you believe should have been or should be taken against anyone involved in disclosing the Plame information? Do you know whether such steps have been taken? If so, please provide the details of what steps have been taken and what other steps you believe should be taken.**

Response: I am not familiar with the facts relating to this matter and did not work on this matter.

B. BARRIERS TO ACCESS TO 9/11 INFORMATION

1. **Did you or anyone else in your office or, to the best of your knowledge, elsewhere in the White House, have any contact in 2001 or 2002 with (a) any member or staff of the Senate Judiciary Committee, or (b) any other Senator or Senate staff, with respect to the Committee's desire to investigate issues relating to the 9/11 attacks? If so, please provide details of what you did and what you know. What do you know about the efforts to deny authorization or funding for that investigation? What was your role and that of your office? If your office had nothing to do with that matter, who handled it for the White House?**

Response: I did not work on this matter.

2. **Did you or anyone else in your office or, to your knowledge, elsewhere in the White House have any role in the denial, delay or limitation of access to the materials and information requested by the Joint Intelligence Committees for their inquiry into 9/11 as described in the Appendix to their Report? In particular, did you or your office participate in any way in the decision to classify the fact that the President had received the PDB dated August 6, 2001? If either answer is yes, please provide details of what you know and what you did.**

Response: I did not work on this matter.

3. **Did you or your office have a role (a) in formulating or implementing the White House opposition to the establishment of the 9/11 Commission before September 2002, (b) in negotiating the details of the legislation establishing the Commission's mandate and structure once the White House agreed to its establishment, or (c) in considering, determining, and negotiating with regard to the White House responses to requests from the Commission for materials, interviews, and information? Please describe your own role in detail.**

Response: I did not work on this matter.

4. **Were you in any way responsible for the White House statements that it was impermissible for Ms. Rice to testify and for the White House to release the August 6th 2001 PDB? If so, please describe your role in detail.**

Response: I did not work on this matter.

5. **Do you see any meaningful distinctions between President Ford's public testimony before a House subcommittee in 1974 and President Bush's appearance before the 9/11 Commission which justify his refusal to testify in public?**

Response: I did not work on this matter.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Feingold

1. According to your Judiciary Committee questionnaire, while working in the White House Counsel's office, you "worked on the nomination and confirmation of federal judges." You state that you also worked on "various ethics issues." As part of your responsibilities in that office, did you review the records of potential nominees for their compliance with standards of legal and judicial ethics?

Response: The responsibility for reviewing background investigation files was performed by the Counsel and Deputy Counsel to the President, as well as attorneys in the Department of Justice. I therefore was rarely involved in that particular aspect of the judicial selection process.

2. Do you believe that adherence to strict ethical standards is an important qualification for being a federal judge?

Response: Yes.

3. During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Prof. Stephen Gillers of NYU Law School has written: "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges.... The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? When did you become aware that Judge Pickering had solicited these letters of support?

Do you believe that Judge Pickering's conduct in this instance is consistent with the ethical obligations of a federal judge?

Do you believe it is appropriate for federal judges to solicit letters of support from lawyers who practice before them and ask that those letters be sent directly to him to be forwarded to the Senate Judiciary Committee?

Response: I believe Judge Pickering addressed inquiries about this matter in his confirmation hearings. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

4. During the Senate's consideration of Judge D. Brook Smith's nomination to the Third Circuit, the Judiciary Committee learned that Judge Smith had not resigned from the Spruce Creek Rod and Gun Club until 1999, even though he had promised during a

confirmation hearing in 1988 that he would do so if he was unable to bring about a change in the club's discriminatory membership policies.

When Judge Smith was nominated did you know that he had made this promise to the Judiciary Committee in 1988 and that he remained a member until 1999? If not, when did you become aware of these facts?

Did you work with Judge Smith in preparing his discussion of his membership in the Spruce Creek Rod and Gun Club in this Judiciary Committee questionnaire and his answers to questions about that membership in the club? Did you review his answers to questions on this matter before they were submitted?

Do you believe Judge Smith's continued membership in the Spruce Creek Rod and Gun Club from 1992 to 1999 was consistent with the Code of Conduct for United States Judges?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

5. Also in connection with Judge Smith's nomination, the Committee considered allegations that he violated the judicial disqualification statute, 28 U.S.C. section 455, by not recusing himself earlier in *SEC v. Black*, and by not recusing himself immediately upon being assigned the criminal matter in *United States v. Black*. Prof. Monroe Freedman of the University of Hofstra University Law School called his violations "among the most serious I have seen."

Were you aware of the controversy over Judge Smith's handling of the *SEC v. Black* and *United States v. Black* cases when he was being considered for nomination to the Third Circuit?

Do you believe that Judge Smith's actions in these cases were consistent with his obligations under the judicial disqualification statute and the Code of Conduct?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

6. As you may know, I have questioned a number of judicial nominees about their acceptance of what some have termed "junkets for judges" – free trips to education seminars sponsored by ideological organizations such as Montana-based Foundation for Research on Economics and the Environment ("FREE"). In answer to a written question, Judge Smith stated that under Advisory Committee Opinion No. 67, which sets out the ethical obligations of judges who wish to go on such trips, he did not need to inquire about the sources of funding of seminars put on by the Law and Economics Center at George Mason University.

Do you agree with Judge Smith's interpretation of Advisory Committee Opinion No. 67?

If you are confirmed, will you accept free trips from organizations such as FREE and the Law and Economics Center?

Response: On these kinds of ethics issues, I would faithfully follow all applicable statutes, court decisions, and policies. I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, "right now, I'm running for state representative." Indeed, he admits that he was actively campaigning for office, stating "I go to functions, go block walking, that sort of thing." The Code of Conduct prohibits a candidate for judicial office from engaging in partisan political activity.

Were you involved in discussions about the timing of Judge Clark's commission or whether Judge Clark should continue to campaign for office after he was confirmed by the Senate?

Do you believe that Judge Clark complied with his ethical obligations in campaigning for the Texas legislature while he was awaiting his commission from President Bush? If not, did you ever recommend to the President or your supervisors that Judge Clark's commission not be signed?

Response: It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

Responses of Brett M. Kavanaugh
to the Written Questions of Senator Schumer

1. When the Supreme Court issues non-unanimous opinions, Justice Scalia and Justice Ginsburg frequently find themselves in disagreement with each other. Do you more frequently agree with Justice Scalia's position or Justice Ginsburg's?

Response: As an appeals court judge, I would faithfully apply the Supreme Court's decisions regardless of who authored any particular decision. I have great respect for all of the Justices on the current Court; eight of them were serving on the Court when I was a law clerk for Justice Kennedy. All of the Supreme Court Justices disagree with one another at times, and that is expected and understandable since the Supreme Court decides only the most difficult and complex cases.

A judicial nominee should not comment on his or her agreement or disagreement with the positions of particular Justices. A judicial nominee similarly should not provide his or her personal views on the correctness of Supreme Court decisions. At her hearing, Justice Ginsburg explained these principles, which have been followed by almost every judicial nominee in our history. In response to one question about her views on a particular case, for example, she said: "I sense that I am in the position of a skier at the top of the hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case." Hearing at 494. She made this and related points several times in her hearing. Hearing at 474 ("I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that's about all I can say."); Hearing at 542 ("I have tried religiously to refrain from commenting on a number of Court decisions"). Justice Ginsburg specifically refused to comment on whether a particular decision was an example of judicial activism. Hearing at 558. Justice Ginsburg explained that the principle she was applying in declining to answer these questions was the "best interests of the Supreme Court."

2. At your confirmation hearing, you testified that you "don't know in the vast, vast majority of cases" what nominees' positions are on choice "unless there has been a public record before." As you know, with numerous nominees there has been "a public record before." They have run or been active in anti-choice organizations, have sponsored anti-choice legislation, have worked for anti-choice causes, and in the instance of Justice Priscilla Owen as described by White House Counsel and then-Texas Supreme Court Justice Alberto Gonzales, engaged in "unconscionable judicial activism" on the anti-choice side of a case that came before her as a judge.

The record of Democratic Senators makes it patently clear that none of us has a litmus test when we vote on judges. We have voted for dozens who are

demonstrably anti-choice. Many, however, believe that this Administration has a litmus test when it comes to choosing judicial nominees.

a. **Do you agree that based on the records of numerous judicial nominees, the White House had substantial reason to be confident that they are anti-choice?**

b. **Do you agree that based on Democratic Senators' records of voting for a substantial majority of the nominees whose records show them to be anti-choice, it is clear we do not have a litmus test?**

c. **At your hearing, you testified that you are "sure there are many" of President Bush's judicial nominees who are pro-choice. Please identify those judicial nominees of this Administration whose records provide substantial reason to believe they are pro-choice.**

Response: I do not agree that "numerous nominees" have had a public record on abortion. I am aware of only a handful out of more than 200 judicial nominees who had any kind of record that would indicate what their personal views on abortion are. I cannot identify which of the more than 200 judicial nominees are pro-life or pro-choice (with the few exceptions of nominees who had taken public positions on the issue) because the President does not have a litmus test on this issue and the Administration does not ask judicial candidates their views on this issue.

3. **If you are confirmed and, as a judge, you find yourself in the identical circumstances that Justice Scalia found himself in for <u>Cheney v. U.S. District Court</u>, will you recuse yourself?**

Response: On recusal issues, I would faithfully follow all applicable statutes, court decisions, and policies, including 28 U.S.C. 455.

4. **Over the last few years, progressive groups have been excoriated by the right wing for their role in the confirmation of federal judges. My view is that outside groups on both sides, representing the interests of millions of Americans, have an appropriate place in the nomination and confirmation process. But there seems to be a certain degree of denial on the Right when it comes to recognizing that outside groups on both sides are involved in the process. We all know that organizations such as the Committee for Justice, Coalition for a Fair Judiciary, and individuals such as C. Boyden Gray and Kay Daly have been active in the efforts to confirm President Bush's judicial nominees.**

I want to be clear in asking this question, that I have no objection to the involvement of activist groups on the Right. My objection is to the hypocrisy of the criticism when the Right is engaged in conduct identical to what progressives are doing.

To set the record straight on the extent of their involvement, please describe the interaction, during your time in the White House Counsel's Office, between the

Administration and the below-listed outside groups and non-government employees regarding judicial nominations, including but not limited to their roles in identifying individuals for judicial nominations, advocating for or against their nominations, evaluating and vetting them, and developing strategies around their nominations and confirmations.

- **a. Committee for Justice (and officers and employees thereof)**
- **b. C. Boyden Gray**
- **c. Coalition for a Fair Judiciary (and officers and employees thereof)**
- **d. Kay Daly**
- **e. Sean Rushton**
- **f. The Federalist Society (and officers and employees thereof)**

Response: I agree that outside groups have a perfectly legitimate and appropriate role in expressing their views on the judicial nomination and confirmation process. Members of the Administration met with outside groups that were interested in the judicial nomination and confirmation process. That is traditional and appropriate. Beyond that, it would not be appropriate in this context for me to provide information regarding the Administration's judicial nomination and confirmation strategy and meetings.

5. You took over as White House staff secretary in May of 2003, just weeks before Administration officials leaked the identity of then-covert CIA operative Valerie Plame to retaliate for her husband's authoring an op-ed that criticized the Administration. As staff secretary, you control the flow of most paper to the President. Ms. Plame's name was leaked on or about July 13, 2003.

I want to be absolutely clear that I have no reason to believe you had anything to do with the leaking of Ms. Plame's name or that you know anything about who committed that crime. However, given that you have been nominated for such a high post and given the positions you have held in the White House, both in the counsel's office and as staff secretary, I believe we have a duty to get your responses to the following questions on the record.

a. What, if anything, do you know about the identity of the person or people who made Ms. Plame's name public?

Response: See the response to this series of questions after question g below.

b. Have you spoken with investigators and/or prosecutors working on the Plame case, regarding the Plame case?

c. Have you testified in the Grand Jury in the Plame case?

d. Have you been told that you are either a target or a subject of the investigation into the criminal leaking of Ms. Plame's identity.

e. **Before July 14, 2003, did you see any paper or electronic document submitted to the President (or otherwise) bearing Ms. Plame's name, identity, or otherwise referencing the wife of Ambassador Joe Wilson?**

i. **If so, please describe in detail what you saw.**

ii. **If so, have you informed the federal prosecutors investigating the case of what you saw?**

f. **Were you aware that anyone was discussing or considering making Ms. Plame's name (or the identity of a covert CIA operative) public before such occurred?**

g. **Were you aware of any other discussion or consideration of any other actions directed toward Ambassador Joe Wilson after publication of his op-ed that criticized the Administration?**

Response: I began my service as Staff Secretary in early July 2003. I am not familiar with the facts relating to this matter, and the answer to these questions is no.

Responses of Brett M. Kavanaugh to the Written Questions of Senator Durbin

1. At your nomination hearing, you discussed your involvement in the judicial nomination process when you worked in the White House Counsel's office. You indicated that you were involved in both the selection side and the confirmation side, but you described only the confirmation side. Please provide details about your role in the selection side. What was the nature of your role in selecting judicial nominees for President Bush?

Response: I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. In assisting with Illinois district court nominations, I worked with members of your staff, as well as staff who worked for Senator Fitzgerald. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

2. For the following judicial nominees, please indicate: (A) whether you recommended the nominee for the position to which he or she was nominated, and (B) the nature of your involvement in their selection and confirmation: Miguel Estrada, Charles Pickering, Priscilla Owen, William Pryor, Carolyn Kuhl, Janice Rogers Brown, William Myers III, Claude Allen, Terrence Boyle, D. Brooks Smith, Dennis Shedd, Michael McConnell, Jeffrey Sutton, John Roberts, Jay Bybee, Timothy Tymkovich, William Haynes, J. Leon Holmes, and Paul Cassell.

Response: It would not be appropriate in this context for me to disclose advice and recommendations that were provided to the President or Judge Gonzales. As I noted in response to Question 1, I participated in the meetings of a judicial selection committee that was responsible for making recommendations to the President. During my time, each of the nominees listed in your question was evaluated and discussed. As with prior Administrations, the White House Counsel's Office and Department of Justice attorneys

assist judicial nominees in the confirmation process, which included reviewing nomination paperwork and preparing for hearings. As part of my responsibilities, I assisted several judicial nominees in this manner, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

3. When you were helping select judicial nominees for President Bush, did you give preference to individuals who were members of the Federalist Society? Did you consider membership in the Federalist Society to be a positive factor for a potential nominee? Why?

Response: The President has selected judicial nominees based on their qualifications, including their intellect, integrity, and temperament, and whether they will fairly and strictly interpret the law. As far as I am aware, the majority of President Bush's judicial nominees have not been members of the Federalist Society.

4. In your capacity as Staff Secretary and Assistant to the President, have you worked on judicial nominations issues either formally or informally? If so, were you involved in the decision to give recess appointments to Charles Pickering and William Pryor? If you were, please describe the nature of your involvement and recommendations. If you no longer work on judicial nominations, please indicate the month you stopped working on this issue.

Response: I became Staff Secretary in early July 2003. As Staff Secretary, I perform traditional tasks assigned to that position, such as assisting with the President's signing of commissions, orders, and other documents, reviewing and clearing memoranda for the President, coordinating drafts of Presidential speeches, and helping to prepare the President's briefing books. In that office, I usually do not work on judicial nominations except with respect to coordinating paperwork. If asked by the President, Counsel, or other members of the staff for my opinion or advice, I provide it as appropriate. As I noted in response to Question 2, it would not be appropriate in this context for me to disclose recommendations or advice that were provided to the President or Judge Gonzales.

5. You and Justice Janice Rogers Brown were nominated together to the 11th and 12th seats on the D.C. Circuit. During the Clinton Administration, some Senate Republicans argued that there was no need for these seats to be filled because the workload did not warrant it. President Clinton nominated individuals to the 11th and 12th seats but those nominees were never given a hearing and vote. There is no evidence that the workload of the D.C. Circuit has increased since that time. In fact, since 1997 the number of appeals is down 27%, the number of pending cases is down 28%, and the number of written decisions per judge is down 14%. In this light, do you believe that it is advisable to fill these seats today? Was any consideration given by the Bush White House to not filling these seats? Please explain.

Response: Congress decides the appropriate number of seats on the federal courts of appeals. Congress historically has done this in consultation with the Judicial Conference of the United States. My understanding is that Congress established in the early 1980's that the D.C. Circuit should have 12 seats.

6. What role did you play in helping judicial nominees answer written questions submitted by Senators on the Judiciary Committee? Please provide examples.

Response: On occasion, I would review the drafts of written answers by nominees, although the Department of Justice had the primary role in reviewing nominees' written answers, as has been the case in prior Administrations as well.

7. You served as a law clerk to Supreme Court Justice Anthony Kennedy. In a December 2003 *Vanity Fair* article, a fellow law clerk of yours at the Supreme Court discussed your attitude about death penalty appeals. He said: "You'd kind of know instinctively how he'd come out, no matter what the petition was." What is your response to this statement? Without naming specific cases, were there any capital punishment cases you worked on in which you recommended that the death penalty not be administered?

Response: The statement is unattributed and inaccurate. I cannot respond to the remainder of the question because law clerks maintain the confidentiality of their work as Supreme Court clerks in perpetuity. It therefore would not be appropriate for me to disclose recommendations or advice I provided to Justice Kennedy on particular cases or matters.

8. At your hearing, Senator Kennedy asked whether you agreed with the statement from the Federalist Society's mission statement that "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Please provide a more direct and complete answer to the question than the one you gave Senator Kennedy at your hearing.

Response: I did not find political affiliation or ideology to correlate to whether one was a good law school professor. It is my impression and widely believed that most law school faculties are composed primarily of Democrats; for example, most of my professors at Yale Law School were Democrats, and many likely would describe themselves as liberal. I liked my law school professors and learned a lot from them and consider them mentors and in many cases friends.

9. One of the stated goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Which priorities do you believe need to be reordered within the legal system of America?

Response: At the federal level, Congress and the President determine what laws to pass based on their assessment of priorities and values. The courts must fairly interpret that law and not assume the role of legislators. As an appeals court judge, I would carefully follow the precedents of the Supreme Court and fairly interpret and apply the statutes passed by Congress.

10. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

> **A. As someone who had significant responsibility at the White House for carrying out this mandate, do you believe that President Bush has been successful in fulfilling this pledge?**
>
> **B. How would you describe the judicial philosophy of Justices Scalia and Thomas?**
>
> **C. How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?**
>
> **D. Do you consider yourself to be a strict constructionist? Why or why not?**
>
> ***E.* Do you think that the Supreme Court's landmark decisions in *Brown v. Board of Education, Miranda v. Arizona,* and *Roe v. Wade* are consistent with strict constructionism? Why or why not?**

Response: President Bush has stated that he seeks judicial nominees who will apply the law as written and not legislate from the bench. He seeks nominees who have demonstrated that they know the difference between personal opinion and the strict interpretation of the law. Almost all of President Bush's judicial nominees have been rated "Well Qualified" or "Qualified" by the American Bar Association and have been confirmed by the Senate.

If confirmed, I would fairly interpret and apply the law, carefully and strictly adhere to the text of the Constitution and of the statutes passed by Congress, and faithfully follow the binding precedents of the Supreme Court and D.C. Circuit. Beyond that, I would not attach any particular overarching label to my likely judicial approach.

A judicial nominee should not comment on his or her agreement or disagreement with the positions of particular Justices. A judicial nominee similarly should not provide his or her personal views on the correctness of Supreme Court decisions. At her hearing, Justice Ginsburg explained these principles, which have been followed by almost every judicial nominee in our history. In response to one question about her views on a particular case, for example, she said: "I sense that I am in the position of a skier at the top of [the] hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case." Hearing at 494. She made this and related points several times in her hearing. See Hearing at 474 ("I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about all I can say."); Hearing at 542 ("I have tried religiously to refrain from commenting on a number of Court decisions"). Justice Ginsburg also specifically refused to comment on whether a particular decision was an example of judicial activism. Hearing at 558. Justice Ginsburg explained that the principle she was applying in declining to answer these questions was the "best interests of the Supreme Court."

11. In the case *Rice v. Cayetano*, you were the counsel of record in an amicus brief arguing that the state of Hawaii violated the Constitution by permitting only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs. In a 1999 *Wall Street Journal* op-ed you wrote about *Rice v. Cayetano* entitled "Are Hawaiians Indians? The Justice Department Thinks So," you expressed considerable cynicism about the Clinton Administration's justification for filing a brief on behalf of the state of Hawaii. You wrote: "As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency."

A. Do you stand by your statement that the Clinton Administration filed a brief on behalf of Hawaii because "Hawaii is a strongly Democratic state," and that the Clinton Administration took "the politically correct position" in order to "support the state's system of racial separatism"?

B. Do you believe there are any instances in which the Ashcroft Justice Department has failed – in your words – "to put law and principle above politics and expediency"? If so, please provide specific examples.

Response: I wrote that op-ed in conjunction with my representation of a client and did so to advance the position of my client. As the article states, my client argued that Hawaiians could not be analogized to Native Americans for the purposes of justifying a racial voting qualification. The Department of Justice took the opposite view. The

Supreme Court agreed 7-2 with the position of my client. It would not be appropriate for me to state my agreement or disagreement with what I wrote as a lawyer for a client. That said, I usually do not think it appropriate or necessary to ascribe negative motives to decisions of government officials. The statement in this article could have been phrased differently; had it been phrased differently, it would have more effectively represented my client's interests. With respect to sub-part B of the question, the answer is no.

12. In your *Wall Street Journal* op-ed, you wrote that the position of the Clinton Administration was "to allow political correctness to trump the Constitution." You also wrote: "The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe." Justices Ginsburg and Stevens were apparently "fooled" by the Justice Department because they dissented in this case and largely adopted the Justice Department's position. At your nomination hearing, however, you described Justice Ginsburg as "an excellent Justice." Do you believe that your *Wall Street Journal* op-ed was excessively harsh in its condemnation of the Clinton Administration and Supreme Court Justices who voted for that Administration's position?

Response: As I noted in response to Question 11, I believe the passage you quote would have more effectively supported my client's position had it been phrased differently.

13. One of your clients in the *Rice v. Cayetano* case was the Center for Equal Opportunity, an organization that opposes the use of affirmative action. The organization's mission statement refers to affirmative action as "racial preferences" and states: "CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting."

> **A. Do you believe that affirmative action constitutes a "racial preference"?**
>
> **B. Do you share the desire of your former client to prevent the use of affirmative action in the contexts of employment, education, and voting?**

Response: The Supreme Court has decided many cases on affirmative action programs and, if confirmed, I would faithfully follow those precedents. The Court has established detailed tests to assess whether affirmative action programs are race-based or race-neutral – and also whether they pass constitutional muster. My personal views or the views of my former clients on these or other issues would not affect how I would approach decisions as an appeals court judge. I would carefully and faithfully follow all precedent of the Supreme Court.

14. In the case *Santa Fe Independent School District v. Doe*, you wrote an amicus brief on behalf of Representatives J.C. Watts and Steve Largent in which you argued that the use of loudspeakers for student-led prayers at high school football games did not constitute an Establishment Clause violation of the First Amendment. The Supreme Court rejected your argument by a vote of 6-3, ruling that the prayer involved both perceived and actual endorsement of religion. Do you believe that the Supreme Court was wrong in reaching that decision?

Response: As a judicial nominee, it would not be appropriate for me to comment on whether a particular Supreme Court decision was correct, for the reasons set forth by Justice Ginsburg in her hearing, for example. See also response to question 10 above. As an appeals court judge, I would faithfully apply the Supreme Court's decision in the Santa Fe case, which resolved a question that had previously divided lower courts after the question had been left open in Lee v. Weisman (1992).

15. Other than the work you performed on behalf of J.C. Watts and Steve Largent in *Santa Fe Independent School District v. Doe*; in defense of a local ordinance that granted religious entities an exemption from the county's zoning restrictions; and on behalf of the American relatives of Elian Gonzalez, please describe all other pro bono legal work that you have performed as an attorney.

Response: I have worked in public service as a government lawyer for 11 of the 14 years since I graduated from law school. In private practice, I spent a significant amount of time doing pro bono and reduced-fee work. In addition to the cases you cited, for example, I worked on a religious freedom case in the Supreme Court known as Good News Club v. Milford Central School District. I also worked on school choice litigation in Florida for a reduced fee.

16. You indicate on your Senate questionnaire that you "went to Deland, Florida, in November 2000 to participate in legal activities related to the recount." Please describe these activities in more detail.

Response: Republican and Democratic lawyers observed the recount activities in Florida in 2000. I was part of a group of Republican lawyers that provided observers for the recount in Volusia County. The recount activities in Volusia County were relatively quick and uncontroversial.

17. You indicate on your Senate questionnaire that you were the Regional Coordinator for Pennsylvania, Maryland, Delaware, and the District of Columbia for a group called "Lawyers for Bush Cheney 2000." Please describe your activities

as Regional Coordinator.

Response: Among other activities, I would participate in weekly conference calls, communicate with the state directors for the states I was assigned about their efforts to recruit members for Lawyers for Bush-Cheney, and attend events held for Governor Bush.

18. On your Senate questionnaire, you stated: "In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit." Please provide more information about the meaning of that statement. Why were you not selected for the Fourth Circuit? Was the opposition of the Maryland Senators a factor in your not being selected?

Response: I met at length with Senator Sarbanes, and he indicated that my record made me a better nominee for the D.C. Circuit than for the Fourth Circuit since I had practiced primarily in Washington and as a government lawyer. He made it clear that he would not support a nominee for that seat on the Fourth Circuit unless the nominee was a Maryland lawyer, maintained an office in Maryland, and practiced regularly in the Maryland courts. He said that Senator Mikulski agreed with him about this.

SUBMISSIONS FOR THE RECORD

JOHN CORNYN

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FOR IMMEDIATE RELEASE
April 27, 2004

CORNYN INTRODUCES BRETT KAVANAUGH IN JUDICIARY COMMITTEE HEARING

WASHINGTON—*U.S. Sen. John Cornyn, Chairman of the Judiciary Committee's Constitution subcommittee, introduced Brett K. Kavanaugh, nominee for the U.S. Court of Appeals for the D.C. Circuit, at his nomination hearing in the Judiciary Committee on Tuesday.*

--Below is the text of Sen. Cornyn's introduction of Brett Kavanaugh as prepared--

Mr. Chairman and Ranking Member, I am privileged to introduce to the committee Brett Kavanaugh – a distinguished attorney and devoted public servant. I have known Brett for several years, and I have had the privilege of working with him on a case I argued to the US Supreme Court, so I have been able to observe his legal skills from up close. I have every confidence that Brett would be an exceptional jurist on the U.S. Court of Appeals for the D.C. Circuit. His distinguished academic and professional record confirms beyond all doubt that he possesses the intellectual ability to be a federal judge. His temperament and character demonstrate that he is well suited to the office. Indeed, I can think of no better evidence of his sound judgment than the fact that he has chosen to marry a good woman from the great state of Texas. Brett deserves the support of this committee, and the support of the United States Senate.

As you know, Mr. Chairman, one-fourth of the active D.C. Circuit court is currently vacant. And as you also know, Mr. Chairman, the D.C. Circuit is unique amongst the federal courts of appeals. Of course, the D.C. Circuit is an appellate court, not a trial court. Appellate judges do not try cases or adjudicate factual disputes – instead, they hear arguments on legal issues. But unlike the docket of other courts of appeals, the docket of the D.C. Circuit is uniquely focused on the operations of the federal government. Accordingly, attorneys who have experience working with and within the federal government are uniquely qualified to serve on that distinguished court.

Brett Kavanaugh is an ideal candidate for the D.C. Circuit. He has an extensive record of public service. For over a decade, he has held the most prestigious positions an attorney can hold in our federal government. After graduating from Yale College and Yale Law School, Brett served as a law clerk to three distinguished federal appellate judges, including U.S. Supreme Court Justice Anthony Kennedy. Brett has also served as an attorney in the Office of the Solicitor General, representing the United States government in cases before the U.S. Supreme Court. He has served as a federal prosecutor in the Office of Independent Counsel under the Honorable Kenneth Starr. He has personally argued civil and criminal cases in the U.S. Supreme Court and federal courts of appeals throughout the country. And he has been called upon for his wisdom and counsel by the President of the United States – first through his service as Associate Counsel and Senior Associate Counsel to the President, and now as Staff Secretary, one of the President's most senior trusted advisers.

Mr. Chairman, I can think of few attorneys of any age who can boast this level of experience with the inner workings of the federal government. It is no wonder, then, that the American Bar Association has rated Brett Kavanaugh "well qualified" to serve on the D.C. Circuit – "the gold standard by which judicial candidates are judged," according to leading Senate Democrats on this very committee.

Ordinarily, a nominee possessing such credentials and experiences would have little difficulty receiving swift confirmation by the United States Senate. Unfortunately, as observers of this committee well know, we are not living under ordinary circumstances today. I hope that the distinguished nominee before the committee today will receive fair treatment. His exceptional record of public service in the federal government will serve him well on the D.C. Circuit bench. His wisdom and counsel have been trusted at the highest levels of government. Yet I fear that it is *precisely* Brett's distinguished record of experience that will be used against him. I sincerely hope that that will not happen – after all, it would be truly perverse to use one's record of service against a nominee, especially with respect to a court that is so much in need of jurists who are knowledgeable about the inner workings of the federal government.

Indeed, many successful judicial nominees have brought to the bench extensive records of service in partisan political environments. I have often said that, when you place your hand on the Bible and swear an oath to serve as a judge, you change – you learn that your role is no longer partisan, your duty is no longer to advocate on behalf of a particular party or client, but rather to serve as a neutral arbiter of law. The American people understand that when your job changes, you change – and that people are fully capable of putting aside their personal beliefs in order to fulfill professional duty.

That's why this body has traditionally confirmed nominee after nominee with clear records of service to one particular party or political philosophy. Ruth Bader Ginsburg served as General Counsel of the ACLU. Of course, it's difficult to imagine a more ideological job than General Counsel of the ACLU. Yet she was confirmed by overwhelming margins of the United States Senate – first by unanimous consent to the D.C. Circuit, and then by a vote of 96-3 to the U.S. Supreme Court. Stephen Breyer was the Democrats' Chief Counsel on the Senate Judiciary Committee, before he too was easily confirmed to the 1st Circuit and then to the U.S. Supreme Court. Byron White was the second most powerful political appointee at the Justice Department under President Kennedy, when the Senate confirmed him to the Supreme Court by voice vote. Liberal activist Abner Mikva was a Democrat member of Congress when he was confirmed to the D.C. Circuit by a majority of the Senate. Indeed, as many as 42 of the 54 judges who have served on the D.C. Circuit came to the bench with political backgrounds – including service in appointed or elected political office. All received the respect of an up-or-down vote on the floor of the United States Senate, and all received the support of at least a majority of Senators, as our Constitution demands.

So historically, this body and this committee have exercised the advice and consent function seriously and appropriately, by emphasizing legal excellence and experience – and not by punishing nominees simply for serving their political party. It would be tragic for the federal judiciary, and ultimately harmful to the American people who depend on it, to establish a new standard today, and to declare that any attorney who takes on a political client is somehow disqualified from confirmation – no matter how talented, how devoted, or how fit for the federal bench they may truly be.

Brett Kavanaugh is a skilled attorney who has demonstrated his commitment to public service throughout his life and career. He happens to be a Republican, and he happens to be close to the President. This is a Presidential election year, but the rigorous fight for the White House should not spill over to the judicial confirmation process. Last year, it was wrong for close friends of the President like Texas Supreme Court Justice Priscilla Owen to be denied even the basic courtesy and Senate tradition of an up-or-down vote, simply to score political points against the President. This year, it would be terribly wrong for Brett to be denied confirmation – or at least an up-or-down vote – simply because he has ably and consistently served his President, his party, and his country.

News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

April 27, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the Nomination of

BRETT M. KAVANAUGH
TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

I am pleased to welcome to the Committee today members, guests, and our nominee, Mr. Brett Kavanaugh, who has been nominated by President Bush to be a United States Circuit Judge for the District of Columbia Circuit. We also welcome members of his family. I would note his father, Mr. Ed Kavanaugh, long-time President of the CTFA, is a great individual whom we all respect. Welcome to you all.

Before we turn to the nomination, I want to tell members of the Committee that I remain hopeful that we can continue to complete the work of the Committee on both legislation and nominations. I was disappointed that we were not able to accomplish more at our markup last week. Earlier this month we did report five district judges and two circuit judges. I do appreciate the Committee's efforts in that regard.

I remain concerned about the executive calendar and floor action. I remain hopeful that an accommodation on nominees can be reached and that floor action can be scheduled for those judges. The Senate has confirmed only four judges this year – all District court judges. By comparison, in the last Presidential election year of 2000 – with a Democratic President and a Republican Senate – seven judges had been confirmed by this point in the year, including five Circuit court judges. Furthermore, we are way behind the pace of that election year, which saw a total of 39 judges confirmed. And we remain well behind President Clinton's first term confirmation total of 203.

So while we have made some progress in reporting nominees to the full Senate, the work of confirming judges remains. We presently have twenty-nine judges on the Executive Calendar. Five Circuit nominees remain from last year on the executive calendar in addition to the six reported this year. Eighteen district nominees are available for Senate confirmation, including two holdovers from the last session. But we are making progress, and I thank all members for their support and ask for their continued cooperation.

Today we will consider the nomination of Mr. Brett M. Kavanaugh. He is an outstanding nominee, who has been nominated to the Circuit Court of Appeals for the District of Columbia. He comes to us with a sterling resume and a record of distinguished public service. Mr. Kavanaugh currently serves as Assistant to the President and Staff Secretary, having been

appointed to that position by President George W. Bush in 2003. He previously served in the Office of Counsel to the President, as an Associate Counsel and Senior Associate Counsel.

After graduating from Yale Law School in 1990, Mr. Kavanaugh served as a law clerk for three appellate judges: Justice Anthony M. Kennedy of the Supreme Court, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, and Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit. He served for one year as an attorney in the Office of the Solicitor General, where he prepared briefs and oral arguments.

Mr. Kavanaugh served in the Office of Independent Counsel, under Judge Starr, where he conducted Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. He also was responsible for briefs and arguments regarding privilege and other legal matters that arose during investigations conducted by the Office. Mr. Kavanaugh was part of the team that prepared the 1998 report to Congress regarding possible grounds for impeachment of the President of the United States.

In addition to his extensive public service, Mr. Kavanaugh was also in private practice. As a partner at the distinguished firm of Kirkland & Ellis he worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation.

Mr. Kavanaugh received his law degree from Yale Law School, where he was a Notes Editor for the Yale Law Journal. He is a *cum laude* graduate of Yale College, where he received his B.A. degree.

The American Bar Association has rated Brett Kavanaugh as "Well Qualified." Let me remind everyone what that rating means. According to guidelines published by the American Bar Association Standing Committee on Federal Judiciary, "To merit a rating of 'Well Qualified,' the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

I want to turn now to a few of the arguments which I have heard raised by a number of Mr. Kavanaugh's opponents and address some of the concerns I expect to hear today.

First, is that Mr. Kavanaugh is too young and inexperienced to be given a lifetime appointment to the federal bench, particularly to the important D.C. Circuit Court of Appeals. There are many examples of judges who were appointed to the bench at an age similar to Mr. Kavanaugh, who is 39 years old, and have had illustrious careers. For example, all three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39 and all have been recognized as distinguished jurists. Justice Kennedy was appointed to the 9th Circuit when he was 38 years old; Judge Kozinski was appointed to the 9th Circuit when he was 35 years old; and Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.

I think many of my colleagues would agree that age is not a factor in public service, other than the constitutional requirements. I would note that many in this body began their service in

their 30's if not barely age 30. Through successful re-elections we have been benefited from a life-time of service from such members.

With regard to judicial experience, I would reiterate that Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials with extensive experience in the appellate courts, both as a clerk and as counsel, having argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

As I have pointed out with previous nominees, a number of highly successful judges have come to the federal appellate bench without prior judicial experience. On this particular court, the D.C. Circuit, only three of the nineteen judges confirmed since President Carter's term began in 1977 previously had served as judges. Furthermore, President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.

Opponents will attempt to portray Mr. Kavanaugh as a right-wing ideologue who pursues a partisan agenda. I believe this allegation is without merit and a careful scrutiny of his record will demonstrate otherwise. He is an individual who has devoted the majority of his career to public service, not private ideological causes. Within his public career he has dedicated his work to legal issues, always working carefully and thoroughly in a professional manner.

In short, Mr. Kavanaugh is a person of high integrity, of skilled professional competence, and outstanding character. He will be a great addition to the federal bench and I look forward to hearing his testimony and responses.

# # #

Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

April 27, 2004

Statement of Senator Patrick Leahy
On the Nomination of Brett Kavanaugh
April 27, 2004

Today we are considering the nomination of yet another controversial nomination to a U.S. Court of Appeals, this time to the extremely important D.C. Circuit Court of Appeals. This is arguably the most important court in the nation, with the exception of the Supreme Court, and nominations to it deserve the most careful scrutiny we can give. They also deserve the utmost seriousness of purpose from the President who sends these nominations up to the Senate, as well as rigorous consideration and a respect for the stature of the judges who have served there over the years.

While I see that Mr. Kavanaugh is a well-educated young man who has had a series of prestigious jobs, some legal, some political, with prominent conservatives, I have serious doubts about whether this job is right for him and whether he is right for this job.

This is not his first involvement with judicial selection. During his time in the White House Counsel's Office he served as the President's point man on judicial nominations, bringing us such nominees as Charles Pickering, Priscilla Owen, Miguel Estrada, William Pryor, Carolyn Kuhl and Janice Rogers Brown. Nor is this Mr. Kavanaugh's first involvement with politics. He has built quite a political resume having served four years with the Office of Independent Ken Starr in his pursuit of the Clintons, even helping Mr. Starr write his notorious report to Congress. But whether those experiences add up to the quality and quantity of experience usually associated with the D.C. Circuit remains to be seen.

I look forward to hearing from Mr. Kavanaugh on those and other issues of concern to me about his nomination.

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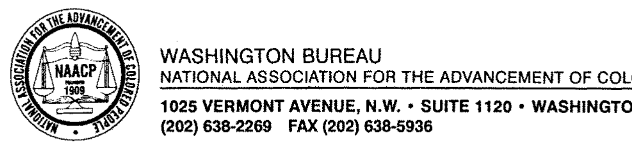
WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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April 26, 2004

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: NAACP OPPOSITION TO THE NOMINATION OF BRETT KAVANAUGH TO THE DC CIRCUIT COURT OF APPEALS

Dear Senators Hatch and Leahy:

On behalf of the National Association for the Advancement of Colored People (NAACP), our nations oldest, largest and most widely recognized grassroots based civil rights organization, I would like to express our opposition to the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia.

Mr. Kavanaugh served on the staff of the White House Judicial Selection Committee as Associate Counsel. As such, Mr. Kavanaugh was responsible for overseeing efforts initiated by President George W. Bush, to pack our nations Courts with extreme right-wing judicial nominees. Clearly inherent to the President's judicial selection process should be the impetus to select nominees that maintain the judicial temperament and integrity necessary to temperate our nations laws as intended by it's crafters, instead of legislating from the Bench. Rather than focusing on nominees that would earn the respect of the American people by maintaining an ideological balance on the U.S. Circuit Court, Brett Kavanaugh focused on right-wing extremist candidates that would seek to employ judicial activist strategies to eviscerate civil rights laws. This disregard for judicial balance and intent of law is clearly

demonstrated in nominees such as Caroline Kuhl, Priscilla Owen, Charles Pickering, William Pryor, Janice Rogers Brown, and Claude Allen. Kavanaugh's actions to fill the U.S. Court system with such extremist Jurist is deeply disturbing to the NAACP, as well as all other Americans that believe our Courts should reflect the sensibilities and values of the American people.

The NAACP is opposed to the nomination of Brett Kavanaugh to the D.C. Circuit Court of Appeals based on the troubling extremist characteristics demonstrated by the nominees he sought to confirm. One nominee, Judge Charles Pickering, demonstrated affection for segregationist policies, his continued insensitivity to racial justice issues, civil rights, voting rights and equal employment protections clearly demonstrates how woefully unqualified he is to serve in this crucial position. As an example, records show Pickering, as a state legislator, supported electoral measures to disenfranchise African Americans by supporting redistricting plans that locked over 40% of the population of Mississippi out of the electoral process. During his confirmation hearing, when asked by members of the Senate why he supported such a racially discriminatory redistricting plan, he simply stated "they" don't vote anyway.

The NAACP opposed Alabama Attorney General William Pryor's nomination to the Eleventh Circuit Court of Appeals because of his opposition to electoral protections under the Voting Rights Act of 1965, and his opposition to equal opportunity programs like affirmative action. William Pryor played a major role in perpetuating the racial segregation of Alabama's three highest State courts, all three courts of which, to this day, have no African American representation whatsoever by convincing a federal court to reject a historic settlement. Finally, William Pryor opposed affirmative action, as he indicated, "I would wholeheartedly support" Alabama's adoption of California's Proposition 209, which banned the use of equal opportunity programs in state hiring, contracting and school admission decisions.

The NAACP opposed Janice Rogers Brown's nomination because her record demonstrated a disdain for affirmative action, a disregard for racial discrimination, and a tremendous lack of experience to serve on the D.C. Circuit Court of Appeals. Brown authored a majority decision that makes it extremely difficult to conduct any sort of meaningful affirmative action program in California. In fact, Brown expanded

Proposition 209, by prohibiting California cities from requiring that their contractors conduct meaningful outreach to minority and women owned subcontractors. The NAACP opposed the nomination of Claude Allen to the United States Court of Appeals for the Fourth Circuit because his views would jeopardize the civil rights and civil liberties protections of African Americans and other racial and ethnic minorities. His stated opposition to the Martin Luther King, Jr. holiday and certain electoral protections under the Voting Rights Act and other social issues during his tenure with former North Carolina Senator, Jesse Helms are adverse to civil rights for African Americans and other racial and ethnic minorities.

The United States Court of Appeals for the District of Columbia is considered the second most powerful court in our country. The Supreme Court's limited caseload means that the D.C. Circuit often provides the determinative legal review of federal agency action involving labor relations, voting rights, affirmative action, clean air standards, health and safety regulations, consumer privacy and campaign finance. Nominees to all courts, including the D.C. Circuit Court, should have superior qualifications.

As such, we urge you in the strongest possible terms to oppose the confirmation of Brett Kavanaugh to the U.S. Court of Appeals for the District of Columbia and urge the Bush Administration to nominate men and women that represent the values, diversity and judicial temperament that will be respected by the American people, as we experienced with President Bush's nomination, and the U.S. Senate's confirmation of Judge Roger Gregory to the U.S. Court of Appeals to the Fourth Circuit.

Thank you for your careful consideration of this crucial matter. Should you have any questions or concerns, please contact me, or my Bureau Counsel, Crispian Kirk, at (202) 638-2269.

Sincerely,

Hilary O. Shelton
Director

New York's Senator

CHARLES E. SCHUMER

313 Hart Senate Office Building • Washington, DC 20510
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FOR IMMEDIATE RELEASE
April 27, 2004

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REMARKS ON THE NOMINATION OF BRETT KAVANAUGH TO DC CIRCUIT COURT OF APPEALS

US Senator Charles Schumer issued the following statement at the Judiciary Committee's markup of the nomination of Brett Kavanaugh to the DC Circuit Court of Appeals:

Mr. Chairman, I want to welcome Brett Kavanaugh, his parents, and his fiancee, to today's hearing. Something tells me this won't be the easiest or most enjoyable hearing for them or for us, but I know that he appreciates what an important position he has been nominated to and how important this process is and I know how proud his family is of him.

Mr. Chairman, it's really unfortunate that we have to be here yet again on a controversial nomination. It's unfortunate because it's so unnecessary. We have offered time and time and time again to work with the Administration to identify well-qualified mainstream conservatives for these judgeships, especially on the DC Circuit. Instead, the White House insists on giving us extreme ideological picks. In this instance, the nomination seems to be as much about politics as it is about ideology.

While the nominations of William Pryor, Janice Rogers Brown, and Priscilla Owen may be among the most ideological we've ever seen, the nomination of Brett Kavanaugh is among the most political in history. In short, this nomination appears to be judicial payment for political services rendered.

Mr. Kavanaugh is a tremendously successful young lawyer. His academic credentials are first rate. He clerked for two prestigious circuit court judges and a Supreme Court justice. And he has been quickly promoted through the ranks of Republican lawyers. Some might call Mr. Kavanaugh the Zelig of young Republican lawyers, as he has managed to find himself at the center of so many high-profile controversial issues in his short career.

From the notorious Starr report, to the Florida recount, to this President's secrecy and privilege claims, to post-9/11 legislative battles including the Victims' Compensation Fund, to controversial judicial nominations, if there's been a partisan political fight that needed a good lawyer in the last decade, Brett Kavanaugh was probably there. And if he was there, there's no question what side he was on.

In fact, Mr. Kavanaugh would probably win first prize as the hard-Right's political lawyer. Where there's a tough job that needs a bright, hard-nosed political lawyer, Brett Kavanaugh has been there.

Judgeships should be above politics. Brett Kavanaugh's nomination seems to be all about politics.

If President Bush truly wanted to unite us, not divide us, this would be the last nomination he would send to the Senate. Anyone who has any illusion that President Bush really wants to change the tone in Washington ought to take a look at this nomination. You could not think of another nomination, given Mr. Kavanaugh's record, more designed to divide us.

Brett Kavanaugh's nomination to the DC Circuit is not just a drop of salt in the partisan wounds, it's the whole shaker.

There is much that many of us find troubling about this nomination and I look forward to hearing the nominee address our myriad concerns. I'd like to take just a moment to lay out two areas that will be central to this discussion.

First, for the first two years of the Administration, when the Administration was developing and implementing its strategy to put ideologues on the bench, Mr. Kavanaugh quarterbacked President Bush's judicial nominations battles. He spoke frequently at public events defending the President's decisions to nominate such controversial jurists as Charles Pickering, Carolyn Kuhl, Priscilla Owen, and William Pryor.

As you all know, many of us have been shocked and appalled by the extreme and out-of-the-mainstream ideologies adhered to by these and other nominees. I speak for myself, many of my colleagues, and a sizeable majority of the American people when I say that we do not want ideologues on the federal bench - whether too far Left or too far Right.

Judges who bring their own agendas to the Judiciary are inclined to make law, not interpret law as the Founding Fathers intended. We want fair and balanced judges, in the real sense of those words.

Nonetheless, this Administration has repeatedly bent over backwards to choose nominees who defend indefensible ideas and whose records are rife and replete with extreme activism.

During his time in the White House Counsel's office, Brett Kavanaugh played a major role in selecting these judges, prepping them for hearings, and defending their nominations at public events. In the course of defending the Administration's record on judicial nominations, Mr. Kavanaugh routinely cited the five criteria used by President Bush in selecting judges.

The five criteria he cites are:

1. Extraordinary intellect;
2. Experience;
3. Integrity;
4. Respect in the legal community and the nominee's home state community; and,
5. Commitment to interpreting law, not making law.

I don't think I'm stepping out on a limb when I say that every one of us up here sees those five criteria as outstanding factors to consider when choosing judges.

But in the same public discussions of the President's judicial nominations where he has cited these five criteria, Mr. Kavanaugh has routinely denied that the President considers a nominee's ideology. The record before us starkly belies that claim -- it just doesn't hold water.

If ideology did not matter, we would see nominations scattered across the ideological spectrum. There would be roughly equal numbers of Democrats and Republicans with a healthy dose of independents thrown in. We would see some nominees edge left of center while others tip right, with a few outliers at each extreme.

Even a President who wanted to have only some ideological impact on the bench would have some balance. That's not the case with the nomination's Brett Kavanaugh has shepherded.

If you were to map the circuit court nominees on an ideological scale of 1-10, with 10 being very liberal and 1 being very conservative, there's a huge number of 1's with some 2's and 3's thrown in and only a smattering of 4's and 5's.

Of course ideology has played a role in this process. Suggesting otherwise insults our intelligence and the intelligence of the American people.

For the last three years, I have been trying to get us to talk honestly about our differences over these judicial nominees. We have pretty much stopped citing minor personal pecadillos in nominees' histories as pretexts for stopping nominations that we really oppose on ideoligical grounds. The process is better for the honesty we have brought to it.

I hope we can continue having an honest dialogue today. Toward that end, I look forward to hearing Mr. Kavanaugh explain how it's possible that the President who has made the most extreme ideological nominations in history does not consider ideology when he makes those picks.

A second area I expect we will get into is closely related to the first. As I noted at the outset, there is no question that Brett Kavanaugh is a bright and talented young lawyer. There is no question that for someone of his age, he has an extraordinary resume and that he has achieved in every job he has held.

But there are serious questions as to why, at 39, having never tried a case, and with a record of service almost exclusively to highly partisan political matters, he is being nominated to a seat on the second most important court in America.

Why is the DC Circuit so important?

The Supreme Court currently takes fewer than 100 cases a year. That means that the lower courts resolve the tens of thousands a cases a year brought by Americans seeking to vindicate their rightsAll the other federal appellate courts handle just those cases arising from within its boundaries. So, for example, the Second Circuit, where I'm from, takes cases coming out of New York, Connecticut, and Vermont.

But the DC Circuit doesn't just take cases brought by residents of Washington, DC. Congress has decided there's value in vesting one court with the power to review certain decisions of administrative agencies.

We've given plaintiffs the power to choose the DC Circuit – and in some cases we've forced them to go to the DC Circuit – because we've decided, for better or worse, that when it comes to these administrative decisions one court should decide what the law is for the whole nation.

When it comes to regulations adopted under the Clear Air Act by the EPA, labor decisions made by the NLRB and rules propounded by OSHA, gas prices regulated by the Federal Energy Regulatory Commission, and many other administrative matters, the decisions are usually made by the judges on the DC Circuit.

To most, it seems like this is the Alphabet Soup Court, since virtually every case involves an agency with an unintelligible acronym. EPA, NLRA, FCC, SEC, FTC, FERC, and so on and so on.

The letters that comprise this Alphabet Soup are what make our government tick.

They are the agencies that write and enforce the rules that determine how much "reform" there will be in campaign finance reform.

They determine how clean water has to be for it to be safe for our families to drink.

They establish the rights workers have when negotiating with corporate powers.

The DC Circuit is important because its decisions determine how these federal agencies go about doing their jobs. And, in so doing, it directly impacts the daily lives of *all* Americans more than any other court in the country, with the exception of the Supreme Court.

There's a lot at stake when considering nominees to the DC Circuit, how their ideological predilections will impact the decisions coming out of the court, and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

Perhaps more than any other court aside from the Supreme Court, the DC Circuit votes break down on ideological lines with amazing frequency. The divide happens in cases with massive national impact.

So we have a real duty to closely scrutinize the nominees who come before us seeking lifetime appointment to this court. And it is no insult to Mr. Kavanaugh to say that there is probably not a single person in this room, except perhaps Mr. Kavanaugh and his family, who doesn't recognize that there are scores of lawyers in Washington and around the country who are of equally high intellectual ability, but who have much more signficant judicial, legal, and academic experience to recommend them for this post.

It's clearly an honor and a compliment that despite his relative lack of experience, this Administration wants Brett Kavanaugh to have this job. But when a lifetime appointment to the second-highest court in the land is at stake, the Administration's desire to honor Mr. Kavanaugh must come into question.

When the President picked Brett Kavanaugh, he was not answering the question, "Who has the broadest and widest experience for the job?" He was rewarding a committed aide who has proven himself in some tough political fights.

Would we have welcomed the renomination of Allen Snyder or Elena Kagan (now the dean of Harvard Law School), two moderate and extremely well-qualified Clinton nominees who never received consideration from this Committee? Of course, we would have.

But we also would have welcomed the nomination of a mainstream conservative who has a record of independence from partisan politics, who has a demonstrated history of non-partisan service, who has a proven record of commitment to the rule of law, and who we can reasonably trust will serve justice, not his political patrons, if confirmed to this powerful lifetime post.

Brett Kavanaugh is the youngest person nominated to the DC Circuit since his mentor, Ken Starr. If you go through the pre-judicial appointment accomplishments of the 9 judges who currently sit on the DC Circuit, you will see that Mr. Kavanaugh's accomplishments pale by comparison.

Chief Judge Ginsburg held several high level Executive Branch posts including heading the antitrust division at DOJ and was a professor at Harvard Law School.

Judge Edwards taught at Michigan and Harvard Law Schools, was the Chairman of Amtrak's board of directors, and published numerous books and articles.

Judge Sentelle had extensive practice as a prosecutor and trial lawyer, and experience as a state judge and as a federal district court judge.

Judge Henderson had a decade in private practice, a decade of public service, and five years as a federal district court judge.

Judge Randolph spent 22 years with federal and state attorneys general offices, including service as Deputy Solicitor General of the United States, and a law firm partnership.

Judge Rogers had roughly 30 years of service in both federal and state governments, including a stint as the Corporation Counsel for DC, and several years on DC's equivalent of a state supreme court.

Judge Tatel divided his nearly 30 years of experience between the public and private sectors, including a partnership at a prestigious law firm and service as general counsel of the Legal Services Corporation.

Judge Garland practiced for 20 years, held a law firm partnership, and supervised both the Oklahoma City bombing trial and Unabomber trial while in a senior position at the Department of Justice.

And Judge Roberts spent nearly 25 years going back and forth between his law firm partnership where he ran his law firm's appellate practice and significant service in the Department of Justice.

Like Mr. Kavanaugh, many of the 9 current judges on this court held prestigious clerkships, including clerkships on the Supreme Court. But they all had signficiant additional experience, non-partisan experience, to help persuade us that they merited confirmation.

If Mr. Kavanaugh had spent the last several years on a lower court or in a non-political position proving his independence from politics, we might be approaching this nomination from a different posture. But he has not. Instead, his resume is almost unambiguously political. Perhaps with more time, and different experience, we would have greater comfort imagining Mr. Kavanaugh on this court.
Suffice to say, on the record before us, Mr. Kavanaugh faces a serious uphill battle. I look forward to hearing his answers to the difficult questions he will face.

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****FINAL CORRECTED VERSION****

STATEMENT

OF

INDEPENDENT COUNSEL KENNETH W. STARR

BEFORE

THE COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

10:00 A.M.

THURSDAY, NOVEMBER 19, 1998

2141 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, D.C.

Thank you, Mr. Chairman. I welcome this opportunity to appear before the Committee and to provide information relating to the Committee's inquiry into possible impeachable offenses by the President of the United States. This is my first opportunity to publicly report on certain issues related to our investigation. I look forward to doing so and assisting the Committee.

I. Introduction

I appreciate both the seriousness of the Committee's work and the gravity of its assignment. I have reviewed the statements made by the 37 Committee Members in the October 5 hearing. Any citizen who watched that hearing would have been impressed by the depth and breadth of the discussion that day, and proud of the diligence with which Members of this Committee are approaching this extraordinarily difficult and unwelcome task. I appear before you today, therefore, fully recognizing the solemnity and importance of this process.

As you know, in January of this year, Attorney General Reno petitioned the three-Judge panel that oversees independent counsels to authorize our Office to investigate whether Monica Lewinsky or others committed federal crimes relating to the sexual harassment lawsuit brought by Paula Jones against President Clinton. Our Office conducted a swift yet thorough investigation. We completed the primary factual investigation in under eight months, notwithstanding a number of obstacles in our path.

The law requires an independent counsel to report to the House of Representatives substantial and credible information that may constitute grounds for an impeachment. On September 9, pursuant to our statutory duty, we submitted a referral and backup documentation to the House. I am here today at your invitation in furtherance of our statutory obligation.

I recognize that the House of Representatives -- not an independent counsel -- has the sole power to impeach. My role here today is to discuss our referral and our investigation.

II. Lewinsky Investigation

A. Overview

Let me begin with an overview. As our referral explains, the evidence suggests that the President made false statements under oath and otherwise thwarted the search for truth in the Jones v. Clinton case. The evidence further suggests that the President made false statements under oath to the grand jury on August 17.

That same night, the President publicly acknowledged an inappropriate relationship, but maintained that his testimony had been legally accurate. The President also declared that all inquiries into the matter should end because, he said, it was private.

Shortly after the President's August 17 speech, Senators Lieberman, Kerrey, and Moynihan stated that the President's actions were not a private matter. In our view, they were correct. Indeed, the evidence suggests that the President

repeatedly tried to thwart the legal process in the Jones case and the grand jury investigation. That is not a private matter. The evidence further suggests that the President, in the course of these efforts, misused his authority and power as President and contravened his duty to faithfully execute the laws. That, too, is not a private matter.

The evidence suggests that the misuse of Presidential authority occurred in the following ten ways:

First. The evidence suggests that the President made a series of premeditated false statements under oath in his civil deposition on January 17, 1998. The President had taken an oath to tell the truth, the whole truth, and nothing but the truth. By making false statements under oath, the President, the Chief Executive of our Nation, failed to adhere to that oath and to his Presidential oath to faithfully execute the laws.

Second. The evidence suggests that, apart from making false statements under oath, the President engaged in a pattern of behavior during the Jones litigation to thwart the judicial process. The President reached an agreement with Ms. Lewinsky that each would make false statements under oath. He provided job assistance to Ms. Lewinsky at a time when the Jones case was proceeding and Ms. Lewinsky's truthful testimony would have been harmful. He engaged in an apparent scheme to conceal gifts that had been subpoenaed from Ms. Lewinsky. He coached a potential witness, his own secretary Betty Currie, with a false account of relevant events.

Those acts constitute a pattern of obstruction that is fundamentally inconsistent with the President's duty to faithfully execute the laws.

Third. The evidence suggests that the President participated in a scheme at his deposition in which his attorney, in his presence, deceived a United States District Judge in an effort to cut off questioning about Ms. Lewinsky. The President did not correct his attorney's false statement. A false statement to a federal judge in order to prevent relevant questioning is an obstruction of the judicial process.

Fourth. The evidence suggests that on January 23, 1998, after the criminal investigation had become public, the President made false statements to his Cabinet and used his Cabinet as unwitting surrogates to publicly support the President's false story.

Fifth. The evidence suggests that the President, acting in a premeditated and calculated fashion, deceived the American people on January 26 and on other occasions when he denied a relationship with Ms. Lewinsky.

Sixth. The evidence suggests that the President, after the criminal investigation became public, made false statements to his aides and concocted false alibis that these government employees repeated to the grand jury. As a result, the grand jury received inaccurate information.

Seventh. Having promised the American people to cooperate with the investigation, the President refused six invitations to

testify to the grand jury. Refusing to cooperate with a duly authorized federal criminal investigation is inconsistent with the general statutory duty imposed on all Executive Branch employees to cooperate with criminal investigations. It also is inconsistent with the President's duty to faithfully execute the laws.

Eighth. The President and his Administration asserted three different governmental privileges to conceal relevant information from the federal grand jury. The privilege assertions were legally baseless in these circumstances. They were inconsistent with the actions of Presidents Carter and Reagan in similar circumstances. And they delayed and impeded the investigation.

Ninth. The President made false statements under oath to the grand jury on August 17, 1998. The President again took an oath to tell the truth, the whole truth, and nothing but the truth. The evidence demonstrates that the President failed to adhere to that oath and thus to his Presidential oath to faithfully execute the laws.

Tenth. The evidence suggests that the President deceived the American people in his speech on August 17 by stating that his testimony had been legally accurate.

In addition to those ten points, it bears mention that well before January 1998, the President used government resources and prerogatives to pursue his relationship with Monica Lewinsky. The evidence suggests that the President used his secretary Betty Currie, a government employee, to facilitate and conceal the

relationship with Monica Lewinsky. The President used White House aides and the United States Ambassador to the United Nations in his effort to find Ms. Lewinsky a job at a time when it was foreseeable -- even likely -- that she would be a witness in the _Jones_ case. And the President used a government attorney -- Bruce Lindsey -- to assist his personal legal defense during the _Jones_ case.

In short, the evidence suggests that the President repeatedly used the machinery of government and the powers of his Office to conceal his relationship with Monica Lewinsky from the American people, from the judicial process in the _Jones_ case, and from the grand jury.

B. _Sexual Harassment Law_

Let me turn, then, to the legal context in which the Lewinsky issues first arose. At the outset, I want to emphasize that our referral never suggests that the relationship between the President and Ms. Lewinsky in and of itself could be a high crime or misdemeanor. Indeed, the referral never passes judgment on the President's relationship with Ms. Lewinsky. The propriety of a relationship is _not_ the concern of our Office.

The referral is instead about obstruction of justice, lying under oath, tampering with witnesses, and misuse of power. The referral cannot be understood without appreciating this vital distinction.

This case raises the following initial question: Is a plaintiff in a sexual harassment lawsuit entitled to obtain

truthful evidence from the defendant, and from associates of the defendant, in order to support her claim? That should be easy to answer. No citizen who finds himself accused in a sexual harassment case, or in any other kind of case, can lie under oath or otherwise obstruct justice and thereby prevent the plaintiff from discovering evidence and proving her case.

Paula Jones, a former Arkansas state employee, filed a federal sexual harassment suit against President Clinton in 1994. The President denied those allegations. We will never know whether a jury would have credited Ms. Jones's allegations. We also will never know whether the ultimate decisionmaker would have found that the alleged facts, if true, constitute sexual harassment. When the President and Ms. Jones settled the case last week, the Eighth Circuit Court of Appeals was still considering the preliminary legal question whether the facts as alleged could constitute sexual harassment.

After the suit was first filed in 1994, the President attempted to delay the trial until his Presidency was over. The President claimed a temporary Presidential immunity from civil suit. The case proceeded to the Supreme Court. At oral argument, the President's attorney specifically warned our Nation's highest Court that if Ms. Jones won, her lawyers would be able to investigate the President's relationships with other women, as is common in sexual harassment cases. The Supreme Court rejected the President's constitutional claim -- and did so by a nine to zero vote. The Court concluded that the

Constitution did not provide such a temporary immunity from suit.

The idea was simple and powerful: No one is above the law. The Supreme Court sent the case back for trial with words that warrant emphasis: "Like every other citizen who invokes" the District Court's jurisdiction, Ms. Jones "has a right to an orderly disposition of her claims."

After the Supreme Court's decision, the parties started to gather the facts. The parties questioned relevant witnesses in depositions. They submitted written questions. They made requests for documents.

Sexual harassment cases are often "he said-she said" disputes. Evidence reflecting the behavior of both parties can be critical -- including the defendant's relationships with other employees in the workplace.

Such questions can be uncomfortable, but they occur every day in courts and law offices around the country. Individuals take an oath to tell the truth, the whole truth, and nothing but the truth. And no one is entitled to lie under oath simply because he or she does not like the questions or because he believes the case is frivolous or financially motivated or politically motivated. The Supreme Court has emphatically and repeatedly rejected the notion that there is ever a privilege to lie. The Court has stated that there are ways to object to questions; lying under oath is not one of them.

During the fact-gathering process, Judge Susan Webber Wright followed the standard principles of sexual harassment cases.

Over repeated objection from the President's attorneys, the Judge permitted inquiries into the President's relationships with government employees. On January 8, 1998, for example, Judge Wright stated that questions as to the President's relationships with other employees "are within the scope of the issues in this case."

In making these rulings, Judge Wright recognized that the questions might prove embarrassing. She stated that "I have never had a sexual harassment case where there was not some embarrassment." She also stated that she could not protect the parties from embarrassment.

Let me summarize the five points that explain how the President's relationship with Ms. Lewinsky -- what was otherwise private conduct -- became a matter of concern to the courts. This is critical to fully understand the nature of the Committee's inquiry.

One. The President was sued for sexual harassment, and the Supreme Court ruled that the case should go forward.

Two. The law of sexual harassment and the law of evidence allow the plaintiff to inquire into the defendant's relationships with other women in the workplace, which in this case included President Clinton's relationship with Ms. Lewinsky.

Three. Applying those settled legal principles, Judge Susan Webber Wright repeatedly rejected the President's objections to such inquiries. The Judge, instead, ordered the President to answer the questions.

Four. It is a federal crime to commit perjury and obstruct justice in civil cases, including sexual harassment cases. Violators are subject to a sentence of up to ten years imprisonment for obstruction and up to five years for perjury.

Five. The evidence suggests that the President and Ms. Lewinsky made false statements under oath and obstructed the judicial process in the Jones case by preventing the court from obtaining the truth about their relationship.

At his grand jury appearance, the President invoked a Supreme Court Justice's confirmation hearings as a comparison to his current situation. The President's use of the analogy did not fit the facts in the Monica Lewinsky matter, however. The President's having raised the analogy, let me make it more fitting to the case here.

Suppose that there is a nominee for a high government position. Assume that there is an allegation of sexual harassment. Suppose that several women other than the accuser who have worked with the nominee testify before the Senate Judiciary Committee. Suppose that the nominee confers with one of those women ahead of time, and that they agree that they will both lie to the Judiciary Committee about their relationship. Assume further that they both do lie under oath about their relationship. And suppose further that a criminal investigation develops and the nominee again lies under oath to the grand jury. If that were proved to have happened, what would the Senate Judiciary Committee do?

Suppose that the lying under oath and obstruction of justice occurs in a sexual harassment suit brought against the nominee. Suppose further that the false statements and obstruction continue into a subsequent criminal investigation. What would this Committee do with compelling evidence of perjury and obstruction of justice committed by, for example, a Justice of the Supreme Court in a sexual harassment suit in which he was the defendant?

Those hypotheticals -- which track the facts of this case -- put in relief the issue before the Committee. Let me again stress that the House, not an independent counsel, has the sole power to impeach. I am suggesting that consideration of our referral be focused on the issues actually presented by the referral.

C. The President's Actions: December 5 -- January 17

I will next turn to some of the essentials of the referral. That will include the specifics of Ms. Lewinsky's involvement in the Jones case and the President's actions in response to that involvement.

The key point about the President's conduct is this. On at least six different occasions -- from December 17, 1997, through August 17, 1998 -- the President had to make a decision. He could choose truth, or he could choose deception. On all six occasions, the President chose deception -- a pattern of calculated behavior over a span of months.

On December 5, 1997, Ms. Jones's attorneys identified Ms.

Lewinsky as a potential witness. Within a day, the President learned that Ms. Lewinsky's name was on the witness list.

After learning this, the President faced his first critical decision. Would he and Monica Lewinsky tell the truth about their relationship? Or would they provide false information -- not just to a spouse or to loved ones -- but under oath in a court of law?

Eleven months ago, the President made his decision. At approximately 2:00 a.m. on December 17, 1997, he called Ms. Lewinsky at her Watergate apartment and told her that she was on the witness list. This was news to Ms. Lewinsky. And it bears noting that the President -- not his lawyer -- made this call to the witness.

During this 2:00 a.m. conversation, which lasted approximately half an hour, the President could have told Ms. Lewinsky that they must tell the truth under oath. The President could have explained that they might face embarrassment but that, as a citizen and as President, he could not lie under oath and he could not sit by while Monica did so. The President did not say anything like that.

On the contrary, according to Ms. Lewinsky, the President suggested that she could sign an affidavit and use -- under oath -- deceptive cover stories that they had devised long ago to explain why Ms. Lewinsky had visited the Oval Office area. The President did not explicitly instruct Ms. Lewinsky to lie. He did not have to. Ms. Lewinsky testified that the President's

suggestion that they use the pre-existing cover stories amounted to a continuation of their pattern of concealing their intimate relationship. Starting with this conversation, the President and Ms. Lewinsky understood, according to Ms. Lewinsky, that they were both going to make false statements under oath.

The conversation between the President and Ms. Lewinsky on December 17 was a critical turning point. The evidence suggests that the President chose to engage in a criminal act -- to reach an understanding with Ms. Lewinsky that they would both make false statements under oath. At that moment, the President's intimate relationship with a subordinate employee was transformed into an unlawful effort to thwart the judicial process. This was no longer an issue of private conduct.

Recall that the Supreme Court had concluded that Paula Jones was entitled to an "orderly disposition" of her claims. The President's action on December 17 was his first direct effort to thwart the Supreme Court's mandate.

The story continued: The President faced a second choice. On December 23, 1997, the President submitted under oath a written answer to an interrogatory. The request stated in relevant part: "Please state the name . . . of [federal employees] with whom you had sexual relations when you [were] . . . President of the United States." In his sworn answer, the President stated "None."

On December 28, the President faced a third critical choice. On that day, the President met with Ms. Lewinsky at the White

House. They discussed the fact that Ms. Lewinsky had been subpoenaed for gifts she had received from the President. According to Ms. Lewinsky, she raised the question of what she should do with the gifts. Later that day, the President's personal secretary, Betty Currie, drove to Ms. Lewinsky's Watergate home. Ms. Lewinsky gave Ms. Currie a sealed box that contained some of the subpoenaed gifts. Ms. Currie then stored the box under her bed at home.

In her written proffer on February 1, four weeks after the fact, Ms. Lewinsky stated that Ms. Currie had called her to retrieve the gifts. If so, that necessarily meant that the President had asked Ms. Currie to call. It would directly and undeniably implicate him in an obstruction of justice. Ms. Lewinsky later repeated that statement in testimony under oath. Ms. Currie, for her part, recalls Ms. Lewinsky calling her. But even if Ms. Lewinsky called Ms. Currie, common sense and the evidence suggest some Presidential knowledge or involvement, as the referral explains.

Let me add another point about the gifts. In his grand jury appearance in August, the President testified that he had no particular concern about the gifts in December 1997 when he had talked to Ms. Lewinsky about them. And he thus suggested that he would have had no reason to take part in December in a plan to conceal the gifts. But there is a serious problem with the President's explanation. If it were true that the President in December was unconcerned about the gifts, he presumably would

have told the truth under oath in his January deposition about the large number of gifts that he and Ms. Lewinsky had exchanged. But he did not tell the truth. At that deposition, when asked whether he had ever given gifts to Monica Lewinsky, and he had given her several on December 28, the President stated "I don't recall. Do you know what they were?"

In short, the critical facts to emphasize about the transfer of gifts are these: First, the President and Ms. Lewinsky met and discussed what should be done with the gifts subpoenaed from Ms. Lewinsky. Second, the President's personal secretary Ms. Currie drove later that day to Ms. Lewinsky's home to pick up the gifts. Third, Ms. Currie stored the box under her bed.

Meanwhile, the legal process continued to unfold, and the President took other actions that had the foreseeable effect of keeping Ms. Lewinsky "on the team." The President helped Ms. Lewinsky obtain a job in New York. His efforts began after the Supreme Court's decision in May 1997 -- at a time when it had become foreseeable that she could be an adverse witness against the President. These job-related efforts intensified in December 1997 after Ms. Lewinsky's name appeared on the witness list.

Vernon Jordan, who had been enlisted in the job search for Ms. Lewinsky, testified that he kept the President informed of the status of Ms. Lewinsky's job search and her affidavit. On January 7, 1998, Mr. Jordan told the President that Ms. Lewinsky had signed the affidavit. Mr. Jordan stated to the President that he was still working on getting her a job. The President

replied, "Good." In other words, the President, knowing that a witness had just signed a false affidavit, encouraged his friend to continue trying to find her a job. After Ms. Lewinsky received a job offer from Revlon on January 12, Vernon Jordan called the President and said: "Mission accomplished."

As is often the situation in cases involving this kind of financial assistance, no direct evidence reveals the President's intent in assisting Ms. Lewinsky. Ms. Lewinsky testified that no one promised her a job for silence; of course, crimes ordinarily do not take place with such explicit discussion. But federal courts instruct juries that circumstantial evidence is just as probative as direct evidence. And the circumstantial evidence here is strong. At a bare minimum, the evidence suggests that the President's job assistance efforts stemmed from his desire to placate Ms. Lewinsky so that she would not be tempted -- under the burden of an oath -- to tell the truth about the relationship. Monica Lewinsky herself recognized that at the time, saying to a friend, "Somebody could construe or say, 'Well, they gave her a job to shut her up. They made her happy.'"

And given that the President's plan to testify falsely could succeed only if Ms. Lewinsky went along, the President naturally had to be concerned that Ms. Lewinsky at any time might turn around and decide to tell the truth. Indeed, some wanted her to tell the truth. For example, one friend talked to Ms. Lewinsky about the December 28 meeting with the President. The friend stated that she was concerned because she "didn't want to see

[Monica] being like Susan McDougal" and did not want Monica "to lie to protect the President." Needless to say, any sudden decision by Ms. Lewinsky to tell the truth, whether out of anger at the President or simple desire to be law-abiding, would have been very harmful to the President. That helps to explain his motive in providing job assistance.

In mid-January, Ms. Lewinsky finalized her false affidavit with her attorney, who sent it to Judge Wright's Court. The affidavit falsely denied a sexual relationship with the President and essentially recounted the cover stories they had discussed in their middle-of-the-night conversation on December 17.

Let me turn to the President's January 17 deposition. Some have suggested that the President might have been surprised or ambushed at his deposition. Those suggestions are wrong. The President had clear warning that there would be questions about Monica Lewinsky. She had been named on the December 5 witness list. On January 12, only five days before the deposition, Ms. Jones's attorneys identified Ms. Lewinsky as a trial witness. In response, Judge Wright approved her as a witness. Two days later, on January 14, the President's private attorney asked Ms. Lewinsky's attorney to fax Ms. Lewinsky's affidavit. During the deposition itself, the President's attorney stated that the President was "fully familiar" with Ms. Lewinsky's affidavit.

At the outset of his January 17 deposition, therefore, the President faced a fourth critical decision. Fully aware that he would likely receive questions about Ms. Lewinsky, would the

President continue to make false statements under oath -- this time in the presence of a United States District Judge?

At the start of the deposition, Judge Susan Webber Wright administered the oath. The President swore to tell the truth, the whole truth, and nothing but the truth. As his testimony began, the President, in response to a question from Ms. Jones's attorneys, stated that he understood he was providing his testimony under the penalty of perjury.

The President was asked a series of questions about Ms. Lewinsky. After a few questions, the President's attorney -- Mr. Bennett -- objected to the questioning about Ms. Lewinsky, referring to it as "innuendo." Mr. Bennett produced Ms. Lewinsky's false affidavit. Mr. Bennett stated to Judge Wright that Ms. Lewinsky's affidavit indicated that "there is absolutely no sex of any kind in any manner, shape, or form." Mr. Bennett stated that the President was "fully aware of Ms. Lewinsky's affidavit." During Mr. Bennett's statements, the President sat back and let his attorney mislead Judge Wright. The President said not a word -- to the Judge or, so far as we are aware, to his attorney.

Judge Wright overruled Mr. Bennett's objection. The questioning continued. In response, the President made false statements not only about his intimate relationship with Ms. Lewinsky, but about a whole host of matters. The President testified that he did not know that Vernon Jordan had met with Ms. Lewinsky and talked about the Jones case. That was untrue.

He testified that he could not recall being alone with Ms. Lewinsky. That was untrue. He testified that he could not recall ever being in the Oval Office hallway with Ms. Lewinsky except perhaps when she was delivering pizza. That was untrue. He testified that he could not recall gifts exchanged between Ms. Lewinsky and him. That was untrue. He testified -- after a 14-second pause -- that he was "not sure" whether he had ever talked to Ms. Lewinsky about the possibility that she might be asked to testify in the lawsuit. That was untrue. The President testified that he did not know whether Ms. Lewinsky had been served a subpoena at the time he last saw her in December 1997. That was untrue. When his attorney read Ms. Lewinsky's affidavit denying a sexual relationship, the President stated that the affidavit was "absolutely true." That was untrue.

The evidence thus suggests that the President -- long aware that Ms. Lewinsky was a likely topic of questioning at his deposition -- made not one or two, but a series of false statements under oath. The President further allowed his attorney to use Ms. Lewinsky's affidavit, which the President knew to be false, to deceive the Court. This evidence suggests that the President directly contravened the oath he had taken -- as well as the Supreme Court's mandate, in which the Court had stated that Ms. Jones was entitled, like every other citizen, to a lawful disposition of her case.

D. <u>The President's Actions: January 17-21</u>

As our referral outlines, the President's deposition did not

mark the end of the scheme to conceal. During his deposition testimony, the President referred to his secretary Betty Currie. The President testified, for example, that Ms. Lewinsky had come to the White House to see Ms. Currie, not him; that Ms. Currie had been involved in assisting Ms. Lewinsky in her job search; and that Ms. Currie had communicated with Vernon Jordan about Mr. Jordan's assistance to Ms. Lewinsky. In response to one question at the deposition, the President said he did not know the answer and "you'd have to ask Betty."

Given the President's repeated references to Ms. Currie and his suggestion to Ms. Jones's attorneys that they contact her, the President had to know that Ms. Jones's attorneys might want to question Ms. Currie. Shortly after 7:00 p.m. on Saturday, January 17 -- just two and a half hours after the deposition -- the President attempted to contact Ms. Currie at her home. The President asked Ms. Currie to come to the White House the next day, which she did, although it was unusual for her to come in on a Sunday. According to Ms. Currie, the President appeared concerned and made a number of statements about Ms. Lewinsky to Ms. Currie. The statements included:

"You were always there when she was there, right? We were never really alone."

"You could see and hear everything."

Ms. Currie concluded that the President wanted her to agree with him when he made these statements. Ms. Currie stated that she did in fact indicate her agreement -- although she knew that

the President and Ms. Lewinsky had been alone and that she could not hear or see them when they were alone.

Ms. Currie further testified that the President ran through the same basic statements with her again on January 20 or 21.

What is important with respect to these two episodes is that at the time the President made these statements, he knew that they were false. He knew he had been alone with Ms. Lewinsky. He knew Ms. Currie could not see or hear everything. The President thus could not have been trying to refresh his recollection, as he subsequently suggested. That raises the question: Is there a legitimate explanation for the President to have said those things in that manner to Ms. Currie? The circumstances suggest not. The facts suggest that the President was attempting to improperly coach Ms. Currie, at a time when he could foresee that she was a potential witness in Jones v. Clinton.

E. The President's Actions: January 21-August 17

The President's next major decision came in the days immediately after January 21. On the 21st, the Washington Post publicly reported the story of Ms. Lewinsky's relationship with the President. After the public disclosure of his relationship with Ms. Lewinsky and the ongoing criminal investigation, the President faced a decision. Would he admit the relationship publicly, correct his testimony in Ms. Jones's case, and ask for the indulgence of the American people? Or would he continue to deny the truth?

For this question, the President consulted others. According to Dick Morris, the President and he talked on January 21. Mr. Morris suggested that the President publicly confess. The President replied "But what about the legal thing? You know, the legal thing? You know, Starr and perjury and all." Mr. Morris suggested they take a poll. The President agreed. Mr. Morris called with the results. He stated that the American people were willing to forgive adultery but not perjury or obstruction of justice. The President replied, "Well, we just have to win, then."

Over the next several months, it became apparent that the strategy to win had many prongs. First, the President denied the truth publicly and emphatically. Second, he publicly promised to cooperate with the investigation. Third, the President deflected and diverted the investigation by telling aides false stories that were then relayed to the grand jury. Fourth, he refused invitations to testify to the grand jury for over six months. Fifth, his Administration delayed the investigation through multiple privilege claims, each of which has been rejected by the federal courts. Sixth, surrogates of the President attacked the credibility and legitimacy of the grand jury investigation. Seventh, surrogates of the President attempted to convince the Congress and the American people that the matter was unimportant.

The first step was for the President to deny the truth publicly. For this, political polling led to Hollywood staging. The President's California friend and producer Harry Thomason

flew to Washington and advised that the President needed to be very forceful in denying the relationship. On Monday, January 26, in the Roosevelt Room, before Members of Congress and other citizens, the President provided a clear and emphatic public statement denying the relationship.

The President also made false statements to his Cabinet and aides. They then spoke publicly and professed their belief in the President.

The second step was to promise cooperation. The President told the American people on several television and radio shows on January 21 and 22 that "I'm going to do my best to cooperate with the investigation."

The third step was the President's refusal to provide testimony to the grand jury despite six invitations to do so and despite his public promise to cooperate. Refusing invitations to provide information to a grand jury in a federal criminal investigation authorized by the Attorney General of the United States -- and one in which there is a high national interest in prompt completion -- was inconsistent with the President's initial January promise to cooperate and with the general statutory duty of all government officials to cooperate with federal criminal investigations.

As a fourth step, the President not only refused to testify himself, but he authorized the use of various governmental privileges to delay the testimony of many of his taxpayer-paid assistants. The extensive use of governmental privileges against

grand jury and criminal investigations has, of course, been a pattern throughout the Administration. Most notably, the White House cited privilege in 1993 to prevent Justice Department and Park Police officials from reviewing documents in Vincent Foster's office in the days after his death.

In the Lewinsky investigation, the President asserted two privileges, Executive Privilege and a government attorney-client privilege. A subordinate Administration official, without objection from the President, claimed a previously unheard-of privilege that was called the protective function privilege. The privileges were asserted to prevent the full testimony of several White House aides and the full testimony of the sworn law enforcement officers of the Secret Service.

In asserting Executive Privilege, the President was plowing headlong into the Supreme Court's unanimous decision 24 years ago in United States v. Nixon. There, the Supreme Court ruled that Executive Privilege was overcome by the need for relevant evidence in criminal proceedings. And thus, it came as no surprise that Chief Judge Norma Holloway Johnson rejected President Clinton's effort to use Executive Privilege to prevent disclosure of relevant evidence.

In asserting protective function and government attorney-client privileges, the Administration was asking the federal courts to make up one new privilege out of whole cloth and to apply another privilege in a context in which no federal court had ever applied it before. And thus it again came as little

surprise that the federal courts rejected the Administration's claims. Indeed, as to the government attorney-client claim, the D.C. Circuit and the District Court, like the Eighth Circuit a year ago, stated that the President's position not only was wrong but would authorize a "gross misuse of public assets." The Supreme Court refused to grant review of the cases notwithstanding the Administration's two strongly worded petitions.

This point bears emphasis: The Administration justified its many privilege claims by claiming an interest in protecting the Presidency, not the President personally. But that justification is dubious for two reasons. First, Presidents Carter and Reagan waived all government privileges at the outset of criminal investigations in which they were involved. The examples set by those two Presidents demonstrate that such privilege claims in criminal investigations are manifestly unnecessary to protect the Presidency. Second, these novel privilege claims were quite weak as a matter of law.

And that raises a question: What was it about the Monica Lewinsky matter that generated the Administration's particularly aggressive approach to privileges? The circumstantial evidence suggests an answer: delay. Indeed, when this Office sought to have the Supreme Court decide all three privilege claims at once this past June, the Administration opposed expedited consideration.

Not only did the Administration invoke these three losing

privileges, but the President publicly suggested that he had not invoked Executive Privilege when in fact he had. On March 24, 1998, while travelling in Africa, the President was asked about Executive Privilege. He stated in response: "You should ask someone who knows. . . . I haven't discussed that with the lawyers. I don't know." But White House Counsel Charles Ruff had filed an affidavit in federal court only seven days earlier in which he swore that he had discussed the assertion of Executive Privilege with the President and the President had approved its invocation.

After Chief Judge Johnson ruled against the President, the President dropped the Executive Privilege claim in the Supreme Court. In August, the President explained to the grand jury why he dropped it. The President stated: "I didn't really want to advance an executive privilege claim in this case beyond having it litigated."

But this statement -- to the grand jury -- was inaccurate. In truth, the President had again asserted Executive Privilege only a few days earlier. And a few days after his grand jury testimony, the President again asserted Executive Privilege to prevent the testimony of Bruce Lindsey. These Executive Privilege cases continue to this day; indeed, one case is now pending in the D.C. Circuit.

When the President and the Administration assert privileges in a context involving the President's personal issues; when the President pretends publicly that he knows nothing about the

Executive Privilege assertion; when the President and the Administration rebuff our Office's efforts to expedite the cases to the Supreme Court; when the President contends in the grand jury that he never really wanted to assert Executive Privilege beyond having it litigated -- despite the fact that he had asserted it six days earlier and did so again eleven days afterwards, there is substantial and credible evidence that the President has misused the privileges available to his Office. And the misuse delayed and impeded the federal grand jury's investigation.

The fifth tactic was diversion and deflection. The President made false statements to his aides and associates about the nature of the relationship -- with knowledge that they could testify to that effect to the grand jury sitting here in Washington. The President did not simply say to his associates that the allegations were false or that the issue was a private matter that he did not want to discuss. Instead, the President concocted alternative scenarios that were then repeated to the grand jury.

The final two tactics were related: (i) to attack the grand jury investigation, including the Justice Department prosecutors in my Office -- to declare war, in the words of one Presidential ally -- and (ii) to shape public opinion about the proper resolution of the entire matter. It is best that I leave it to someone outside our Office to elaborate on the war against our Office. But no one really disputes that those tactics were

employed -- and continue to be employed to this day.

F. The President's Actions: August 17

This strategy proceeded for nearly seven months. It changed course in August after Monica Lewinsky reached an immunity agreement with our Office, and the grand jury, after deliberation, issued a subpoena to the President.

The President testified to the grand jury on August 17. Beforehand, many in Congress and the public advised that the President should tell the whole truth. They cautioned that the President could not lie to the grand jury. Senator Hatch, for example, stated that "So help me, if he lies before the grand jury, that will be grounds for impeachment." Senator Moynihan stated simply that perjury before the grand jury was, in his view, an impeachable offense.

The evidence suggests that the President did not heed this Senatorial advice. Although admitting to an ambiguously defined inappropriate relationship, the President denied that he had lied under oath at his civil deposition. He also denied any conduct that would establish that he had lied under oath at his civil deposition. The President thus denied certain conduct with Ms. Lewinsky and devised a variety of tortured and false definitions.

The President's answers have not been well received. Congressman Schumer, for one, stated that "it is clear that the President lied when he testified before the grand jury." Congressman Meehan stated that the President engaged in a "dangerous game of verbal Twister." Indeed, the President made

false statements to the grand jury and then that same evening spoke to the Nation and criticized all attempts to show that he had done so as invasive and irrelevant. The President's approach appeared to contravene the oath he took at the start of the grand jury proceedings. It also disregarded the admonitions of those Members of Congress who warned that lying to the grand jury would not be tolerated. It also discounted Judge Wright's many orders in which she had ruled that this kind of evidence was relevant in the Jones case.

And thus ended the over-eight-month journey that had begun on December 5, 1997, when Monica Lewinsky's name appeared on the witness list. The evidence suggests that the eight months included false statements under oath, false statements to the American people, false statements to the President's Cabinet and aides, witness tampering, obstruction of justice, and the use of Presidential authority and power in an effort to conceal the truth of the relationship and to delay the investigation.

III. Jurisdiction

Given the serious nature of perjury and obstruction of justice, regardless of its setting, it is obvious that the actions of the President and Ms. Lewinsky to conceal the truth warranted criminal investigation. Let me explain how the investigation came to be handled by our Office rather than by the Department of Justice or some new independent counsel. The explanation is straightforward.

On January 8, an attorney in my Office was informed that a

witness (who was Linda Tripp, a witness in prior investigations), had information she wanted to provide. A message was conveyed back that she should provide her information directly. Ms. Tripp called our Office on January 12. In that conversation and later, she provided us a substantial amount of information.

Let me pause here and emphasize that our Office, like most law enforcement agencies, has received innumerable tips about a wide variety of matters over the past four years -- from Swiss bank accounts to drug smuggling. You name it. We have heard it. In each case, we must make an initial assessment whether it is a serious tip or a crank call, as well as an assessment of jurisdictional issues.

We handled the information from Ms. Tripp in this same manner. When we confirmed that the information appeared credible, we reached out to the Department of Justice, as we have done regularly during my tenure as independent counsel. We contacted Deputy Attorney General Eric Holder within 48 hours after Ms. Tripp provided us information. The next day, we fully informed the Deputy Attorney General about Ms. Tripp's information. About Ms. Tripp's tapes and the questions concerning their legality under state law. About the consensual FBI recording of Ms. Tripp and Ms. Lewinsky. About the indications that Vernon Jordan was providing employment assistance to a witness who had the potential to harm the President -- a fact pattern that we had seen in the Webster Hubbell investigation, as I shall describe presently.

We discussed jurisdiction. We noted that it is in everyone's interest to avoid time-consuming jurisdictional challenges. We stated that the Lewinsky investigation could be considered outside our jurisdiction as then constituted. We stressed that someone needed to work the case: the Justice Department or an independent counsel.

Later that evening, the Deputy Attorney General telephoned and reported that the Attorney General had tentatively decided to assign the matter to us. Before her decision was final, we reviewed the evidence in detail with two experienced career prosecutors in the Department. One senior Justice Department prosecutor listened to portions of the FBI tape. The Attorney General made her final decision on Friday, January 16. That day, through a senior career prosecutor, the Attorney General asked the three-Judge Special Division to expand our jurisdiction. The Special Division granted the request that day.

In short, our entry into this investigation was standard, albeit expedited, procedure.

IV. Referral Standards

Seven months later, after conducting the factual investigation and after the President's grand jury testimony, the question we faced was what to do with the evidence. Section 595(c) of Title 28 in the independent counsel statute requires an independent counsel investigating possible crimes to provide to the House of Representatives -- in the words of the statute -- "substantial and credible information that may constitute grounds

for an impeachment."

This reporting provision suggests a statutory preference that possible criminal wrongdoing by the President be addressed in the first instance by the House of Representatives. It also requires an analysis of the law of impeachment.

As we understood the text of the Constitution, its history, and relevant precedents, it was clear that obstruction of justice in its various forms, including perjury, "may constitute grounds for an impeachment." Even apart from any abuses of Presidential authority and power, the evidence of perjury and obstruction of justice required us to refer this information to the House.

Perjury and obstruction of justice are, of course, serious crimes. In 1790, the First Congress passed a criminal law that banned perjury. A violator was subject to three years' imprisonment. Today, federal criminal law makes perjury a felony punishable by five years' imprisonment.

In cases involving public officials, courts treat false statements with special condemnation. United States District Judge Royce Lamberth recently sentenced Ronald Blackley, former Chief of Staff to the former Secretary of Agriculture, to 37 months' imprisonment for false statements. The Court stated that it "has a duty to send a message to other high-level government officials that there is a severe penalty to be paid for providing false information under oath."

Although perjury and obstruction of justice are serious federal crimes, some have suggested that they are not high crimes

or misdemeanors when the underlying events concern the President's private actions. Under this theory, a President's obstruction and perjury must involve concealment of official actions. This interpretation does not appear in the Constitution itself. Moreover, the Constitution lists bribery as a high crime or misdemeanor. And if a President involved in a civil suit bribed the judge to rule in his favor or bribed a witness to provide favorable testimony, there could be no textual question that he had committed a high crime or misdemeanor under the plain language of Article II -- even though the underlying events would not have involved his official duties. In addition, virtually everyone agrees that serious crimes such as murder and rape would be impeachable even though they do not involve official duties.

Justice Story stated in his famous Commentaries that there is not a syllable in the Constitution which confines impeachment to official acts. With respect, an absolute and inflexible requirement of a connection to official duties appears, fairly viewed, to be an incorrect interpretation of the Constitution.

History and practice support the conclusion that perjury, in particular, is a high crime or misdemeanor. Perjury has been the basis for the removal of several judges. As far as we know, no one questioned whether perjury was a high crime or misdemeanor in those cases. In addition, as several of the scholars who appeared before you testified, perjury seems to have been recognized as a high crime or misdemeanor at the time of the Founding. And the House Manager's report in the impeachment of

Judge Walter Nixon for perjury stated, "It is difficult to imagine an act more subversive to the legal process than lying from the witness stand." And finally, I note that the Federal Sentencing Guidelines include bribery and perjury in the same Guideline (2J1.3), reflecting the common-sense conclusion that bribery and perjury are equivalent means of interfering with the governmental process.

For these reasons, we concluded that perjury and obstruction of justice, like bribery, "may constitute grounds for an impeachment." Having said that, let me again emphasize my role here. Whether the President's actions are, in fact, grounds for an impeachment or some other congressional sanction is a decision in the sole discretion of the Congress.

A final point warrants mention in this respect. Criminal prosecution and punishment are not the same as -- or a substitute for -- congressionally imposed sanctions. As the Supreme Court stated in a 1993 case, "the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses -- the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgment."

V. The Office of Independent Counsel: 1994-1998

Our job over the past several years has involved far more than simply the Monica Lewinsky matter. The pattern of

obstruction of justice, false statements, and misuse of Executive authority in the Lewinsky investigation did not occur in a vacuum.

A. Overview

In August 1994, I took over the Madison Guaranty investigation from Bob Fiske. Over the ensuing years, I have essentially become independent counsel for five distinct investigations: for Madison and Whitewater, for Foster-related matters, for the Travel Office, for the FBI Files matter, and for the Monica Lewinsky investigation -- as well as for a variety of obstruction and related matters arising from those five major investigations. A brief overview of those investigations may assist the Committee in its assessment of the President's conduct.

First, some statistics. Our investigation has resulted in conviction of fourteen individuals, including the former Associate Attorney General of the United States Webster Hubbell, the then-sitting Governor of Arkansas Jim Guy Tucker, and the Clintons' two business partners Jim and Susan McDougal.

We are proud not only of the cases we have won, but also of our decisions not to indict. To take one well-known example, the Senate Whitewater Committee sent our Office public criminal referrals on several individuals. The Committee stated in its June 21, 1996, public letter that the testimony of Susan Thomases was "particularly troubling and suggests a possible violation of law." But this Office did not seek charges against her.

Apart from our indictments and convictions, this Office also has faced an extraordinary number of legal disputes -- on issues of privilege, jurisdiction, substantive criminal law, and the like. By my count, at least seventeen of our cases have been decided by the federal courts of appeals, and we have won all seventeen. One privilege case arising in our Travel Office investigation went to the D.C. Circuit where we prevailed 2-1 and then to the Supreme Court where we lost 6-3.

We had to litigate in the courts as our investigation ran into roadblocks and hurdles that slowed us down. It is true that the Administration produced a great amount of information. But unlike the prosecutors in the investigations involving Presidents Reagan and Carter, we have been forced to go to court time and again to seek information from the Executive Branch and to fight a multitude of privilege claims asserted by the Administration -- every single one of which we have won.

In sum, this Office has achieved a superb record in courts of <u>law</u> -- of significant and hard-fought convictions, of fair and wise decisions not to charge, of thorough and accurate reports on the Vincent Foster and Monica Lewinsky matters, of legal victories in various courts. We go to court and not on the talk-show circuit. And our record shows that there is a bright line between law and politics, between courts and polls. It leaves the polls to the politicians and spin doctors. We are officers of the court who live in the world of the law. We have presented our cases in court, and with very rare exception, we have won.

B. Madison Guaranty: President Clinton and Susan McDougal

The center of all of this -- the core of our Arkansas-based investigation -- was Madison Guaranty Savings and Loan. Madison was a federally insured savings and loan in Little Rock, Arkansas, run by Jim and Susan McDougal. Like many savings and loans in the 1980's, Madison was fraudulently operated. Mrs. Clinton and other lawyers at the Rose Law Firm in Little Rock performed legal work for Madison in the 1980's.

Madison first received national attention in March 1992 when a New York Times report raised several issues about the relationship between the Clintons and the McDougals in connection with Madison. Federal bank regulators examined Madison in 1992 and 1993. The regulators sent criminal referrals to the Justice Department, and the Justice Department launched a criminal investigation of Madison in November 1993. In part because of the relationship of the Clintons to the McDougals, Attorney General Reno appointed Bob Fiske in January 1994. I was appointed independent counsel in August 1994 to continue the investigation.

Madison exemplified the troubled practices of savings and loans in the 1980's. The failure of the institution ultimately cost federal taxpayers approximately $65 million. Congresswoman Waters put it this way in a 1995 hearing: "By any standard, Madison Guaranty was a disaster. . . . It gambled with investments, cooked the books and ultimately bilked the taxpayers of the United States. Madison is a metaphor for the S&L crisis."

The McDougals' operation of Madison raised serious questions whether bank funds had been used illegally to assist business and political figures in Arkansas such as Jim Guy Tucker and then-Governor Clinton. As to the Clintons, the question arose primarily because they were partners with the McDougals in the Whitewater Development Company. The Whitewater corporation initially controlled and developed approximately 230 acres of property on the White River in Northern Arkansas. Given Jim McDougal's role at the center of both institutions and given Whitewater's constant financial difficulties, there were two important questions: Were Madison funds diverted to benefit Whitewater? If so, were the Clintons either involved in or knowledgeable of that diversion of funds?

These questions were not idle speculation. In early 1994, a Little Rock Judge and businessman David Hale pled guilty to certain unrelated federal crimes. As part of his plea, David Hale told Mr. Fiske's team that he had received money as a result of a loan from Madison in 1986 and that his company loaned it to others as part of a scheme to help some members of the Arkansas political establishment.

One loan of $300,000 went to Susan McDougal's make-believe company, Master Marketing. Based on our investigation, we now know that some $50,000 of the proceeds of that loan went to benefit the Whitewater corporation. David Hale stated that he had discussed the Susan McDougal loan with Governor Clinton, including at a meeting in 1986 with Jim McDougal and the

Governor.

In August 1994, when I first arrived in Little Rock, we devised a plan. First, based on the testimony of David Hale and others, as well as documentary evidence, we would take steps, if appropriate, to seek an indictment of Jim and Susan McDougal and others involved in what clearly appeared to be criminal transactions. If a Little Rock jury convicted the McDougals or others, we would then obtain their testimony and determine whether they had other relevant information -- including, of course, whether the McDougals possessed information that would either exonerate or incriminate the Clintons as to Madison and Whitewater matters.

This approach was the time-honored and professional way to conduct the investigation. We garnered a number of guilty pleas in my first year, including from Webster Hubbell, who had worked at the Rose Law Firm and was knowledgeable about its work with Madison, including that of Mrs. Clinton. In addition, Robert Palmer, a real estate appraiser, pled guilty to fraudulently doctoring Madison documents to deceive federal bank examiners. Three other associates of McDougal pled guilty and agreed to cooperate.

In August 1995, a year after I was appointed, a federal grand jury in Little Rock indicted Jim and Susan McDougal and the then-sitting Governor of Arkansas Jim Guy Tucker. The case went to trial in March 1996 amid charges by all three defendants -- and their allies -- that the case was a political witch hunt.

Some predicted that an Arkansas jury would never convict the sitting Governor. Those expectations were heightened when President Clinton was subpoenaed as a defense witness. The President testified for the defense from the Map Room of the White House. During his sworn testimony, the President testified that he did not know about the Susan McDougal loan nor had he ever been in a meeting with Hale and McDougal about the loan. He also testified that he had never received a loan from Madison. This was important testimony. Its truth -- or falsity -- went to the core issue of our investigation.

On May 28, 1996, all three defendants were convicted -- Jim McDougal of 18 felonies, Susan McDougal of four felonies, and Governor Tucker of two felonies. Governor Tucker announced his resignation that day.

After his conviction, Jim McDougal began cooperating with our investigation. We spent many hours with him gaining additional insights and facts. He informed our career investigators and prosecutors that David Hale was accurate. According to Jim McDougal, President Clinton had testified falsely at the McDougal-Tucker trial. Jim McDougal testified he had been at a meeting with David Hale and Governor Clinton about the Master Marketing loan. And Jim McDougal testified that Governor Clinton had received a loan from Madison. Jim McDougal said on one of his first sessions with our Office that the President's trial testimony was, in his words, "at variance with the truth."

In late 1997, we considered whether this evidence justified a referral to Congress. We drafted a report. But we concluded that it would be inconsistent with the statutory standard because of the difficulty of establishing the truth with a sufficient degree of confidence. We also weighed a prudential factor in reaching that conclusion. There were still two outstanding witnesses who might later corroborate -- or contradict -- the McDougal and Hale accounts: Jim Guy Tucker and Susan McDougal.

In 1998, we were finally able to obtain information from Governor Tucker. It had taken four long years to hear from the Governor. He pled guilty in a tax conspiracy case. When Governor Tucker ultimately testified before the Little Rock grand jury in March and April of this year, he had little knowledge of the loan to Susan McDougal's fictitious company and the President's possible involvement in it. He did shed light on the overall transactions involving Castle Grande and Madison. Importantly, as to one subject, Governor Tucker exonerated the President regarding longstanding questions whether the President and Governor Tucker had a conversation about the Madison referrals in the White House in October 1993.

The remaining witness who perhaps could shed light on the issue was Susan McDougal. And therein lies a story that has caused literally years of delay and added expense to the investigation.

Because the proceeds from the fraudulent loan Susan McDougal received had benefitted the Clintons -- the proceeds were used to

pay obligations of the Whitewater Development Company for which the Clintons were potentially personally liable -- Susan McDougal was subpoenaed to testify before the grand jury in August 1996 and asked several questions at the heart of the investigation, including:

> "Did you ever discuss your loan from David Hale with William Jefferson Clinton?"
>
> "To your knowledge, did William Jefferson Clinton testify truthfully during the course of your trial?"

Susan McDougal refused to answer any of the questions. District Judge Susan Webber Wright then held her in civil contempt, a decision later upheld by the United States Court of Appeals.

The month of September 1996 thus was a crucial time for our Office in its attempt to obtain Susan McDougal's truthful testimony. On September 23, 1996, just two weeks after Ms. McDougal had been found in contempt by Judge Wright, President Clinton was interviewed on PBS. The President said, "There's a lot of evidence to support" various charges that Susan McDougal had made against this Office. But the President cited no evidence.

The President's comments can reasonably be described as supportive of Ms. McDougal's decision to disobey the court order. So far as we are aware, no sitting President has ever publicly indicated his agreement with a convicted felon's stated reason for refusing to obey a federal court order to testify. Essentially, the President of the United States, the Chief Executive, sided with a convicted felon against the United

States, as represented by United States District Judge Susan Webber Wright, the United States Court of Appeals for the Eighth Circuit, and the Office of Independent Counsel.

The President was also asked in this interview whether he would consider pardoning Ms. McDougal. The President refused to rule out a pardon.

The President's answers to these questions were roundly criticized. A New York Times editorial captured the point well, stating that the President's remarks "undercut a legal process that is going forward in an orderly way."

C. Madison Guaranty: Mrs. Clinton and Webster Hubbell

A separate area of our original investigation concerned the Rose Law Firm's work in 1985 and 1986 for Madison. It appeared that Rose may have assisted Madison in performing legal work concerning a piece of property (IDC/Castle Grande), which involved McDougal, Madison, and fraudulent transactions. The complicated real estate deal known as Castle Grande was structured to avoid state banking regulatory requirements and involved violations of federal criminal law.

Grand jury subpoenas were issued in 1994 and 1995 to the Rose Law Firm and to the President and Mrs. Clinton seeking all documents relating to Madison and Castle Grande. We ultimately learned that Mrs. Clinton had performed some work related to Madison's IDC/Castle Grande transactions, but the whole issue remained partially enshrouded in mystery as our Office and the Senate Whitewater Committee investigated the issue in 1995.

The problem was that some of the best evidence regarding Mrs. Clinton's work -- her Rose Law Firm billing records and her time sheets for 1985 and 1986 -- could not be found. The missing records raised suspicions by late 1995 and became a public issue. Webster Hubbell and Vincent Foster had been responsible during the 1992 campaign for gathering information about Mrs. Clinton's work for Madison. Yet the billing records could not be found. The Rose Firm's work for Madison could not be fully pieced together. The Rose Firm no longer had the records.

On January 5, 1996, the records of Mrs. Clinton's activities at Madison were finally produced under unusual circumstances. The records detailed Mrs. Clinton's work on a variety of Madison issues, including the preparation of an option agreement that Madison used to deceive federal bank examiners as part of the Castle Grande deal. After a thorough investigation, we have found no explanation how the billing records got where they were or why they were not discovered and produced earlier. It remains a mystery to this day. Then, in the summer of 1997, a second set of these billing records was found in the attic of the late Vincent Foster's house in Little Rock. The time sheets for Rose's 1985-86 Madison work have never been found.

We should note that Webster Hubbell may have additional information pertaining to Castle Grande -- whether exculpatory or inculpatory -- that we have been unable to obtain. Mr. Hubbell was at the Rose Firm at the relevant time in 1985 and 1986, he gathered information about the Madison issue in the 1992

campaign, and his father-in-law Seth Ward was involved in the Castle Grande deal.

Two other important facts suggest that Mr. Hubbell may have additional information. First, on March 13, 1994, after a meeting at the White House where it had been discussed that Mr. Hubbell would resign from the Justice Department, then-Chief of Staff Mack McLarty told Mrs. Clinton that "We're going to be supportive of Webb."

As this criminal investigation was beginning in 1994 under Bob Fiske and later my Office, Mr. Hubbell received payments totalling nearly $550,000 from several companies and individuals. Many were campaign contributors. These individuals had been contacted through the White House Chief of Staff Mr. McLarty. In June 1994, during a week in which he made several visits to the White House, Indonesian businessman James Riady met with Webster Hubbell and then wired him $100,000. One of the individuals who arranged for Mr. Hubbell to receive a consulting contract was Vernon Jordan. The company that he convinced to hire Hubbell was MacAndrews & Forbes, parent company of Revlon -- the same company that later hired Monica Lewinsky upon Mr. Jordan's recommendation. As he was destined later to do with Monica Lewinsky, Mr. Jordan personally informed the President about his assistance to Mr. Hubbell.

Most of the $550,000 was given to Mr. Hubbell for little or no work. This rush of generosity obviously gives rise to an inference that the money was essentially a gift. And if it was a

gift, why was it given? This money was given despite the fact that Mr. Hubbell was under criminal investigation for fraudulent billing and was a key witness in the Madison Guaranty investigation.

Second, as is known to the public, on certain prison tapes while Mr. Hubbell was in prison, he said to his wife: "I won't raise those allegations that might open it up to Hillary." On another tape, Mr. Hubbell said to White House employee Marsha Scott that he might "have to roll over one more time."

Mr. Hubbell's statements -- when combined with the amount of money he received and the information he was in a position to know -- raise very troubling questions. Mr. Hubbell is currently under federal indictment, and it would be inappropriate to say more about that at this time.

D. Travel Office

Let me add a few brief words about the Travel Office matter. This phase of work arose out of investigations by others of the 1993 firings of Billy Dale and six career co-workers. We do not anticipate that any evidence gathered in that investigation will be relevant to the Committee's current task. The President was not involved in our Travel Office investigation.

As to the status of that investigation, it was on hold for quite a while, in part because of litigation. The investigation is not terminated, but we expect to announce any decisions and actions soon.

E. FBI Files

As to the FBI files matter, there are outstanding issues that we are attempting to resolve with respect to one individual. But I can address two issues of relevance to the Committee's work. First, our investigation, which has been thorough, found no evidence that anyone higher than Mr. Livingstone or Mr. Marceca was in any way involved in ordering the files from the FBI. Second, we have found no evidence that information contained in the files of former officials was used for an improper purpose.

VI. The Office of Independent Counsel

A. Staff

Let me now mention a few words about our personnel, about our process, and about our reflections on this investigation. The character and conduct of the men and women of our Office -- career professionals who take their jobs and their oaths very seriously -- have been badly distorted. Perhaps that is inevitable given the nature of the issues involved in this case and the fact that the President of the United States is the subject of a criminal investigation. But it is regrettable. And so let me offer some truth about the Office.

I will start with our personnel. During the Lewinsky investigation, my staff has included skilled and experienced prosecutors from around the country. They have brought an enormous amount of experience and expertise to the Office. My colleagues during the past year have included a former United

States Attorney; the Chief of the Public Corruption unit of the United States Attorney's Office in Los Angeles; the Chief of the Public Corruption unit of the United States Attorney's Office in Miami; the chief of the bank fraud unit of the United States Attorney's office in San Antonio; prosecutors with lengthy experience in the Public Integrity Section of the Department of Justice; seasoned federal prosecutors from ten different States and the District of Columbia; and veteran state prosecutors from Maryland and Oregon.

The Office also has benefitted from the assistance of Sam Dash, Chief Counsel to the Senate Watergate Committee, who has offered great wisdom throughout my tenure as independent counsel. Professor Ronald Rotunda, constitutional law scholar from the University of Illinois, similarly has provided important advice on a variety of issues. The Office also has received assistance from professors at the University of Michigan, the University of Illinois, Notre Dame, and George Washington. Moreover, former law clerks for six different Supreme Court Justices have served on my staff during the past year.

During the Lewinsky investigation, the Office also relied on many talented investigators with extensive service in the FBI and other law enforcement agencies. And the FBI Laboratory yet again provided superb assistance, as it has throughout the Madison/Whitewater investigation.

In addition, let me express my great appreciation for the grand jurors who devoted much time and energy to examining the

witnesses and considering the evidence. Those 23 citizens of the District of Columbia have performed invaluable service, and I publicly thank them. This is the rare case where grand jury transcripts become publicly scrutinized, and as you now know, these grand jurors were active, knowledgeable, fair, and completely dedicated to uncovering and understanding the truth.

B. The Process

In all of our investigations, difficult decisions have been taken through our Office's deliberative process. The process calls upon each attorney -- drawing upon his or her background and experience -- to offer views on issues in question. This deliberative process is laborious, sometimes tedious. But it is an attempt to ensure that our Office makes the best decisions it can. I have drawn upon a vast array of experienced prosecutors and investigators because I was sensitive to -- and am sensitive to -- the fact that an independent counsel exists outside the Justice Department and is an unusual entity within our constitutional system.

Throughout this investigation, we have made every effort to follow Department of Justice practice and policy and to utilize time-honored law enforcement techniques. Of course, with their vast experience in the Department and FBI, my prosecutors and investigators embody such policy and practice. Nonetheless, it was often the case during an all-attorneys meeting that we would repair to the United States Attorney's Manual to be sure we had it right. It is true that some traditional law enforcement

procedures may not be entirely comfortable for some witnesses. But the procedures have been refined over decades of practice in which society's right to detect and prosecute crime has been balanced against individual liberty. It was not our place to reinvent the investigative wheel. Nor was it our place to discard law enforcement practices that are used every day by prosecutors and police throughout the country.

C. Decisions During the Investigation

With that, let me be the first to say that the Lewinsky investigation, in particular, presented some of the most challenging issues any lawyer could face. We had to make numerous difficult decisions -- and often had to do so quickly. Those included factual judgments (is witness X or witness Y telling us the whole truth?), strategic choices (do we provide immunity to Ms. Lewinsky in order to obtain her testimony? Is it appropriate to subpoena the President?), legal decisions (Do we accept the assertion of Executive Privilege for Bruce Lindsey or do we go to court to challenge it? What about the asserted Secret Service privilege?), and historic constitutional judgments (what is the meaning of Section 595(c) of the independent counsel statute and how do we write a referral that satisfies its requirements?).

Major decisions during the Lewinsky investigation have not been easy. And given the hurricane-force political winds swirling about us, we were well aware that, no matter what decision we made, criticism would come from somewhere. As

Attorney General Reno has said, in high-profile cases like these, you are damned if you do and damned if you don't, so you'd better just do what you think is the right and fair thing.

We also attempted to be thorough. But we did not invent that approach just for the Lewinsky case. To take just one previous example, in investigating matters relating to the death of Vincent Foster, we were painstaking in examining evidence, questioning witnesses, and calling upon experts in homicide and suicide. We were criticized during that investigation for being too thorough, taking too long. But time has proved the correctness of our approach. After an extensive investigation, the Office produced a report that addressed the many questions, confronted the difficult issues, laid out new evidence, and reached a definitive conclusion. Over time, the controversy over the Foster tragedy has dissipated because we insisted on being uncompromisingly thorough both in the investigation and in our report.

After the Attorney General and the Court of Appeals assigned us the Lewinsky investigation, the Office again received criticism for being too thorough. But the Lewinsky investigation could not be properly conducted in a slapdash manner. It was our duty to be meticulous, to be careful. We were. And in the process, we uncovered substantial and credible evidence of serious legal wrongdoing by the President.

Some then suggested that the report we submitted to Congress was too thorough. But bear in mind that we submitted the

referral, as we were required by statute, to the House of Representatives, not to the public. And we must dispute the suggestion that a report to the House suggesting possible impeachable offenses committed by the President of the United States should tell something less than the full story. The facts, the story are critical -- they affect credibility, they are necessary to avoid a distorted picture, they ultimately are the basis for a just conclusion. As a result, just as the jurors found the details of specific land deals critical in our trial of Governor Jim Guy Tucker and the McDougals, just as the Supreme Court includes the details of grisly murders in its death penalty cases, so too the details of the President's relationship with Ms. Lewinsky became relevant -- indeed, critical -- in determining whether and the extent to which the President made false statements under oath and otherwise obstructed justice in both the Jones v. Clinton case and then again in his grand jury testimony.

As you know, by an overwhelming bipartisan vote, the House immediately disclosed our referral to the public. But I want to be clear that the public disclosure or non-disclosure of the referral and the backup materials was a decision our Office did not make -- and lawfully could not make. We had no way of knowing in advance of submitting the referral, and we did not know, whether the House would publicly release both the report and the backup materials; would release portions of one or both; would release redacted versions of the report and backup

documents; would prepare and release a summary akin to Mr. Schippers' oral presentation; or would simply keep the referral and backup materials under seal just as Special Prosecutor Jaworski's submission in 1974 remained under seal. As a result, we respectfully but firmly reject the notion that our Office was trying to inflame the public. We are professionals, and we were trying to get the relevant facts, the full story, to the House of Representatives. That was our task. And that is what we did.

In fact, the referral has served a purpose. There has been virtually no dispute about a good many of the factual conclusions in the report. In the wake of the referral, for example, few have ventured that the President told the truth, the whole truth, and nothing but the truth in his civil case and before the grand jury. A key reason, we submit, is that we insisted -- as we have in our other investigations -- that we be exhaustive in the investigation and that we document the facts and conclusions in our report.

D. <u>Reflections</u>

I want to be absolutely clear on one point, however. Any suggestion that the men and women of our Office enjoyed or relished this investigation is wrong. It is nonsense. In at least three ways, the Lewinsky investigation caused all of us considerable dismay -- and continues to do so.

First, none of us has any interest whatsoever in investigating the factual details underlying the allegations of perjury and obstruction of justice in this case. My staff and I

agree with the sentiments expressed by Chairman Hyde in the November 9 hearing when he said "I'd like to forget all of this. I mean, who needs it?" But the Constitution and the criminal law do not have exceptions for unseemly or unpleasant or difficult cases. The Attorney General and the Court of Appeals assigned us a duty to pursue the facts. And we did so.

Second, this investigation has proved difficult for us because it centered on legal wrongdoing by the President of the United States. The Presidency is an Office that we -- like all Americans -- revere and respect. No prosecutor is comfortable when he or she reports wrongdoing by the President. All of us want to believe that our President has at all times acted with integrity -- and certainly that he has not violated the criminal law.

Everyone in my Office therefore envies the position years ago of Paul Curran, the distinguished counsel appointed by Attorney General Griffin Bell to investigate certain financial transactions involving President Carter. Mr. Curran received complete cooperation from President Carter, found no wrongdoing, and promptly returned to private life. I would like to do the same.

Third, this investigation was unpleasant because our Office knew that some Americans, for a variety of reasons, would be opposed to our work. But we would not, could not, allow ourselves to be deterred from doing our work. As I have said, our Office was assigned a specific duty to gather the facts --

and then, if appropriate, to make decisions and report the facts as quickly as we possibly could. In the end, we tried to adhere to the principle Congressman Graham discussed on October 5: Thirty years from now, not thirty days from now, we want to be able to say that we did the right thing.

E. The Independent Counsel

At the end of the day, I -- and no one else -- was responsible for our key decisions. And my background thus warrants brief note.

I came to this job as a product of the judicial process, of the courts. I began my legal career in 1973 as a law clerk, first for Judge David Dyer on the Fifth Circuit Court of Appeals and then for two years for Chief Justice Warren Burger. Following my clerkships, I was in private law practice in Los Angeles and Washington, during which time I worked on all manner of litigation matters -- civil, administrative, and criminal.

After William French Smith took office as Attorney General in January 1981, I served as Counselor to the Attorney General from 1981 to 1983. In that capacity, I experienced firsthand the varied and difficult judgment calls that faced the Attorney General every day -- whether it was dealing with the aftermath of the attempted assassination of President Reagan or selecting a Supreme Court nominee, in that case Justice Sandra Day O'Connor. I took away from the experience an admiration that has continued to this day for the career Justice Department lawyers, prosecutors, and law enforcement officials who toil without

fanfare, and for whom the guiding principles are fairness and respect for the law.

In 1983, President Reagan nominated and the Senate confirmed me to be a Judge on the United States Court of Appeals for the District of Columbia Circuit. I became a colleague on a Court with truly great Judges -- from J. Skelley Wright to Antonin Scalia, from Ruth Ginsburg to Robert Bork -- and tackled the important and intricate issues that came before the D.C. Circuit. The cases included issues as diverse as the constitutional right of a military serviceman to wear a yarmulke (a right I supported in vain) and the right of a newspaper, in that case The Washington Post, to be free under the First Amendment from the crushing threat of liability under the libel laws.

In 1989, I accepted appointment as Solicitor General of the United States. The Solicitor General is, as you know, the lawyer who represents the United States in arguments before the Supreme Court. A distinguished predecessor, Thurgood Marshall, often stated that being Solicitor General was the greatest job a lawyer could have, bar none. Justice Marshall had it right. As Solicitor General, I argued 25 cases before the Supreme Court. The arguments covered the spectrum of our law including whether flag burning is a protected right under the Constitution, whether there is a constitutional right to refuse unwanted medical treatment near the end of one's life, and whether the Senate's decision to convict and remove an impeached Judge is subject to judicial review. While I was Solicitor General, my overarching

goal was to run an Office faithful to the law, not to political or ideological opinion. And I think the record shows that I did just that.

In 1993, I left my second tour of duty in the Justice Department and returned to private practice and teaching constitutional law. In the period before I was named independent counsel in August 1994, I was not completely absent from public service, however. In late 1993, I was asked by the Senate Ethics Committee, chaired by Nevada's Democratic Senator Richard Bryan, to review Senator Packwood's diaries as part of the Ethics Committee's investigation.

Every person is, of course, deeply affected by his or her experiences. For my part, my experience is in the law and the courts. I am not a man of polls, public relations, or politics -- which I suppose is obvious at this point. I am not experienced in political campaigns.

As a product of the law and the courts, I have come to an unyielding faith in our court system -- our system of judicial review, the independence of our judges, our jury system, the integrity of the oath, the sanctity of the judicial process. The phrase on the facade of the Supreme Court "Equal Justice Under Law," the inscription inside the Justice Department building, "the United States wins its point when justice is done its citizens in the courts," are more than slogans. They are principles that the courts in this country apply every day. Our Office saw that firsthand in the trial of Governor Jim Guy

Tucker, Jim McDougal, and Susan McDougal. A juror said afterwards that they fought for the defendants' liberty, but were overwhelmed by the evidence. It is our judicial process that helps make this country distinct. And my background, my instincts, my beliefs have instilled in me a deep respect for the legal process that is at the foundation of our Republic.

President Lincoln asked that "reverence for the laws . . . be proclaimed in legislative halls and enforced in courts of justice." Mr. Chairman, my Office and I revere the law. I am proud of what we have accomplished. We were assigned a difficult job. We have done it to the very best of our abilities. We have tried to be both fair and thorough.

I thank the Committee and the American people for their attention.

105th Congress, 2d Session – – – – – – – – – – – – House Document 105–310

REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(c)

COMMUNICATION

FROM

KENNETH W. STARR, INDEPENDENT COUNSEL

TRANSMITTING

A REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES FILED IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(c)

SEPTEMBER 11, 1998.—Referred to the Committee on the Judiciary pursuant to H. Res. 525 and ordered to be printed

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Documents Cited in Referral: Bates Numbers 1000–V006

Key Dates

November 1992	William Jefferson Clinton elected President of the United States.
May 1994	Paula Jones files lawsuit against President Clinton.
July 1995	Monica S. Lewinsky begins White House internship.
November 15, 1995	President begins sexual relationship with Lewinsky.
April 5, 1996	Lewinsky transferred from White House to Pentagon.
November 1996	President Clinton reelected.
March 29, 1997	Last intimate contact between President and Monica Lewinsky.
December 5, 1997	Lewinsky appears on *Jones* Witness List.
December 19, 1997	Lewinsky served with subpoena to appear at deposition and produce gifts from President Clinton.
December 24, 1998	Lewinsky's last day of work at the Pentagon.
December 28, 1997	Lewinsky meets with the President and receives gifts; later gives box of gifts from the President to Betty Currie.
January 7, 1998	Lewinsky signs affidavit intended for filing in *Jones* case.
January 13, 1998	Lewinsky accepts job offer at Revlon in New York.
January 16, 1998	Special Division appoints Independent Counsel Kenneth W. Starr to investigate Lewinsky matter.
January 17, 1998	President deposed in *Jones* case.
January 18, 1998	President meets with Betty Currie to discuss President's deposition.
January 21, 1998	Lewinsky matter reported in press; President denies allegations of a sexual relationship and of suborning perjury.
April 1, 1998	Judge Wright grants summary judgment for President Clinton in the *Jones* litigation.
July 17, 1998	President served with grand jury subpoena, later withdrawn in return for testimony.
July 28, 1998	Immunity/Cooperation Agreement reached between Lewinsky and OIC.
August 17, 1998	President testifies before the grand jury; later he publicly acknowledges improper relationship.
September 9, 1998	OIC submits Referral to Congress pursuant to 28 U.S.C. § 595(c).

Table of Names

The Principals	
William Jefferson Clinton	President of the United States.
Paula Corbin Jones	Plaintiff in a civil suit against President Clinton.
Monica Lewinsky	Former White House Intern and Employee.
Betty Currie	Personal Secretary to the President.
Vernon Jordan	Friend of President Clinton, and Partner at Law Firm of Akin, Gump, Strauss, Hauer & Feld.
The First Family	
Hillary Rodham Clinton	First Lady of the United States.
Chelsea Clinton	Daughter of the President and First Lady.
Presidential Aides/Advisors/Assistants	
Madeline Albright	Secretary of State.
Sidney Blumenthal	Assistant to the President.
Erskine Bowles	White House Chief of Staff.
Lanny Bruer	Special Counsel to the President.
Stephen Goodin	Aide to President Clinton.
Nancy Hernreich	Deputy Assistant to the President and Director of Oval Office Operations.
John Hilley	Assistant to the President and Director of Legislative Affairs; Monica Lewinsky's Supervisor.
Harold Ickes	Former Deputy Chief of Staff.
Janis Kearney	Special Assistant to the President and Records Manager.
Timothy Keating	Special Assistant to the President and Staff Director for Legislative Affairs; Monica Lewinsky's Immediate Supervisor.
Ann Lewis	Director, White House Communications.
Evelyn Lieberman	Former Deputy Chief of Staff.
Bruce Lindsey	Deputy White House Counsel.
Sylvia Mathews	Deputy White House Chief of Staff.
Thomas "Mack" McLarty	Former White House Chief of Staff.
Cheryl Mills	Deputy White House Counsel.
Dick Morris	Former Advisor to President Clinton.
Bob Nash	Assistant to the President and Director of Presidential Personnel.
Leon Panetta	Former White House Chief of Staff.
John Podesta	Deputy White House Chief of Staff.
Hon. Bill Richardson	U.S. Ambassador to the United Nations.
Charles Ruff	White House Counsel.
Marsha Scott	Deputy Director of Personnel.
George Stephanopoulous	Former Senior Advisor for Policy and Strategy.
Barry Toiv	Deputy White House Press Secretary.
Other White House Personnel	
Karin Joyce Abramson	Former Director of the White House Intern Program.
Caroline Badinelli	Former White House Intern.

Name	Position
Douglas Band	Former White House Intern.
Tracy Anne Bobowick	Former White House Employee, Correspondence Office.
Laura Capps	Former White House Intern.
Jay Footlik	Former Employee of the Office of Presidential Personnel.
Patrick Griffin	Former Assistant to the President and Director of Legislative Affairs.
George Hannie	White House Butler.
Jocelyn Jolley	Former Director of Congressional Correspondence in the White House.
Maureen Lewis	Former White House Employee, Correspondence Office.
Glen Maes	White House Steward to President Clinton.
Bayani Nelvis	White House Steward to President Clinton.
Charles O'Malley	White House Operations Deputy Chief.
Jennifer Palmieri	Former Special Assistant to the Chief of Staff.
Debra Schiff	Receptionist, West Wing Lobby.
Jamie Beth Schwartz	Former Special Assistant to the Social Secretary in the White House Social Office.
Patsy Thomasson	Director of the Office of Administration, Executive Office of the President.
Kathleen Willey	Former White House Volunteer.
Michael Williams	Former White House Intern.
Department of Defense Employees	
Kenneth Bacon	Assistant Secretary of Defense for Public Affairs; Monica Lewinsky's Pentagon Supervisor.
Elizabeth Bailey	Special Assistant to the Secretary of Defense for White House Liaison.
Clifford Bernath	Former Deputy to Assistant Secretary of Defense for Public Affairs.
Donna Boltz	Assistant in the Office of the Assistant Secretary of Defense for Public Affairs.
Jeremy "Mike" Boorda	Admiral, United States Navy (deceased).
Richard Bridges	Colonel, Director for Defense Information.
Rebecca Cooper	Chief of Staff, United States Mission to the United Nations.
Monica Ramirez Cranick	Sergeant, Broadcast Engineer, Office of the Secretary of Defense for Public Affairs.
Marsha Dimel	Administrative Support Specialist for Personnel and Administration in the National Security Council.
Charles Duncan	Former Special Assistant to the Secretary of Defense for Public Affairs.
Kate Friedrich	Special Assistant, National Security Advisor.
Jeff Gradick	Commander, Military Assistant to the Deputy Assistant to the Assistant Secretary of Defense for Public Affairs.
James Graybeal	Lt. Commander, Military Assistant to the Deputy Assistant to the Assistant Secretary of Defense for Public Affairs.
Mark Huffman	Office Manager, Office of Public Affairs, United States Department of Defense.
Jodi Kessinger	Former Administrative Assistant, Office of the National Security Advisor, National Security Council.
Janet Reno	Attorney General of the United States.

Darby Ellen Stott	Special Assistant, White House Press Secretary.
Mona Sutphen	Special Assistant to the United States Ambassador to the United Nations.
Robert Tyrer	Chief of Staff for the Secretary of Defense.
Isabelle Watkins	Executive Assistant to Bill Richardson.
Monica Lewinsky's Friends/Family/Acquaintances	
Andrew Bleiler	Former Boyfriend of Monica Lewinsky.
Catherine Allday Davis	Friend of Monica Lewinsky.
Kelly Lynn Davis	Friend of Monica Lewinsky.
Neysa Erbland	Friend of Monica Lewinsky.
Kathleen Estep	Counselor to Monica Lewinsky.
Deborah Finerman	Aunt of Monica Lewinsky.
David Grobanie	Owner of Briarwood Bookstore.
Dr. Irene Kassorla	Therapist to Monica Lewinsky.
Walter Kaye	Family friend of Monica Lewinsky.
Marcia Lewis	Mother of Monica Lewinsky.
Ashley Raines	Friend of Monica Lewinsky and White House Director of Office and Policy Development Operations and Special Liaison.
Peter Strauss	Husband of Marcia Lewis.
Linda Tripp	Friend of Monica Lewinsky.
Natalie Rose Ungvari	Friend of Monica Lewinsky.
Dale Young	Family friend of Monica Lewinsky.
Monica Lewinsky's New York Employment Contacts	
Celia Berk	Managing Director of Human Resources at Burson-Marstellar.
Ursula Fairbairn	Executive Vice President, Human Resources and Quality of American Express.
Peter Georgescu	Chairman and Chief Executive Officer at Young & Rubicam.
Richard Halerpin	Executive Vice President and Special Counsel to the President of Revlon.
Barbara Naismith	Secretary at American Express.
Ronald Perelman	Chairman of the Board of McAndrews & Forbes Holding Incorporated.
Thomas Schick	Executive Vice President, Corporate Affairs and Communications at American Express.
Douglas S. Willey	Vice President, Hecht-Spencer.
Secret Service	
William C. Bordley	Secret Service Uniformed Officer.
Gary Byrne	Secret Service Uniformed Officer.
Daniel Carbonetti	Secret Service Uniformed Officer.
Brent Chinery	Secret Service Uniformed Officer.
Larry Cockell	Special Agent In Charge, Secret Service Presidential Protective Division.
Douglas Dragotta	Secret Service Uniformed Officer.
Robert C. Ferguson	Secret Service Uniformed Officer.
Lewis Fox	Retired Secret Service Uniformed Officer.
Mathew Fitsch	Lt., Secret Service Uniformed Division.
Nelson Garabito	Secret Service Uniformed Officer.
Bryan Hall	Secret Service Uniformed Officer.
Brian Henderson	Secret Service Uniformed Officer.
Reginald Hightower	Secret Service Uniformed Officer.
Oliver Janney	Secret Service Uniformed Officer.
Greg LaDow	Secret Service Uniformed Officer.
William Ludtke III	Secret Service Uniformed Officer.
Tim Lynn	Secret Service Uniformed Officer.
Lewis Merletti	Director, Secret Service.
John Muskett	Secret Service Uniformed Officer.
Fremon Myles, Jr	Secret Service Uniformed Officer.
Robert Myrick	Secret Service Uniformed Officer.

Gary Niedzwieki	Secret Service Uniformed Officer.
Joe Overstreet	Secret Service Uniformed Officer.
Steven Pape	Secret Service Uniformed Officer.
Stacy Porter	Secret Service Uniformed Officer.
Geoffrey Purdie	Secret Service Uniformed Officer.
William Clair Shegogue	Secret Service Uniformed Officer.
Barry Smith	Secret Service Uniformed Officer.
William Tyler	Secret Service Uniformed Officer.
Sandra Verna	Secret Service Uniformed Officer.
Keith Williams	Secret Service Uniformed Officer, Sergeant.
Michael Wilson	Secret Service Uniformed Officer.
Bryant Withrow	Lt., Secret Service Uniformed Office Division.
Lawyers and Judges	
Kirbe Behre	Linda Tripp's former attorney.
Robert Bennett	Attorney for President Clinton.
Robert Bittman	Deputy Independent Counsel.
Plato Cacheris	Attorney for Monica Lewinsky.
Frank Carter	Monica Lewinsky's former attorney.
Lloyd Cutler	Former White House Counsel.
Mitchell Ettinger	Attorney for President Clinton.
Vince Foster	Former Deputy White House Counsel.
Hon. Norma Holloway Johnson	Chief Judge, U.S. District Court for the District of Columbia.
David Kendall	Attorney for President Clinton.
Karl Metzner	Attorney for Betty Currie.
Kathy Sexton	Attorney for President Clinton.
Hon. Susan Webber Wright	U.S. District Judge presiding over *Jones* v. *Clinton* civil suit.
Hon. David Tatel	Judge, U.S. Court of Appeals for the D.C. Circuit.
Media	
Matt Drudge	Drudge Report.
Kristen Ganong	Manager of Publications, The Heritage Foundation.
Lucianne Goldberg	Literary Agent.
Michael Isikoff	Reporter, Newsweek Magazine.
Jim Lehrer	Television Journalist.
Eleanor Mondale	Reporter, CBS News.
Susan Schmidt	Correspondent, Washington Post.
Foreign Dignitaries	
Yitzak Rabin	Former Prime Minister of Israel.
Ernesto Zedillo	President of Mexico.
Other	
Ron Brown	Former Commerce Secretary.
Patrick Fallon	Special Agent, Federal Bureau of Investigation.
Webster L. Hubbell	Former Associate Attorney General, Friend of the Clinton Family.

INTRODUCTION

As required by Section 595(c) of Title 28 of the United States Code, the Office of the Independent Counsel ("OIC" or "Office") hereby submits substantial and credible information that President William Jefferson Clinton committed acts that may constitute grounds for an impeachment.[1]

The information reveals that President Clinton:

- lied under oath at a civil deposition while he was a defendant in a sexual harassment lawsuit;
- lied under oath to a grand jury;
- attempted to influence the testimony of a potential witness who had direct knowledge of facts that would reveal the falsity of his deposition testimony;
- attempted to obstruct justice by facilitating a witness's plan to refuse to comply with a subpoena;
- attempted to obstruct justice by encouraging a witness to file an affidavit that the President knew would be false, and then by making use of that false affidavit at his own deposition;
- lied to potential grand jury witnesses, knowing that they would repeat those lies before the grand jury; and
- engaged in a pattern of conduct that was inconsistent with his constitutional duty to faithfully execute the laws.

The evidence shows that these acts, and others, were part of a pattern that began as an effort to prevent the disclosure of information about the President's relationship with a former White House intern and employee, Monica S. Lewinsky, and continued as an effort to prevent the information from being disclosed in an ongoing criminal investigation.

FACTUAL BACKGROUND

In May 1994, Paula Corbin Jones filed a lawsuit against William Jefferson Clinton in the United States District Court for the Eastern District of Arkansas.[2] Ms. Jones alleged that while he was the Governor of Arkansas, President Clinton sexually harassed her during an incident in a Little Rock hotel room.[3] President Clinton

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[1] Section 595(c) of Title 28 of the United States Code is part of the Ethics in Government Act. The section provides: *(c) Information relating to impeachment.*—An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title [concerning the assignment of judges to the Special Division that appoints an independent counsel] shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

[2] Ms. Jones also named Arkansas State Trooper Danny Ferguson as a defendant. For a detailed background of the *Jones* v. *Clinton* lawsuit, see the accompanying Appendix, Tab C.

[3] In 1991, Ms. Jones was an employee of the Arkansas Industrial Development Corporation. Ms. Jones alleged that while at work at a meeting at the Excelsior Hotel that day, she was invited into a hotel room with Governor Clinton, and that once she was there, the Governor exposed his genitals and asked her to perform oral sex on him. Ms. Jones alleged that she suf-

Continued

denied the allegations. He also challenged the ability of a private litigant to pursue a lawsuit against a sitting President. In May 1997, the Supreme Court unanimously rejected the President's legal argument. The Court concluded that Ms. Jones, "[l]ike every other citizen who properly invokes [the District Court's] jurisdiction * * * has a right to an orderly disposition of her claims," and that therefore Ms. Jones was entitled to pursue her claims while the President was in office.[4] A few months later, the pretrial discovery process began.[5]

One sharply disputed issue in the *Jones* litigation was the extent to which the President would be required to disclose information about sexual relationships he may have had with "other women." Ms. Jones's attorneys sought disclosure of this information, arguing that it was relevant to proving that the President had propositioned Ms. Jones. The President resisted the discovery requests, arguing that evidence of relationships with other women (if any) was irrelevant.

In late 1997, the issue was presented to United States District Judge Susan Webber Wright for resolution. Judge Wright's decision was unambiguous. For purposes of pretrial discovery, President Clinton was required to provide certain information about his alleged relationships with other women. In an order dated December 11, 1997, for example, Judge Wright said: "The Court finds, therefore, that the plaintiff is entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees."[6] Judge Wright left for another day the issue whether any information of this type would be admissible were the case to go to trial. But for purposes of answering the written questions served on the President, and for purposes of answering questions at a deposition, the District Court ruled that the President must respond.

In mid-December 1997, the President answered one of the written discovery questions posed by Ms. Jones on this issue. When asked to identify all women who were state or federal employees and with whom he had had "sexual relations" since 1986,[7] the President answered under oath: "None."[8] For purposes of this interrogatory, the term "sexual relations" was not defined.

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fered various job detriments after refusing Governor Clinton's advances. This Referral expresses no view on the factual or legal merit, or lack thereof, of Ms. Jones's claims.

[4] *Jones* v. *Clinton,* 117 S. Ct. 1636, 1652 (1997).

[5] The purpose of discovery in a civil lawsuit is "to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." Fed. R. Civ. P. 26 advisory committee notes (1946). The discovery process allows the parties to obtain from their respective opponents written answers to interrogatories, oral testimony in depositions under oath, documents, and other tangible items so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

[6] 921–DC–00000461 (Dec. 11, 1997 Order at 3). Similarly, in a December 18, 1997 Order, Judge Wright noted that "the issue [was] one of discovery, not admissibility of evidence at trial. Discovery, as all counsel know, by its very nature takes unforeseen twists and turns and goes down numerous paths, and whether those paths lead to the discovery of admissible evidence often simply cannot be predetermined." 1414–DC–00001012–13 (Dec. 18, 1997 Order at 7–8).

[7] V002–DC–00000020 (President Clinton's Responses to Plaintiff's Second Set of Interrogatories at 5).

[8] V002–DC–00000053 (President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories at 2). During discovery in a civil lawsuit, the parties must answer written questions ("interrogatories") that are served on them by their opponent. Fed. R. Civ. P. 33. The answering party must sign a statement under penalty of perjury attesting to the truthfulness of the answers. *Id.*

On January 17, 1998, President Clinton was questioned under oath about his relationships with other women in the workplace, this time at a deposition. Judge Wright presided over the deposition. The President was asked numerous questions about his relationship with Monica Lewinsky, by then a 24-year-old former White House intern, White House employee, and Pentagon employee. Under oath and in the presence of Judge Wright, the President denied that he had engaged in a "sexual affair," a "sexual relationship," or "sexual relations" with Ms. Lewinsky. The President also stated that he had no specific memory of having been alone with Ms. Lewinsky, that he remembered few details of any gifts they might have exchanged, and indicated that no one except his attorneys had kept him informed of Ms. Lewinsky's status as a potential witness in the *Jones* case.

The Investigation

On January 12, 1998, this Office received information that Monica Lewinsky was attempting to influence the testimony of one of the witnesses in the Jones litigation, and that Ms. Lewinsky herself was prepared to provide false information under oath in that lawsuit. The OIC was also informed that Ms. Lewinsky had spoken to the President and the President's close friend Vernon Jordan about being subpoenaed to testify in the Jones suit, and that Vernon Jordan and others were helping her find a job. The allegations with respect to Mr. Jordan and the job search were similar to ones already under review in the ongoing Whitewater investigation.[9]

After gathering preliminary evidence to test the information's reliability, the OIC presented the evidence to Attorney General Janet Reno. Based on her review of the information, the Attorney General determined that a further investigation by the Independent Counsel was required.

On the following day, Attorney General Reno petitioned the Special Division of the United States Court of Appeals for the District of Columbia Circuit, on an expedited basis, to expand the jurisdiction of Independent Counsel Kenneth W. Starr. On January 16, 1998, in response to the Attorney General's request, the Special Division issued an order that provides in pertinent part:

> The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones* v. *Clinton*.[10]

On January 28, 1998, after the allegations about the President's relationship with Ms. Lewinsky became public, the OIC filed a Motion for Limited Intervention and a Stay of Discovery in *Jones* v. *Clinton*. The OIC argued that the civil discovery process should be

[9] For a brief discussion of the scope of the OIC's jurisdiction, see "The Scope of the Referral," below.

[10] The full text of the Special Division's Order is set forth in the Appendix, Tab A.

halted because it was having a negative effect on the criminal investigation. The OIC represented to the Court that numerous individuals then under subpoena in *Jones,* including Monica Lewinsky, were integral to the OIC's investigation, and that courts routinely stayed discovery in such circumstances.[11]

The next day Judge Wright responded to the OIC's motion. The Court ruled that discovery would be permitted to continue, except to the extent that it sought information about Monica Lewinsky. The Court acknowledged that "evidence concerning Monica Lewinsky might be relevant to the issues in [the *Jones*] case." [12] It concluded, however, that this evidence was not "essential to the core issues in this case," and that some of that evidence "might even be inadmissible." [13] The Court found that the potential value of this evidence was outweighed by the potential delay to the *Jones* case in continuing to seek discovery about Ms. Lewinsky.[14] The Court also was concerned that the OIC's investigation "could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case." [15]

On March 9, 1998, Judge Wright denied Ms. Jones's motion for reconsideration of the decision regarding Monica Lewinsky. The order states:

> The Court readily acknowledges that evidence of the Lewinsky matter might have been relevant to plaintiff's case and, as she argues, that such evidence might possibly have helped her establish, among other things, intent, absence of mistake, motive, and habit on the part of the President.* * * Nevertheless, whatever relevance such evidence may otherwise have * * * it simply is not essential to the core issues in this case * * *.[16]

On April 1, 1998, Judge Wright granted President Clinton's motion for summary judgment, concluding that even if the facts alleged by Paula Jones were true, her claims failed as a matter of law.[17] Ms. Jones has filed an appeal, and as of the date of this Referral, the matter remains under consideration by the United States Court of Appeals for the Eighth Circuit.

After the dismissal of Ms. Jones's lawsuit, the criminal investigation continued. It was (and is) the view of this Office that any attempt to obstruct the proper functioning of the judicial system, regardless of the perceived merits of the underlying case, is a serious matter that warrants further inquiry. After careful consideration of all the evidence, the OIC has concluded that the evidence of wrongdoing is substantial and credible, and that the wrongdoing is of sufficient gravity that it warrants referral to Congress.[18]

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[11] *Jones* v. *Clinton,* Motion of the United States for Limited Intervention and a Stay of Discovery, at 6. The overlap in the proceedings was significant. Witnesses called before the grand jury in the criminal investigation had been subpoenaed by both parties to the civil case; defendant's counsel had subpoenaed information from the OIC; and the plaintiff's attorneys had subpoenaed documents directly related to the criminal matter.

[12] *Jones* v. *Clinton,* Order, Jan. 29, 1998, at 2.

[13] *Id.*

[14] *Id.* at 2–3.

[15] *Id.* at 3.

[16] *Jones* v. *Clinton,* 993 F. Supp. 1217, 1222 (E.D. Ark. 1998) (footnote and emphasis omitted).

[17] *Jones* v. *Clinton,* 990 F. Supp. 657, 679 (E.D. Ark. 1998).

[18] In the course of its investigation, the OIC gathered information from a variety of sources, including the testimony of witnesses before the grand jury. Normally a federal prosecutor is pro-

THE SIGNIFICANCE OF THE EVIDENCE OF WRONGDOING

It is not the role of this Office to determine whether the President's actions warrant impeachment by the House and removal by the Senate; those judgments are, of course, constitutionally entrusted to the legislative branch.[19] This Office is authorized, rather, to conduct criminal investigations and to seek criminal prosecutions for matters within its jurisdiction.[20] In carrying out its investigation, however, this Office also has a statutory duty to disclose to Congress information that "may constitute grounds for an impeachment," a task that inevitably requires judgment about the seriousness of the acts revealed by the evidence.

From the beginning, this phase of the OIC's investigation has been criticized as an improper inquiry into the President's personal behavior; indeed, the President himself suggested that specific inquiries into his conduct were part of an effort to "criminalize my private life." [21] The regrettable fact that the investigation has often required witnesses to discuss sensitive personal matters has fueled this perception.

All Americans, including the President, are entitled to enjoy a private family life, free from public or governmental scrutiny. But the privacy concerns raised in this case are subject to limits, three of which we briefly set forth here.

First. The first limit was imposed when the President was sued in federal court for alleged sexual harassment. The evidence in such litigation is often personal. At times, that evidence is highly embarrassing for both plaintiff and defendant. As Judge Wright noted at the President's January 1998 deposition, "I have never had a sexual harassment case where there was not some embarrassment." [22] Nevertheless, Congress and the Supreme Court have

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hibited by Rule 6(e) of the Federal Rules of Criminal Procedure from disclosing grand jury material, unless it obtains permission from a court or is otherwise authorized by law to do so. This Office concluded that the statutory obligation of disclosure imposed on an Independent Counsel by 28 U.S.C. § 595(c) grants such authority. Nevertheless, out of an abundance of caution, the OIC obtained permission from the Special Division to disclose grand jury material as appropriate in carrying out its statutory duty. A copy of the disclosure order entered by the Special Division is set forth in the Appendix, Tab B. We also advised Chief Judge Norma Holloway Johnson, who supervises the principal grand jury in this matter, of our determination on that issue.

[19] U.S. Const., art. I, § 2, cl. 5; art. I, § 3, cl. 6.

[20] 28 U.S.C. § 594(a).

[21] Before the grand jury, the President refused to answer certain questions about his conduct with Ms. Lewinsky on the ground that he believed the inquiries were unnecessary "and . . . I think, frankly, go too far in trying to criminalize my private life." Clinton 8/17/98 GJ at 94.

Others have argued that alleged "lies about sex" have nothing to do with the President's performance in office, and thus, are inconsequential. Former White House Counsel Jack Quinn articulated this view:

> This is a matter of sex between consenting adults, and the question of whether or not one or the other was truthful about it. . . . This doesn't go to the question of his conduct in office. And, in that sense, it's trivial.

John F. Harris, "In Political Washington, A Confession Consensus," *Washington Post,* Aug. 4, 1998, at A1 (quoting Quinn's statement on CBS's "Face the Nation").

The President echoed this theme in his address to the Nation on August 17, 1998, following his grand jury testimony:

> . . . I intend to reclaim my family life for my family. It's nobody's business but ours. Even Presidents have private lives. It is time to stop the pursuit of personal destruction and the prying into private lives and get on with our national life.

Testing of a President: In His Own Words, Last Night's Address, *The New York Times,* Aug. 18, 1998, at A12.

[22] Clinton 1/17/98 Depo. at 9. As two commentators have noted: "[T]o the extent that discovery is permitted with respect to the sexual activities of either the complainant or the alleged har-

Continued

concluded that embarrassment-related concerns must give way to the greater interest in allowing aggrieved parties to pursue their claims. Courts have long recognized the difficulties of proving sexual harassment in the workplace, inasmuch as improper or unlawful behavior often takes place in private.[23] To excuse a party who lied or concealed evidence on the ground that the evidence covered only "personal" or "private" behavior would frustrate the goals that Congress and the courts have sought to achieve in enacting and interpreting the Nation's sexual harassment laws. That is particularly true when the conduct that is being concealed—sexual relations in the workplace between a high official and a young subordinate employee—itself conflicts with those goals.

Second. The second limit was imposed when Judge Wright required disclosure of the precise information that is in part the subject of this Referral. A federal judge specifically ordered the President, on more than one occasion, to provide the requested information about relationships with other women, including Monica Lewinsky. The fact that Judge Wright later determined that the evidence would not be admissible at trial, and still later granted judgment in the President's favor, does not change the President's legal duty at the time he testified. Like every litigant, the President was entitled to object to the discovery questions, and to seek guidance from the court if he thought those questions were improper. But having failed to convince the court that his objections were well founded, the President was duty bound to testify truthfully and fully. Perjury and attempts to obstruct the gathering of evidence can never be an acceptable response to a court order, regardless of the eventual course or outcome of the litigation.

The Supreme Court has spoken forcefully about perjury and other forms of obstruction of justice:

> In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative.[24]

The insidious effects of perjury occur whether the case is civil or criminal. Only a few years ago, the Supreme Court considered a false statement made in a civil administrative proceeding: "False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant affront' to the truth-seeking

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asser, courts likely will freely entertain motions to limit the availability of such information to the parties and their counsel and to prohibit general dissemination of such sensitive data to third parties." *See* Barbara Lindeman & David D. Kadue, *Sexual Harassment in Employment Law* 563 (1992).

[23] A sexual harassment case can sometimes boil down to a credibility battle between the parties, in which "the existence of corroborative evidence or the lack thereof is likely to be crucial." *Henson* v. *City of Dundee,* 682 F.2d 897, 912 n.25 (11th Cir. 1982). If there are no eyewitnesses, it can be critical for a plaintiff to learn in discovery whether the defendant has committed the same kind of acts before or since. Thus, the Equal Employment Opportunity Commission explained in a 1990 policy statement that the plaintiff's allegations of an incident of sexual harassment "would be further buttressed if other employees testified that the supervisor propositioned them as well." EEOC Policy Guidance (1990). The rules of evidence establish that such corroboration may be used to show the defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). In short, a defendant's sexual history, at least with respect to other employees, is ordinarily discoverable in a sexual harassment suit.

[24] *United States* v. *Mandujano,* 425 U.S. 564, 576 (1975) (plurality opinion).

function of adversary proceedings. . . . Perjury should be severely sanctioned in appropriate cases."[25] Stated more simply, "[p]erjury is an obstruction of justice."[26]

Third. The third limit is unique to the President. "The Presidency is more than an executive responsibility. It is the inspiring symbol of all that is highest in American purpose and ideals."[27] When he took the Oath of Office in 1993 and again in 1997, President Clinton swore that he would "faithfully execute the Office of President."[28] As the head of the Executive Branch, the President has the constitutional duty to "take Care that the Laws be faithfully executed."[29] The President gave his testimony in the *Jones* case under oath and in the presence of a federal judge, a member of a co-equal branch of government; he then testified before a federal grand jury, a body of citizens who had themselves taken an oath to seek the truth. In view of the enormous trust and responsibility attendant to his high Office, the President has a manifest duty to ensure that his conduct at all times complies with the law of the land.

In sum, perjury and acts that obstruct justice by any citizen—whether in a criminal case, a grand jury investigation, a congressional hearing, a civil trial, or civil discovery—are profoundly serious matters. When such acts are committed by the President of the United States, we believe those acts "may constitute grounds for an impeachment."

THE SCOPE OF THE REFERRAL

1. Background of the Investigation.—The link between the OIC's jurisdiction—as it existed at the end of 1997—and the matters set forth in this Referral is complex but direct. In January 1998, Linda Tripp, a witness in three ongoing OIC investigations, came forward with allegations that: (i) Monica Lewinsky was planning to commit perjury in *Jones* v. *Clinton,* and (ii) she had asked Ms. Tripp to do the same. Ms. Tripp also stated that: (i) Vernon Jordan had counseled Ms. Lewinsky and helped her obtain legal representation in the *Jones* case, and (ii) at the same time, Mr. Jordan was helping Ms. Lewinsky obtain employment in the private sector.

OIC investigators and prosecutors recognized parallels between Mr. Jordan's relationship with Ms. Lewinsky and his earlier relationship with a pivotal Whitewater-Madison figure, Webster L. Hubbell. Prior to January 1998, the OIC possessed evidence that

[25] *ABF Freight Sys., Inc.* v. *NLRB,* 510 U.S. 317, 323 (1994).

[26] *United States* v. *Norris,* 300 U.S. 564, 574 (1937). There is occasional misunderstanding to the effect that perjury is somehow distinct from "obstruction of justice." While the crimes are distinct, they are in fact variations on a single theme: preventing a court, the parties, and the public from discovering the truth. Perjury, subornation of perjury, concealment of subpoenaed documents, and witness tampering are all forms of obstruction of justice.

[27] *See* Eugene Lyons, *Herbert Hoover: A Biography* 337 (1964) (quoting Hoover).

[28] U.S. Const., art. II, §1, cl. 8.

[29] U.S. Const., art. II, §3; *see also* George Washington, Second Inaugural Address, March 4, 1793:

> Previous to the execution of any official act of the President the Constitution requires an oath of office. This oath I am now about to take, and in your presence: That if it shall be found during my administration of the Government I have in any instance violated willingly or knowingly the injunctions thereof, I may (besides incurring constitutional punishment) be subject to the upbraidings of all who are now witnesses of the present solemn ceremony.

Inaugural Addresses of the Presidents of the United States, H.R. Doc. No. 82–540, at 4 (1954).

Vernon Jordan—along with other high-level associates of the President and First Lady—helped Mr. Hubbell obtain lucrative consulting contracts while he was a potential witness and/or subject in the OIC's ongoing investigation. This assistance took place, moreover, while Mr. Hubbell was a target of a separate criminal investigation into his own conduct. The OIC also possessed evidence that the President and the First Lady knew and approved of the Hubbell-focused assistance.

Specifically, in the wake of his April 1994 resignation from the Justice Department, Mr. Hubbell launched a private consulting practice in Washington, D.C. In the startup process, Mr. Hubbell received substantial aid from important public and private figures. On the day prior to Mr. Hubbell announcing his resignation, White House Chief of Staff Thomas "Mack" McLarty attended a meeting at the White House with the President, First Lady, and others, where Mr. Hubbell's resignation was a topic of discussion.

At some point after the White House meeting, Mr. McLarty spoke with Vernon Jordan about Mr. Jordan's assistance to Mr. Hubbell. Mr. Jordan introduced Mr. Hubbell to senior executives at New York-based MacAndrews & Forbes Holding Co. Mr. Jordan is a director of Revlon, Inc., a company controlled by MacAndrews & Forbes. The introduction was successful; MacAndrews & Forbes retained Mr. Hubbell at a rate of $25,000 per quarter. Vernon Jordan informed President Clinton that he was helping Mr. Hubbell. [30]

By late 1997, this Office was investigating whether a relationship existed between consulting payments to Mr. Hubbell and his lack of cooperation (specifically, his incomplete testimony) with the OIC's investigation. [31] In particular, the OIC was investigating whether Mr. Hubbell concealed information about certain core Arkansas matters, namely, the much-publicized Castle Grande real estate project and related legal work by the Rose Law Firm, including the First Lady.

Against this background, the OIC considered the January 1998 allegations that: (i) Ms. Lewinsky was prepared to lie in order to benefit the President, and (ii) Vernon Jordan was assisting Ms. Lewinsky in the *Jones* litigation, while simultaneously helping her apply for a private-sector job with, among others, Revlon, Inc.

Based in part on these similarities, the OIC undertook a preliminary investigation. On January 15, 1998, this Office informed the Justice Department of the results of our inquiry. The Attorney General immediately applied to the Special Division of the Court of Appeals for the District of Columbia Circuit for an expansion of the OIC's jurisdiction. The Special Division granted this request and authorized the OIC to determine whether Monica Lewinsky or others had violated federal law in connection with the *Jones* v. *Clinton* case.

2. Current Status of the Investigation.—When the OIC's jurisdiction was expanded to cover the Lewinsky matter in January 1998, several matters remained under active investigation by this Office. Evidence was being gathered and evaluated on, among other

[30] Jordan, House Testimony, 7/24/97, at 46.

[31] From April through November 1994, 17 different persons or entities retained Mr. Hubbell as a consultant. In 1994, he collected $450,010 for this work. In 1995, he collected $91,750, despite beginning a 28-month prison term in August of that year.

things, events related to the Rose Law Firm's representation of Madison Guaranty Savings & Loan Association; events related to the firings in the White House Travel Office; and events related to the use of FBI files. Since the current phase of the investigation began, additional events arising from the Lewinsky matter have also come under scrutiny, including possible perjury and obstruction of justice related to former White House volunteer Kathleen Willey, and the possible misuse of the personnel records of Pentagon employee Linda Tripp.

From the outset, it was our strong desire to complete all phases of the investigation before deciding whether to submit to Congress information—if any—that may constitute grounds for an impeachment. But events and the statutory command of Section 595(c) have dictated otherwise. As the investigation into the President's actions with respect to Ms. Lewinsky and the *Jones* litigation progressed, it became apparent that there was a significant body of substantial and credible information that met the Section 595(c) threshold. As that phase of the investigation neared completion, it also became apparent that a delay of this Referral until the evidence from all phases of the investigation had been evaluated would be unwise. Although Section 595(c) does not specify when information must be submitted, its text strongly suggests that information of this type belongs in the hands of Congress as soon as the Independent Counsel determines that the information is reliable and substantially complete.

All phases of the investigation are now nearing completion. This Office will soon make final decisions about what steps to take, if any, with respect to the other information it has gathered. Those decisions will be made at the earliest practical time, consistent with our statutory and ethical obligations.

THE CONTENTS OF THE REFERRAL

The Referral consists of several parts. Part One is a Narrative. It begins with an overview of the information relevant to this investigation, then sets forth that information in chronological sequence. A large part of the Narrative is devoted to a description of the President's relationship with Monica Lewinsky. The nature of the relationship was the subject of many of the President's false statements, and his desire to keep the relationship secret provides a motive for many of his actions that apparently were designed to obstruct justice.

The Narrative is lengthy and detailed. It is the view of this Office that the details are crucial to an informed evaluation of the testimony, the credibility of witnesses, and the reliability of other evidence. Many of the details reveal highly personal information; many are sexually explicit. This is unfortunate, but it is essential. The President's defense to many of the allegations is based on a close parsing of the definitions that were used to describe his conduct. We have, after careful review, identified no manner of providing the information that reveals the falsity of the President's statements other than to describe his conduct with precision.

Part Two of the Referral is entitled "Information that May Constitute Grounds for An Impeachment." This "Grounds" portion of the Referral summarizes the specific evidence that the President

lied under oath and attempted to obstruct justice. This Part is designed to be understandable if read without the Narrative, although the full context in which the potential grounds for impeachment arise can best be understood if considered against the backdrop of information set forth in Part One.

Several volumes accompany the Referral. The Appendix contains relevant court orders, tables, a discussion of legal and evidentiary issues, background information on the *Jones* litigation, a diagram of the Oval Office, and other reference material. We next set forth a series of "Document Supplements," which attempt to provide some of the most important support material in an accessible format. Document Supplement A contains transcripts of the President's deposition testimony and grand jury testimony; Document Supplement B contains transcripts of Monica Lewinsky's testimony and interview statements. Document Supplements C, D, and E set forth the full text of the documents cited in the Referral. Although every effort has been made to provide full and accurate quotations of witnesses in their proper context, we urge review of the full transcripts of the testimony cited below.

I. NATURE OF PRESIDENT CLINTON'S RELATIONSHIP WITH MONICA LEWINSKY

A. INTRODUCTION

This Referral presents substantial and credible information that President Clinton criminally obstructed the judicial process, first in a sexual harassment lawsuit in which he was the defendant and then in a grand jury investigation. The opening section of the Narrative provides an overview of the object of the President's cover-up, the sexual relationship between the President and Ms. Lewinsky. Subsequent sections recount the evolution of the relationship chronologically, including the sexual contacts, the President's efforts to get Ms. Lewinsky a job, Ms. Lewinsky's subpoena in *Jones* v. *Clinton,* the role of Vernon Jordan, the President's discussions with Ms. Lewinsky about her affidavit and deposition, the President's deposition testimony in *Jones*, the President's attempts to coach a potential witness in the harassment case, the President's false and misleading statements to aides and to the American public after the Lewinsky story became public, and, finally, the President's testimony before a federal grand jury.

B. EVIDENCE ESTABLISHING NATURE OF RELATIONSHIP

1. Physical Evidence

Physical evidence conclusively establishes that the President and Ms. Lewinsky had a sexual relationship. After reaching an immunity and cooperation agreement with the Office of the Independent Counsel on July 28, 1998, Ms. Lewinsky turned over a navy blue dress that she said she had worn during a sexual encounter with the President on February 28, 1997. According to Ms. Lewinsky, she noticed stains on the garment the next time she took it from her closet. From their location, she surmised that the stains were the President's semen. [1]

Initial tests revealed that the stains are in fact semen. [2] Based on that result, the OIC asked the President for a blood sample. [3] After requesting and being given assurances that the OIC had an evidentiary basis for making the request, the President agreed. [4] In the White House Map Room on August 3, 1998, the White House Physician drew a vial of blood from the President in the presence of an FBI agent and an OIC attorney. [5] By conducting the two standard DNA comparison tests, the FBI Laboratory concluded that the President was the source of the DNA obtained from the

[1] Lewinsky 8/6/98 GJ at 31-32, 39-40; DB Photos 0004 (photo of dress).
[2] FBI Lab Report, 8/3/98.
[3] OIC letter to David Kendall, 7/31/98 (1st letter of day).
[4] Kendall letter to OIC, 7/31/98; OIC letter to Kendall, 7/31/98 (2d letter of day); Kendall letter to OIC, 8/3/98; OIC letter to Kendall, 8/3/98.
[5] FBI Observation Report (White House), 8/3/98.

dress.[6] According to the more sensitive RFLP test, the genetic markers on the semen, which match the President's DNA, are characteristic of one out of 7.87 trillion Caucasians.[7]

In addition to the dress, Ms. Lewinsky provided what she said were answering machine tapes containing brief messages from the President, as well as several gifts that the President had given her.

2. Ms. Lewinsky's Statements

Ms. Lewinsky was extensively debriefed about her relationship with the President. For the initial evaluation of her credibility, she submitted to a detailed "proffer" interview on July 27, 1998.[8] After entering into a cooperation agreement, she was questioned over the course of approximately 15 days. She also provided testimony under oath on three occasions: twice before the grand jury, and, because of the personal and sensitive nature of particular topics, once in a deposition. In addition, Ms. Lewinsky worked with prosecutors and investigators to create an 11-page chart that chronologically lists her contacts with President Clinton, including meetings, phone calls, gifts, and messages.[9] Ms. Lewinsky twice verified the accuracy of the chart under oath.[10]

In the evaluation of experienced prosecutors and investigators, Ms. Lewinsky has provided truthful information. She has not falsely inculpated the President. Harming him, she has testified, is "the last thing in the world I want to do."[11]

Moreover, the OIC's immunity and cooperation agreement with Ms. Lewinsky includes safeguards crafted to ensure that she tells the truth. Court-ordered immunity and written immunity agreements often provide that the witness can be prosecuted only for false statements made during the period of cooperation, and not for the underlying offense. The OIC's agreement goes further, providing that Ms. Lewinsky will lose her immunity altogether if the government can prove to a federal district judge—by a preponderance of the evidence, not the higher standard of beyond a reasonable doubt—that she lied. Moreover, the agreement provides that, in the course of such a prosecution, the United States could introduce into evidence the statements made by Ms. Lewinsky during her cooperation. Since Ms. Lewinsky acknowledged in her proffer interview and in debriefings that she violated the law, she has a strong incentive to tell the truth: If she did not, it would be relatively

[6] FBI Lab Reports, 8/6/98 & 8/17/98. The FBI Laboratory performed polymerase chain reaction analysis (PCR) and restriction fragment length polymorphisim analysis (RFLP). RFLP, which requires a larger sample, is the more precise method. *United States* v. *Hicks,* 103 F.3d 837, 844-847 (9th Cir. 1996).

[7] FBI Lab Report, 8/17/98, at 2.

[8] Lewinsky 7/27/98 Int. During earlier negotiations with this Office, Ms. Lewinsky provided a 10-page handwritten proffer statement summarizing her dealings with the President and other matters under investigation. Lewinsky 2/1/98 Statement. Ms. Lewinsky later confirmed the accuracy of the statement in grand jury testimony. Lewinsky 8/20/98 GJ at 62-63. The negotiations in January and February 1998 (which produced the written proffer) did not result in a cooperation agreement because Ms. Lewinsky declined to submit to a face-to-face proffer interview, which the OIC deemed essential because of her perjurious *Jones* affidavit, her efforts to persuade Linda Tripp to commit perjury, her assertion in a recorded conversation that she had been brought up to regard lying as necessary, and her forgery of a letter while in college. In July 1998, Ms. Lewinsky agreed to submit to a face-to-face interview, and the parties were able to reach an agreement.

[9] Ex. ML-7 to Lewinsky 8/6/98 GJ.

[10] Lewinsky 8/26/98 Depo. at 5-6; Lewinsky 8/6/98 GJ at 27-28.

[11] Lewinsky 8/26/98 Depo. at 69.

straightforward to void the immunity agreement and prosecute her, using her own admissions against her.

3. Ms. Lewinsky's Confidants

Between 1995 and 1998, Ms. Lewinsky confided in 11 people about her relationship with the President. All have been questioned by the OIC, most before a federal grand jury: Andrew Bleiler, Catherine Allday Davis, Neysa Erbland, Kathleen Estep, Deborah Finerman, Dr. Irene Kassorla, Marcia Lewis, Ashley Raines, Linda Tripp, Natalie Ungvari, and Dale Young.[12] Ms. Lewinsky told most of these confidants about events in her relationship with the President as they occurred, sometimes in considerable detail.

Some of Ms. Lewinsky's statements about the relationship were contemporaneously memorialized. These include deleted email recovered from her home computer and her Pentagon computer, email messages retained by two of the recipients, tape recordings of some of Ms. Lewinsky's conversations with Ms. Tripp, and notes taken by Ms. Tripp during some of their conversations. The Tripp notes, which have been extensively corroborated, refer specifically to places, dates, and times of physical contacts between the President and Ms. Lewinsky.[13]

Everyone in whom Ms. Lewinsky confided in detail believed she was telling the truth about her relationship with the President. Ms. Lewinsky told her psychologist, Dr. Irene Kassorla, about the affair shortly after it began. Thereafter, she related details of sexual encounters soon after they occurred (sometimes calling from her White House office).[14] Ms. Lewinsky showed no indications of delusional thinking, according to Dr. Kassorla, and Dr. Kassorla had no doubts whatsoever about the truth of what Ms. Lewinsky told her.[15] Ms. Lewinsky's friend Catherine Allday Davis testified that she believed Ms. Lewinsky's accounts of the sexual relationship with the President because "I trusted in the way she had confided in me on other things in her life . . . . I just trusted the relationship, so I trusted her."[16] Dale Young, a friend in whom Ms. Lewinsky confided starting in mid-1996, testified:

> [I]f she was going to lie to me, she would have said to me, "Oh, he calls me all the time. He does wonderful things. He can't wait to see me." * * * [S]he would have embellished the story. You know, she wouldn't be telling me, "He told me he'd call me, I waited home all weekend and I didn't do anything and he didn't call and then he didn't call for two weeks."[17]

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[12] Lewinsky 8/6/98 GJ at 59-60, 87; Lewinsky 8/20/98 GJ at 82; Lewinsky 8/24/98 Int. at 8.

[13] Ms. Tripp testified that she took notes on two occasions. Tripp 6/30/98 GJ at 141–42; Tripp 7/7/98 GJ at 153–54; Tripp 7/16/98 GJ at 112–13.

[14] Kassorla 8/28/98 Int. at 2–3. Ms. Lewinsky (who voluntarily waived therapist-patient privilege) consulted Dr. Kassorla in person from 1992 to 1993 and by telephone thereafter. *Id.* at 1. Anticipating that the White House might fire Ms. Lewinsky in order to protect the President, Dr. Kassorla cautioned her patient that workplace romances are generally ill-advised. *Id.* at 2.

[15] Kassorla 8/28/98 Int. at 2, 4. Ms. Lewinsky also consulted another counselor, Kathleen Estep, three times in November 1996. While diagnosing Ms. Lewinsky as suffering from depression and low self-esteem, Ms. Estep considered her self-aware, credible, insightful, introspective, relatively stable, and not delusional. Estep 8/23/98 Int. at 1–4.

[16] Catherine Davis 3/17/98 GJ at 21–22.

[17] Young 6/23/98 GJ at 40. *See also* Catherine Davis 3/17/98 GJ at 73; Erbland 2/12/98 GJ at 25 ("I never had any reason to think she would lie to me. I never knew of her to lie to me

Continued

4. Documents

In addition to her remarks and email to friends, Ms. Lewinsky wrote a number of documents, including letters and draft letters to the President. Among these documents are (i) papers found in a consensual search of her apartment; (ii) papers that Ms. Lewinsky turned over pursuant to her cooperation agreement, including a calendar with dates circled when she met or talked by telephone with the President in 1996 and 1997; and (iii) files recovered from Ms. Lewinsky's computers at home and at the Pentagon.

5. Consistency and Corroboration

The details of Ms. Lewinsky's many statements have been checked, cross-checked, and corroborated. When negotiations with Ms. Lewinsky in January and February 1998 did not culminate in an agreement, the OIC proceeded with a comprehensive investigation, which generated a great deal of probative evidence.

In July and August 1998, circumstances brought more direct and compelling evidence to the investigation. After the courts rejected a novel privilege claim, Secret Service officers and agents testified about their observations of the President and Ms. Lewinsky in the White House. Ms. Lewinsky agreed to submit to a proffer interview (previous negotiations had deadlocked over her refusal to do so), and, after assessing her credibility in that session, the OIC entered into a cooperation agreement with her. Pursuant to the cooperation agreement, Ms. Lewinsky turned over the dress that proved to bear traces of the President's semen. And the President, who had spurned six invitations to testify, finally agreed to provide his account to the grand jury. In that sworn testimony, he acknowledged "inappropriate intimate contact" with Ms. Lewinsky.

Because of the fashion in which the investigation had unfolded, in sum, a massive quantity of evidence was available to test and verify Ms. Lewinsky's statements during her proffer interview and her later cooperation. Consequently, Ms. Lewinsky's statements have been corroborated to a remarkable degree. Her detailed statements to the grand jury and the OIC in 1998 are consistent with statements to her confidants dating back to 1995, documents that she created, and physical evidence.[18] Moreover, her accounts generally match the testimony of White House staff members; the testimony of Secret Service agents and officers; and White House records showing Ms. Lewinsky's entries and exits, the President's whereabouts, and the President's telephone calls.

before and we talked about our boyfriends and, you know, sexual relationships throughout our friendship and I never knew her as a liar."); Finerman 3/18/98 Depo. at 113–16 (characterizing Ms. Lewinsky as trustworthy and honest); Raines 1/29/98 GJ at 87 ("I have no reason to believe that [Ms. Lewinsky's statements] were lies or made up."); Tripp 7/29/98 GJ at 187 ("There were so many reasons why I believed her. She just had way too much detail. She had detail that none of us could really conceivably have if you had not been exposed in a situation that she claimed to be."); Ungvari 3/19/98 GJ at 19 ("[s]he's never lied to me before"); *id.* at 21, 61–62; Young 6/23/98 GJ at 38–40.

[18] Ms. Lewinsky testified that she has "always been a date-oriented person." Lewinsky 8/6/98 GJ at 28. *See also* Tripp 6/30/98 GJ at 141–42 (Ms. Lewinsky "had a photographic memory for the entire relationship").

C. SEXUAL CONTACTS

1. The President's Accounts

a. Jones Testimony

In the *Jones* deposition on January 17, 1998, the President denied having had "a sexual affair," "sexual relations," or "a sexual relationship" with Ms. Lewinsky.[19] He noted that "[t]here are no curtains on the Oval Office, there are no curtains on my private office, there are no curtains or blinds that can close [on] the windows in my private dining room," and added: "I have done everything I could to avoid the kind of questions you are asking me here today * * *."[20]

During the deposition, the President's attorney, Robert Bennett, sought to limit questioning about Ms. Lewinsky. Mr. Bennett told Judge Susan Webber Wright that Ms. Lewinsky had executed "an affidavit which [Ms. Jones's lawyers] are in possession of saying that there is absolutely no sex of any kind in any manner, shape or form, with President Clinton." In a subsequent colloquy with Judge Wright, Mr. Bennett declared that as a result of "preparation of [President Clinton] for this deposition, the witness is fully aware of Ms. Lewinsky's affidavit."[21] The President did not dispute his legal representative's assertion that the President and Ms. Lewinsky had had "absolutely no sex of any kind in any manner, shape or form," nor did he dispute the implication that Ms. Lewinsky's affidavit, in denying "a sexual relationship," meant that there was "absolutely no sex of any kind in any manner, shape or form." In subsequent questioning by his attorney, President Clinton testified under oath that Ms. Lewinsky's affidavit was "absolutely true."[22]

b. Grand Jury Testimony

Testifying before the grand jury on August 17, 1998, seven months after his *Jones* deposition, the President acknowledged "inappropriate intimate contact" with Ms. Lewinsky but maintained that his January deposition testimony was accurate.[23] In his account, "what began as a friendship [with Ms. Lewinsky] came to include this conduct."[24] He said he remembered "meeting her, or having my first real conversation with her during the government

[19] Clinton 1/17/98 Depo. at 78, 204. The transcript of this deposition testimony appears in Document Supp. A. For reasons of privacy, the OIC has redacted the names of three women from the transcript. The OIC will provide an unredacted transcript if the House of Representatives so requests.

[20] Clinton 1/17/98 Depo. at 57.

[21] Clinton 1/17/98 Depo. at 54.

[22] Clinton 1/17/98 Depo. at 204. Beyond his denial of a sexual relationship with Ms. Lewinsky, the President testified that he could not recall many details of their encounters. He said he could not specifically remember whether he had ever been alone with Ms. Lewinsky, or any of their in-person conversations, or any notes or messages she had sent him, or an audiocassette she had sent him, or any specific gifts he had given her. Alone together: Clinton 1/17/98 Depo. at 52–53, 56–59. Conversations: Id. at 59. Cards and letters: *Id.* at 62. Audiocassette: *Id.* at 63–64. Gifts from the President to Ms. Lewinsky: *Id.* at 75. When asked about their last conversation, the President referred to a December encounter when, he said, Ms. Lewinsky had been visiting his secretary and he had "stuck [his] head out" to say hello. *Id.* at 68. He did not mention a private meeting with Ms. Lewinsky on December 28, 1997, or a telephone conversation with her on January 5, 1998. Lewinsky 8/6/98 GJ at 27–28 & Ex. ML–7; Clinton 8/17/98 GJ at 34–36, 126–28.

[23] Clinton 8/17/98 GJ at 10, 79, 81.

[24] Clinton 8/17/98 GJ at 10.

shutdown in November of '95." According to the President, the inappropriate contact occurred later (after Ms. Lewinsky's internship had ended), "in early 1996 and once in early 1997."[25]

The President refused to answer questions about the precise nature of his intimate contacts with Ms. Lewinsky, but he did explain his earlier denials.[26] As to his denial in the *Jones* deposition that he and Ms. Lewinsky had had a "sexual relationship," the President maintained that there can be no sexual relationship without sexual intercourse, regardless of what other sexual activities may transpire. He stated that "most ordinary Americans" would embrace this distinction.[27]

The President also maintained that none of his sexual contacts with Ms. Lewinsky constituted "sexual relations" within a specific definition used in the *Jones* deposition.[28] Under that definition:

> [A] person engages in "sexual relations" when the person knowingly engages in or causes—(1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person * * *. "Contact" means intentional touching, either directly or through clothing.[29]

According to what the President testified was his understanding, this definition "covers contact by the person being deposed with the enumerated areas, if the contact is done with an intent to arouse or gratify," but it does not cover oral sex performed on the person being deposed.[30] He testified:

> [I]f the deponent is the person who has oral sex performed on him, then the contact is with—not with anything on that list, but with the lips of another person. It seems to be self-evident that that's what it is * * *. Let me remind you, sir, I read this carefully.[31]

In the President's view, "any person, reasonable person" would recognize that oral sex performed on the deponent falls outside the definition.[32]

If Ms. Lewinsky performed oral sex on the President, then—under this interpretation—she engaged in sexual relations but he did not. The President refused to answer whether Ms. Lewinsky in fact had performed oral sex on him.[33] He did testify that direct contact with Ms. Lewinsky's breasts or genitalia would fall within the definition, and he denied having had any such contact.[34]

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[25] Clinton 8/17/98 GJ at 31, 10. *See also id.* at 38–39.

[26] Clinton 8/17/98 GJ at 10, 92–93.

[27] Clinton 8/17/98 GJ at 22.

[28] Clinton 8/17/98 GJ at 10, 12, 93–96.

[29] 849–DC–00000586. The definition mirrors a federal criminal statute, 18 U.S.C. §2246(3). The ellipsis in the quotation omits two paragraphs of the definition that Judge Wright ruled inapplicable. Clinton 1/17/98 Depo. at 21–22. The President testified that he considered the definition "rather strange," and at one point he spoke of "people being drawn into a lawsuit and being given definitions, and then a great effort to trick them in some way." Clinton 8/17/98 GJ at 19, 22. He acknowledged, however, that the definition "was the one the Judge decided on and I was bound by it." Clinton 8/17/98 GJ at 19.

[30] Clinton 8/17/98 GJ at 15, 93, 100, 102.

[31] Clinton 8/17/98 GJ at 151.

[32] Clinton 8/17/98 GJ at 168.

[33] Clinton 8/17/98 GJ at 102–105, 167–68.

[34] Clinton 8/17/98 GJ at 95–96, 100, 110, 139. The President did not always specify that the contact had to be direct. *Id.* at 15 ("[m]y understanding of the definition is it covers contact by

2. Ms. Lewinsky's Account

In his grand jury testimony, the President relied heavily on a particular interpretation of "sexual relations" as defined in the *Jones* deposition. Beyond insisting that his conduct did not fall within the *Jones* definition, he refused to answer questions about the nature of his physical contact with Ms. Lewinsky, thus placing the grand jury in the position of having to accept his conclusion without being able to explore the underlying facts. This strategy—evidently an effort to account for possible traces of the President's semen on Ms. Lewinsky's clothing without undermining his position that he did not lie in the *Jones* deposition—mandates that this Referral set forth evidence of an explicit nature that otherwise would be omitted.

In light of the President's testimony, Ms. Lewinsky's accounts of their sexual encounters are indispensable for two reasons. First, the detail and consistency of these accounts tend to bolster Ms. Lewinsky's credibility. Second, and particularly important, Ms. Lewinsky contradicts the President on a key issue. According to Ms. Lewinsky, the President touched her breasts and genitalia—which means that his conduct met the *Jones* definition of sexual relations even under his theory. On these matters, the evidence of the President's perjury cannot be presented without specific, explicit, and possibly offensive descriptions of sexual encounters.

According to Ms. Lewinsky, she and the President had ten sexual encounters, eight while she worked at the White House and two thereafter.[35] The sexual encounters generally occurred in or near the private study off the Oval Office—most often in the windowless hallway outside the study.[36] During many of their sexual encounters, the President stood leaning against the doorway of the bathroom across from the study, which, he told Ms. Lewinsky, eased his sore back.[37]

Ms. Lewinsky testified that her physical relationship with the President included oral sex but not sexual intercourse.[38] According to Ms. Lewinsky, she performed oral sex on the President; he never performed oral sex on her.[39] Initially, according to Ms. Lewinsky, the President would not let her perform oral sex to completion. In

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the person being deposed with the enumerated areas, if the contact is done with an intent to arouse or gratify"); *id.* at 16 (definition covers "[a]ny contact with the areas there mentioned").

[35] Lewinsky 8/6/98 GJ at 27–28 & Ex. ML–7. These numbers include occasions when one or both of them had direct contact with the other's genitals, but not occasions when they merely kissed. On the timing of some of their sexual encounters, Ms. Lewinsky's testimony is at odds with the President's. According to Ms. Lewinsky, she and the President had three sexual encounters in 1995 (the President said he recalled none) and two sexual encounters in 1997 (not one, as the President testified). Lewinsky 8/6/98 GJ at 27–28 & Ex. ML–7; Lewinsky 8/26/98 Depo. at 6; Clinton 8/17/98 GJ at 9–10. The President's account omits the two 1995 encounters when Ms. Lewinsky was an intern (as well as one 1995 encounter when she worked on the White House staff), and it treats the 1997 encounter that produced the semen-stained dress as a single aberration.

[36] Lewinsky 8/6/98 GJ at 34–36; Lewinsky 8/20/98 GJ at 17; Lewinsky 7/27/98 Int. at 2; Lewinsky 7/31/98 Int. at 4; Catherine Davis 3/17/98 GJ at 16; Erbland 2/12/98 GJ at 27–28, 43–44; Finerman 3/18/98 Depo. at 32; Kassorla 8/28/98 Int. at 2; Raines 1/29/98 GJ at 32–33; Tripp 7/2/98 GJ at 54, 101; Tripp 7/7/98 GJ at 171; Ungvari 3/19/98 GJ at 19, 25.

[37] Lewinsky 8/6/98 GJ at 35; Lewinsky 7/27/98 Int. at 2.

[38] Lewinsky 8/6/98 GJ at 12, 21; Lewinsky 2/1/98 Statement at 1. *See also* Andrew Bleiler 1/28/98 Int. at 3; Catherine Davis 3/17/98 GJ at 21; Kassorla 8/28/98 Int. at 2; Tripp 7/2/98 GJ at 100, 104–107; Ungvari 3/19/98 GJ at 23.

[39] Lewinsky 8/6/98 GJ at 19; Catherine Davis 3/17/98 GJ at 20; Erbland 2/12/98 GJ at 29, 44; Ungvari 3/19/98 GJ at 20; Young 6/23/98 GJ at 37–38; *but see* Raines 1/29/98 GJ at 43 (testifying that she was "pretty sure" that Ms. Lewinsky spoke of reciprocal oral sex); Tripp GJ 7/2/98 at 101 (testifying that she understood that, on rare occasions, the President reciprocated).

Ms. Lewinsky's understanding, his refusal was related to "trust and not knowing me well enough." [40] During their last two sexual encounters, both in 1997, he did ejaculate.[41]

According to Ms. Lewinsky, she performed oral sex on the President on nine occasions. On all nine of those occasions, the President fondled and kissed her bare breasts. He touched her genitals, both through her underwear and directly, bringing her to orgasm on two occasions. On one occasion, the President inserted a cigar into her vagina. On another occasion, she and the President had brief genital-to-genital contact.[42]

Whereas the President testified that "what began as a friendship came to include [intimate contact]," Ms. Lewinsky explained that the relationship moved in the opposite direction: "[T]he emotional and friendship aspects * * * developed after the beginning of our sexual relationship." [43]

D. EMOTIONAL ATTACHMENT

As the relationship developed over time, Ms. Lewinsky grew emotionally attached to President Clinton. She testified: "I never expected to fall in love with the President. I was surprised that I did." [44] Ms. Lewinsky told him of her feelings. [45] At times, she believed that he loved her too.[46] They were physically affectionate: "A lot of hugging, holding hands sometimes. He always used to push the hair out of my face." [47] She called him "Handsome"; on occasion, he called her "Sweetie," "Baby," or sometimes "Dear." [48] He told her that he enjoyed talking to her—she recalled his saying that the two of them were "emotive and full of fire," and she made him feel young.[49] He said he wished he could spend more time with her.[50]

Ms. Lewinsky told confidants of the emotional underpinnings of the relationship as it evolved. According to her mother, Marcia Lewis, the President once told Ms. Lewinsky that she "had been hurt a lot or something by different men and that he would be her

[40] Lewinsky 8/6/98 GJ at 38–39. *See also* Lewinsky 8/20/98 GJ at 24.

[41] Lewinsky 8/6/98 GJ at 19–20, 38–39; Ungvari 3/19/98 GJ at 23–24.

[42] Lewinsky 7/30/98 Int. at 5–13, 15–16; Lewinsky 8/6/98 GJ at 19–21; Lewinsky 8/20/98 GJ at 31–32, 40, 67–69; Lewinsky 8/26/98 Depo. at 20, 30–31, 50; Andrew Bleiler 1/28/98 Int. at 3; Catherine Davis 3/17/98 GJ at 20–21, 169; Erbland 2/12/98 GJ at 29, 43–45; Estep 8/23/98 Int. at 2; Kassorla 8/28/98 Int. at 2; Ungvari 3/19/98 GJ at 23–24.

[43] Clinton 8/17/98 GJ at 10; Lewinsky 8/26/98 Depo. at 5. In Ms. Lewinsky's recollection, the friendship started to develop following their sixth sexual encounter, when the President sat down and talked with her for about 45 minutes after she had complained that he was making no effort to get to know her. Lewinsky 8/26/98 Depo. at 23, 33–34.

[44] Lewinsky 8/20/98 GJ at 59. *See also id.* at 52; Lewinsky 8/6/98 GJ at 168. After the President's August 1998 speech acknowledging improper conduct with Ms. Lewinsky, she testified that she was no longer certain of her feelings because, in her view, he had depicted their relationship as "a service contract, that all I did was perform oral sex on him and that that's all that this relationship was. And it was a lot more than that to me * * *." Lewinsky 8/20/98 GJ at 54. *See also id.* at 53–56, 102–104.

[45] MSL–55–C–0178 (document retrieved from Ms. Lewinsky's home computer); Catherine Davis 3/17/98 GJ at 147; Erbland 2/12/98 GJ at 92.

[46] Lewinsky 8/20/98 GJ at 52; T1 at 101. *See also* Marcia Lewis 2/11/98 GJ at 7; Catherine Davis 3/17/98 GJ at 182.

[47] Lewinsky 8/6/98 GJ at 18.

[48] Lewinsky 7/27/98 Int. at 6; Currie 5/7/98 GJ at 60; Catherine Davis 3/17/98 GJ at 27; Raines 1/29/98 GJ at 53; Ungvari 3/19/98 GJ at 45; Young 6/23/98 GJ at 47; 1037–DC–00000042 (email from Ms. Lewinsky: "Jeez, I hate being called 'dear.' The creep calls me that sometimes. It's an old person saying!") (spelling and punctuation corrected). When angry, Ms. Lewinsky referred to the President as "creep" or "big creep." Lewinsky 8/4/98 Int. at 8; Marcia Lewis 2/11/98 GJ at 17; Raines 1/29/98 GJ at 52; Ungvari 3/19/98 GJ at 45.

[49] Lewinsky 7/27/98 Int. at 6.

[50] Lewinsky 8/26/98 Depo. at 55–57; Lewinsky 7/27/98 Int. at 6.

friend or he would help her, not hurt her."[51] According to Ms. Lewinsky's friend Neysa Erbland, President Clinton once confided in Ms. Lewinsky that he was uncertain whether he would remain married after he left the White House. He said in essence, "[W]ho knows what will happen four years from now when I am out of office?" Ms. Lewinsky thought, according to Ms. Erbland, that "maybe she will be his wife."[52]

E. CONVERSATIONS AND PHONE MESSAGES

Ms. Lewinsky testified that she and the President "enjoyed talking to each other and being with each other." In her recollection, "We would tell jokes. We would talk about our childhoods. Talk about current events. I was always giving him my stupid ideas about what I thought should be done in the administration or different views on things."[53] One of Ms. Lewinsky's friends testified that, in her understanding, "[The President] would talk about his childhood and growing up, and [Ms. Lewinsky] would relay stories about her childhood and growing up. I guess normal conversations that you would have with someone that you're getting to know."[54]

The longer conversations often occurred after their sexual contact. Ms. Lewinsky testified: "[W]hen I was working there [at the White House] * * * we'd start in the back [in or near the private study] and we'd talk and that was where we were physically intimate, and we'd usually end up, kind of the pillow talk of it, I guess, * * * sitting in the Oval Office * * *."[55] During several meetings when they were not sexually intimate, they talked in the Oval Office or in the area of the study.[56]

Along with face-to-face meetings, according to Ms. Lewinsky, she spoke on the telephone with the President approximately 50 times, often after 10 p.m. and sometimes well after midnight.[57] The President placed the calls himself or, during working hours, had his secretary, Betty Currie, do so; Ms. Lewinsky could not telephone him directly, though she sometimes reached him through Ms. Currie.[58] Ms. Lewinsky testified: "[W]e spent hours on the phone talking."[59] Their telephone conversations were "[s]imilar to what we discussed in person, just how we were doing. A lot of discussions about my job, when I was trying to come back to the White House and then once I decided to move to New York * * *. We talked about everything under the sun."[60] On 10 to 15 occasions, she and the Presi-

[51] Marcia Lewis 2/11/98 GJ at 7–8.

[52] Erbland 2/12/98 GJ at 84. *See also* Lewinsky 8/26/98 Depo. at 56–57; Catherine Davis 3/17/98 GJ at 166–67. In late 1997, Ms. Lewinsky asked Vernon Jordan whether he believed that the Clintons would remain married. Lewinsky 2/1/98 Statement at 8; Jordan 3/3/98 GJ at 150.

[53] Lewinsky 8/6/98 GJ at 17. *See also* Lewinsky 8/26/98 Depo. at 24; Lewinsky 8/24/98 Int. at 6; Tripp 7/7/98 GJ at 172.

[54] Raines 1/29/98 GJ at 39. *See also* Catherine Davis 3/17/98 GJ at 18; Finerman 3/18/98 Depo. 47–49; Raines 1/29/98 GJ at 47–48; Tripp 7/14/98 GJ at 77, 79–81.

[55] Lewinsky 8/6/98 GJ at 52–53.

[56] Lewinsky 8/6/98 GJ at 52.

[57] Lewinsky 8/6/98 GJ at 21–23; Lewinsky 7/27/98 Int. at 2. *See also* Catherine Davis 3/17/98 GJ at 36; Erbland 2/12/98 GJ at 38–39, 43; Finerman 3/18/98 Depo. at 26–29, 110, 116–17; Raines GJ at 51; Tripp 7/7/98 GJ at 62–63, 65–66; Ungvari 3/19/98 GJ at 81.

[58] Lewinsky 8/6/98 GJ at 44; Lewinsky 8/24/98 Int. at 5; Currie 5/14/98 GJ at 131–32, 136, 141; Currie 7/22/98 GJ at 35, 77.

[59] Lewinsky 8/20/98 GJ at 55.

[60] Lewinsky 8/6/98 GJ at 23.

dent had phone sex.[61] After phone sex late one night, the President fell asleep mid-conversation.[62]

On four occasions, the President left very brief messages on Ms. Lewinsky's answering machine, though he told her that he did not like doing so because (in her recollection) he "felt it was a little unsafe."[63] She saved his messages and played the tapes for several confidants, who said they believed that the voice was the President's.[64]

By phone and in person, according to Ms. Lewinsky, she and the President sometimes had arguments. On a number of occasions in 1997, she complained that he had not brought her back from the Pentagon to work in the White House, as he had promised to do after the election.[65] In a face-to-face meeting on July 4, 1997, the President reprimanded her for a letter she had sent him that obliquely threatened to disclose their relationship.[66] During an argument on December 6, 1997, according to Ms. Lewinsky, the President said that "he had never been treated as poorly by anyone else as I treated him," and added that "he spent more time with me than anyone else in the world, aside from his family, friends and staff, which I don't know exactly which category that put me in."[67]

Testifying before the grand jury, the President confirmed that he and Ms. Lewinsky had had personal conversations, and he acknowledged that their telephone conversations sometimes included "inappropriate sexual banter."[68] The President said that Ms. Lewinsky told him about "her personal life," "her upbringing," and "her job ambitions."[69] After terminating their intimate relationship in 1997, he said, he tried "to be a friend to Ms. Lewinsky, to be a counselor to her, to give her good advice, and to help her."[70]

F. GIFTS

Ms. Lewinsky and the President exchanged numerous gifts. By her estimate, she gave him about 30 items, and he gave her about 18.[71] Ms. Lewinsky's first gift to him was a matted poem given by her and other White House interns to commemorate "National Boss Day," October 24, 1995.[72] This was the only item reflected in White House records that Ms. Lewinsky gave the President before (in her account) the sexual relationship began, and the only item that he

[61] Lewinsky 8/6/98 GJ at 23–24; Lewinsky 7/27/98 Int. at 2. *See also* Catherine Davis 3/17/98 GJ at 36–37; Erbland 2/12/98 GJ at 38–39; Raines 1/29/98 GJ at 51; Ungvari 3/19/98 GJ at 81. Ms. Lewinsky gave the President a novel about phone sex, Vox by Nicholson Baker. Lewinsky 7/27/98 Int. at 13; 1361–DC–00000030 (White House list of books in private study, including *Vox*).

[62] Lewinsky 7/30/98 Int. at 15.

[63] Lewinsky 8/6/98 GJ at 23; Lewinsky 8/20/98 GJ at 6. The messages, on tapes that Ms. Lewinsky turned over to the OIC, are as follows: "Aw, shucks." "Hey." "Come on. It's me." "Sorry I missed you." Lewinsky 8/6/98 GJ at 22-23; Lewinsky 7/29/98 Int. at 3, 5; Lewinsky 8/3/98 Int. at 6.

[64] Lewinsky 8/6/98 GJ at 22–23; Catherine Davis 3/17/98 GJ at 28–29; Erbland 2/12/98 GJ at 49; Kassorla 8/28/98 Int. at 4; Raines 1/29/98 GJ at 89; Tripp 7/2/98 GJ at 89; Tripp 7/9/98 GJ at 95–97, 104–105; Ungvari 3/19/98 GJ at 31–33.

[65] Lewinsky 8/6/98 GJ at 67–69.

[66] Lewinsky 8/6/98 GJ at 74–75.

[67] Lewinsky 8/6/98 GJ at 114.

[68] Clinton 8/17/98 GJ at 10.

[69] Clinton 8/17/98 GJ at 47, 51.

[70] Clinton 8/17/98 GJ at 47, 124.

[71] Lewinsky 8/6/98 GJ at 25–26.

[72] Lewinsky 7/27/98 Int. at 12. *See also* MSL–55–DC–0184–186 (eight-line poem recovered from Ms. Lewinsky's home computer that refers to President as "the Boss with whom we're all smitten" and wishes him "Happy National Boss Day!").

sent to the archives instead of keeping.[73] On November 20—five days after the intimate relationship began, according to Ms. Lewinsky—she gave him a necktie, which he chose to keep rather than send to the archives.[74] According to Ms. Lewinsky, the President telephoned the night she gave him the tie, then sent her a photo of himself wearing it.[75] The tie was logged pursuant to White House procedures for gifts to the President.[76]

In a draft note to the President in December 1997, Ms. Lewinsky wrote that she was "very particular about presents and could never give them to anyone else—they were all bought with you in mind."[77] Many of the 30 or so gifts that she gave the President reflected his interests in history, antiques, cigars, and frogs. Ms. Lewinsky gave him, among other things, six neckties, an antique paperweight showing the White House, a silver tabletop holder for cigars or cigarettes, a pair of sunglasses, a casual shirt, a mug emblazoned "Santa Monica," a frog figurine, a letter opener depicting a frog, several novels, a humorous book of quotations, and several antique books.[78] He gave her, among other things, a hat pin, two brooches, a blanket, a marble bear figurine, and a special edition of Walt Whitman's *Leaves of Grass.*[79]

Ms. Lewinsky construed it as a sign of affection when the President wore a necktie or other item of clothing she had given him. She testified: "I used to say to him that 'I like it when you wear my ties because then I know I'm close to your heart.' So—literally and figuratively."[80] The President was aware of her reaction, according to Ms. Lewinsky, and he would sometimes wear one of the items to reassure her—occasionally on the day they were scheduled to meet or the day after they had met in person or talked by telephone.[81] The President would sometimes say to her, "Did you see I wore your tie the other day?"[82]

In his grand jury testimony, the President acknowledged that he had exchanged a number of gifts with Ms. Lewinsky. After their in-

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[73] V006–DC–00000167; V006–DC–00000181 (gift record and donor information); V006–DC–00003646 (correspondence history).

[74] V006–DC–00000157–158 (gift record and donor information).

[75] Lewinsky 8/11/98 Int. at 2; V006–DC–00000178 (autographed photo).

[76] Few of Ms. Lewinsky's subsequent gifts were logged. Of the roughly 30 gifts (including several antiques) that, in her account, she gave the President, White House records show only the matted poem from interns, two or three neckties (records conflict), and a T-shirt. V006–DC–00000157; V006–DC–00000162; V006–DC–00000167; V006–DC–00000180; V006–DC–00000181; V006–DC–00003714; V006–DC–00003715.

[77] MSL–55–DC–0177.

[78] Lewinsky 8/26/98 Depo. at 5–6 & Ex. ML–7. In response to a January 20, 1998, subpoena seeking "any and all gifts * * * to or from Monica Lewinsky * * * including * * * any tie, mug, paperweight, book, or other article," the President turned over a necktie, two antique books, a mug, and a silver standing holder for cigars or cigarettes. Subpoena V002; V002–DC–00000001; V002–DC–00000469. A subpoena dated July 17, 1998, identified specific gifts, including *Vox*, a novel about phone sex by Nicholson Baker that, according to Ms. Lewinsky, she gave the President in March 1997. Lewinsky 8/6/98 GJ at 183–84; Lewinsky 7/27/98 Int. at 13; Subpoena D1415. The President did not produce *Vox* in response to either subpoena, though his attorney represented that "the President has complied with [the] grand jury subpoenas." David Kendall Letter to OIC, 8/31/98. *Vox*, however, does appear on an October 1997 list of books in the President's private study, and Ms. Lewinsky saw it in the study on November 13, 1997. 1361–DC–00000030; Lewinsky 8/6/98 GJ at 183–84.

[79] Lewinsky 8/26/98 Depo. at 5–6 & Ex. ML–7.

[80] Lewinsky 8/20/98 GJ at 36. *See also* Lewinsky 8/6/98 GJ at 236; Catherine Davis 3/17/98 GJ at 153.

[81] Lewinsky 8/6/98 GJ at 236; Lewinsky 8/20/98 GJ at 36; Lewinsky 8/3/98 Int. at 8; Lewinsky 8/11/98 Int. at 2–3. For example, one day after the President and Ms. Lewinsky talked by telephone on February 7, 1996, and one day after they talked on August 4, 1996, he wore a necktie she had given him. Lewinsky 8/5/98 Int. at 1; Lewinsky 8/11/98 Int. at 2–3.

[82] Lewinsky 8/6/98 GJ at 236.

timate relationship ended in 1997, he testified, "[S]he continued to give me gifts. And I felt that it was a right thing to do to give her gifts back." [83]

G. MESSAGES

According to Ms. Lewinsky, she sent the President a number of cards and letters. In some, she expressed anger that he was "not paying enough attention to me"; in others, she said she missed him; in still others, she just sent "a funny card that I saw." [84] In early January 1998, she sent him, along with an antique book about American presidents, "[a]n embarrassing mushy note." [85] She testified that the President never sent her any cards or notes other than formal thank-you letters.[86]

Testifying before the grand jury, the President acknowledged having received cards and notes from Ms. Lewinsky that were "somewhat intimate" and "quite affectionate," even after the intimate relationship ended.[87]

H. SECRECY

1. Mutual Understanding

Both Ms. Lewinsky and the President testified that they took steps to maintain the secrecy of the relationship. According to Ms. Lewinsky, the President from the outset stressed the importance of keeping the relationship secret. In her handwritten statement to this Office, Ms. Lewinsky wrote that "the President told Ms. L to deny a relationship, if ever asked about it. He also said something to the effect of if the two people who are involved say it didn't happen—it didn't happen." [88] According to Ms. Lewinsky, the President sometimes asked if she had told anyone about their sexual relationship or about the gifts they had exchanged; she (falsely) assured him that she had not. [89] She told him that "I would always deny it, I would always protect him," and he responded approvingly. [90] The two of them had, in her words, "a mutual understanding" that they would "keep this private, so that meant deny it and * * * take whatever appropriate steps needed to be taken." [91] When she and the President both were subpoenaed to testify in the *Jones* case, Ms. Lewinsky anticipated that "as we had on every other occasion and every other instance of this relationship, we would deny it." [92]

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[83] Clinton 8/17/98 GJ at 47. *See also id.* at 33–36, 43–46.
[84] Lewinsky 8/6/98 GJ at 26.
[85] Lewinsky 8/6/98 GJ at 189.
[86] Lewinsky 8/6/98 GJ at 26–27.
[87] Clinton 8/17/98 GJ at 48–49. In the *Jones* deposition, in contrast, the President was asked if he remembered anything written in Ms. Lewinsky's notes or cards to him. He testified: "No. Sometimes, you know, just either small talk or happy birthday or sometimes, you know, a suggestion about how to get more young people involved in some project I was working on. Nothing remarkable. I don't remember anything particular about it." Clinton 1/17/98 Depo. at 62.
[88] Lewinsky 2/1/98 Statement at 10. *See also* Lewinsky 8/20/98 GJ at 62–63; Lewinsky 8/6/98 GJ at 141–42, 178–79. Ms. Lewinsky once told Betty Currie: "As long as no one saw us—and no one did—then nothing happened." Currie 1/27/98 GJ at 63–64.
[89] Lewinsky 8/6/98 GJ at 78, 97–101; Lewinsky 7/27/98 Int. at 3.
[90] Lewinsky 8/20/98 GJ at 22. *See also* Lewinsky 7/27/98 Int. at 9 (President assumed Ms. Lewinsky's *Jones* affidavit would be a denial, since their pattern had been to conceal and deny).
[91] Lewinsky 8/20/98 GJ at 4; Lewinsky 8/6/98 GJ at 166–67. *See also* Lewinsky 7/27/98 Int. at 9–10, 12.
[92] Lewinsky 8/6/98 GJ at 234.

In his grand jury testimony, the President confirmed his efforts to keep their liaisons secret.[93] He said he did not want the facts of their relationship to be disclosed "in any context," and added: "I certainly didn't want this to come out, if I could help it. And I was concerned about that. I was embarrassed about it. I knew it was wrong."[94] Asked if he wanted to avoid having the facts come out through Ms. Lewinsky's testimony in *Jones*, he said: "Well, I did not want her to have to testify and go through that. And, of course, I didn't want her to do that, of course not."[95]

2. COVER STORIES

For her visits to see the President, according to Ms. Lewinsky, "[T]here was always some sort of a cover."[96] When visiting the President while she worked at the White House, she generally planned to tell anyone who asked (including Secret Service officers and agents) that she was delivering papers to the President.[97] Ms. Lewinsky explained that this artifice may have originated when "I got there kind of saying, 'Oh, gee, here are your letters,' wink, wink, wink, and him saying, 'Okay, that's good.' "[98] To back up her stories, she generally carried a folder on these visits.[99] (In truth, according to Ms. Lewinsky, her job never required her to deliver papers to the President.[100]) On a few occasions during her White House employment, Ms. Lewinsky and the President arranged to bump into each other in the hallway; he then would invite her to accompany him to the Oval Office.[101] Later, after she left the White House and started working at the Pentagon, Ms. Lewinsky relied on Ms. Currie to arrange times when she could see the President. The cover story for those visits was that Ms. Lewinsky was coming to see Ms. Currie, not the President.[102]

While the President did not expressly instruct her to lie, according to Ms. Lewinsky, he did suggest misleading cover stories.[103] And, when she assured him that she planned to lie about the relationship, he responded approvingly. On the frequent occasions when Ms. Lewinsky promised that she would "always deny" the relationship and "always protect him," for example, the President responded, in her recollection, " 'That's good,' or—something affirmative. * * * [N]ot—'Don't deny it.' "[104]

Once she was named as a possible witness in the *Jones* case, according to Ms. Lewinsky, the President reminded her of the cover stories. After telling her that she was a potential witness, the President suggested that, if she were subpoenaed, she could file an affidavit to avoid being deposed. He also told her she could say that, when working at the White House, she had sometimes delivered letters to him, and, after leaving her White House job, she had

[93] Clinton 8/17/98 GJ at 38.
[94] Clinton 8/17/98 GJ at 38, 119. *See also id.* at 80, 119, 136, 153.
[95] Clinton 8/17/98 GJ at 37.
[96] Lewinsky 8/6/98 GJ at 53–54. *See also* Lewinsky 7/27/98 Int. at 2, 11; Lewinsky 8/19/98 Int. at 4; Lewinsky 2/1/98 Statement at 1.
[97] Lewinsky 8/6/98 GJ at 53–54.
[98] Lewinsky 8/6/98 GJ at 54.
[99] Lewinsky 8/6/98 GJ at 54–55; Lewinsky 7/30/98 Int. at 10.
[100] Lewinsky 8/6/98 GJ at 54–55.
[101] Lewinsky 8/6/98 GJ at 18, 53–54.
[102] Lewinsky 8/6/98 GJ at 18–19; Lewinsky 2/1/98 Statement at 1.
[103] Lewinsky 8/20/98 GJ at 105; Lewinsky 2/1/98 Statement at 1.
[104] Lewinsky 8/20/98 GJ at 22.

sometimes returned to visit Ms. Currie.[105] (The President's own testimony in the Jones case mirrors the recommendations he made to Ms. Lewinsky for her testimony. In his deposition, the President testified that he saw Ms. Lewinsky "on two or three occasions" during the November 1995 government furlough, "one or two other times when she brought some documents to me," and "sometime before Christmas" when Ms. Lewinsky "came by to see Betty."[106])

In his grand jury testimony, the President acknowledged that he and Ms. Lewinsky "might have talked about what to do in a nonlegal context" to hide their relationship, and that he "might well have said" that Ms. Lewinsky should tell people that she was bringing letters to him or coming to visit Ms. Currie.[107] But he also stated that "I never asked Ms. Lewinsky to lie."[108]

3. Steps to Avoid Being Seen or Heard

After their first two sexual encounters during the November 1995 government shutdown, according to Ms. Lewinsky, her encounters with the President generally occurred on weekends, when fewer people were in the West Wing.[109] Ms. Lewinsky testified:

> He had told me * * * that he was usually around on the weekends and that it was okay to come see him on the weekends. So he would call and we would arrange either to bump into each other in the hall or that I would bring papers to the office.[110]

From some of the President's comments, Ms. Lewinsky gathered that she should try to avoid being seen by several White House employees, including Nancy Hernreich, Deputy Assistant to the President and Director of Oval Office Operations, and Stephen Goodin, the President's personal aide.[111]

Out of concern about being seen, the sexual encounters most often occurred in the windowless hallway outside the study.[112] According to Ms. Lewinsky, the President was concerned that the two of them might be spotted through a White House window. When they were in the study together in the evenings, he sometimes turned out the light.[113] Once, when she spotted a gardener outside the study window, they left the room.[114] Ms. Lewinsky testified

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[105] Lewinsky 2/1/98 Statement at 4; Lewinsky 8/6/98 GJ at 123, 233.

[106] Clinton 1/17/98 Depo. at 50–51, 68.

[107] Clinton 8/17/98 GJ at 118–19.

[108] Clinton 8/17/98 GJ at 119. The President did not elaborate on his understanding of the words "ask[]" or "lie" in that statement. In other exchanges, he indicated that he construes some words narrowly. *Id.* at 59 (accuracy of particular statement "depends on what the meaning of the word 'is' is"); *id.* at 107 ("I have not had sex with her as I defined it"); id. at 134 ("it depends on how you define alone"); *id.* ("there were a lot of times when we were alone, but I never really thought we were").

[109] Lewinsky 8/6/98 GJ at 47. Along with weekend visits, Ms. Lewinsky sometimes saw the President on holidays: New Year's Eve, President's Day, Easter Sunday, July 4. In November 1997, she grew irritated that the President did not arrange to see her on Veterans Day. Lewinsky 9/3/98 Int. at 2.

[110] Lewinsky 8/6/98 GJ at 18. *See also* Lewinsky 8/20/98 GJ at 7, 22.

[111] Lewinsky 8/6/98 GJ at 84–85; Lewinsky 8/20/98 GJ at 7. Ms. Lewinsky told friends about White House people she tried to avoid. Tripp 6/30/98 GJ at 159–60, 164; Tripp 7/14/98 GJ at 75; T1 at 32; 1037–DC–00000318 (email from Ms. Lewinsky).

[112] Lewinsky 8/6/98 GJ at 34–35; Lewinsky 8/20/98 GJ at 16–17; Lewinsky 7/31/98 Int. at 4. The study is one of the most private rooms in the White House. Fox 2/17/98 GJ at 76. *See also* Chinery 7/23/98 GJ at 52; Currie 5/6/98 GJ at 67; Ferguson 7/17/87 GJ at 32, 38; Maes 4/8/98 GJ at 89–90; Podesta 6/23/98 GJ at 72.

[113] Lewinsky 7/31/98 Int. at 4.

[114] Lewinsky 8/4/98 Int. at 4.

that, on December 28, 1997, "when I was getting my Christmas kiss" in the doorway to the study, the President was "looking out the window with his eyes wide open while he was kissing me and then I got mad because it wasn't very romantic." He responded, "Well, I was just looking to see to make sure no one was out there." [115]

Fear of discovery constrained their sexual encounters in several respects, according to Ms. Lewinsky. The President ordinarily kept the door between the private hallway and the Oval Office several inches ajar during their encounters, both so that he could hear if anyone approached and so that anyone who did approach would be less likely to suspect impropriety.[116] During their sexual encounters, Ms. Lewinsky testified, "[W]e were both aware of the volume and sometimes * * * I bit my hand—so that I wouldn't make any noise." [117] On one occasion, according to Ms. Lewinsky, the President put his hand over her mouth during a sexual encounter to keep her quiet.[118] Concerned that they might be interrupted abruptly, according to Ms. Lewinsky, the two of them never fully undressed.[119]

While noting that "the door to the hallway was always somewhat open," the President testified that he did try to keep the intimate relationship secret: "I did what people do when they do the wrong thing. I tried to do it where nobody else was looking at it." [120]

4. Ms. Lewinsky's Notes and Letters

The President expressed concern about documents that might hint at an improper relationship between them, according to Ms. Lewinsky. He cautioned her about messages she sent:

> There were * * * some occasions when I sent him cards or notes that I wrote things that he deemed too personal to put on paper just in case something ever happened, if it got lost getting there or someone else opened it. So there were several times when he remarked to me, you know, you shouldn't put that on paper.[121]

She said that the President made this point to her in their last conversation, on January 5, 1998, in reference to what she character-

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[115] Lewinsky 8/6/98 GJ at 36. *See also* Lewinsky 7/31/98 Int. at 4.

[116] Lewinsky 8/6/98 GJ at 36–37; Lewinsky 7/27/98 Int. at 2. According to a Secret Service officer who entered the Oval Office when the President and Ms. Lewinsky were in or near the study, the door leading from the Oval Office to the hallway was slightly ajar. Muskett 7/21/98 GJ at 36–37, 39. In his *Jones* deposition, the President was asked if there are doors at both ends of the hallway. He responded: "[There] are, and they're always open." Clinton 1/17/98 Depo. at 59. In early 1998, in the course of denying any sexual relationship with Ms. Lewinsky, the President repeatedly told Deputy Chief of Staff John Podesta that "the door was open." Podesta 6/16/98 GJ at 88–89.

[117] Lewinsky 8/6/98 GJ at 56. *See also* Lewinsky 7/31/98 Int. at 3.

[118] Lewinsky 7/31/98 Int. at 3.

[119] Lewinsky 8/26/98 Depo. at 44–45; Lewinsky 7/30/98 Int. at 9; Lewinsky 7/31/98 Int. at 4. Ms. Lewinsky also testified about various steps she took on her own to ensure that the relationship remained secret, such as using different doors to enter and depart the Oval Office area, avoiding the President at a White House party, and referring to the President as "her" in pages to Betty Currie. Lewinsky 8/6/98 GJ at 44–45, 57, 218; Lewinsky 8/20/98 GJ at 5–6, 18; Lewinsky 7/29/98 Int. at 2–3.

[120] Clinton 8/17/98 GJ at 38. *See also id.* at 53 (to President's knowledge, Ms. Currie did not see intimate activity between President and Ms. Lewinsky); *id.* at 54 ("I'd have to be an exhibitionist not to have tried to exclude everyone else.").

[121] Lewinsky 8/6/98 GJ at 56.

ized as "[a]n embarrassing mushy note" she had sent him.[122] In addition, according to Ms. Lewinsky, the President expressed concerns about official records that could establish aspects of their relationship. She said that on two occasions she asked the President if she could go upstairs to the Residence with him. No, he said, because a record is kept of everyone who accompanies him there.[123]

The President testified before the grand jury: "I remember telling her she should be careful what she wrote, because a lot of it was clearly inappropriate and would be embarrassing if somebody else read it." [124]

5. Ms. Lewinsky's Evaluation of Their Secrecy Efforts

In two conversations recorded after she was subpoenaed in the *Jones* case, Ms. Lewinsky expressed confidence that her relationship with the President would never be discovered. [125] She believed that no records showed her and the President alone in the area of the study. [126] Regardless of the evidence, in any event, she would continue denying the relationship. "If someone looked in the study window, it's not me," she said. [127] If someone produced tapes of her telephone calls with the President, she would say they were fakes. [128]

In another recorded conversation, Ms. Lewinsky said she was especially comforted by the fact that the President, like her, would be swearing under oath that "nothing happened." [129] She said:

> [T]o tell you the truth, I'm not concerned all that much anymore because I know I'm not going to get in trouble. I will not get in trouble because you know what? The story I've signed under—under oath is what someone else is saying under oath. [130]

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[122] Lewinsky 8/6/98 GJ at 189, 198. *See also* Lewinsky 8/2/98 Int. at 3. The President was under a legal obligation to turn this note over to the Jones attorneys but failed to do so.

[123] Lewinsky 8/24/98 Int. at 8.

[124] Clinton 8/17/98 GJ at 50. *See also id.* at 130–131.

[125] One of these tapes, T30, is a face-to-face conversation between Ms. Tripp and Ms. Lewinsky, recorded under FBI auspices. The other, T22, is a telephone conversation between Ms. Tripp and Ms. Lewinsky, recorded by Ms. Tripp.

From these and other transcripts of recorded conversations, the OIC has redacted various brief, irrelevant, and gratuitous passages, mostly references to Ms. Lewinsky's family members. Most of these redactions are only a word or two long; others are somewhat longer. The tapes themselves have not been edited by the OIC, and the OIC will provide unredacted transcripts if the House of Representatives so requests.

Ms. Tripp produced to the OIC 27 tapes (four of which proved inaudible or blank) of her telephone conversations with Ms. Lewinsky. Ms. Tripp testified that she turned over the original recordings. She testified that she knew nothing about any duplications of the recordings, though others had access to or control over the tapes at times before they were turned over. According to a preliminary FBI examination, several of the 23 tapes containing audible conversations exhibit signs of duplication, and one tape exhibiting signs of duplication was produced by a recorder that was stopped and restarted during the recording process. These preliminary results raise questions about the reliability and authenticity of at least one recording, which in turn raise questions about the accuracy of Ms. Tripp's testimony regarding her handling of the tapes. The OIC is continuing to investigate this matter. This Referral does not quote or rely on any tapes that exhibit signs of duplication. For a fuller discussion, *see* Appendix, Tab I.

[126] T30 at 41.

[127] T30 at 41.

[128] T30 at 41-42.

[129] T22 at 12.

[130] T22 at 12.

II. 1995: INITIAL SEXUAL ENCOUNTERS

Monica Lewinsky began her White House employment as an intern in the Chief of Staff's office in July 1995. At White House functions in the following months, she made eye contact with the President. During the November 1995 government shutdown, the President invited her to his private study, where they kissed. Later that evening, they had a more intimate sexual encounter. They had another sexual encounter two days later, and a third one on New Year's Eve.

A. OVERVIEW OF MONICA LEWINSKY'S WHITE HOUSE EMPLOYMENT

Monica Lewinsky worked at the White House, first as an intern and then as an employee, from July 1995 to April 1996. With the assistance of family friend Walter Kaye, a prominent contributor to political causes, she obtained an internship starting in early July, when she was 21 years old.[131] She was assigned to work on correspondence in the office of Chief of Staff Leon Panetta in the Old Executive Office Building.[132]

As her internship was winding down, Ms. Lewinsky applied for a paying job on the White House staff. She interviewed with Timothy Keating, Special Assistant to the President and Staff Director for Legislative Affairs.[133] Ms. Lewinsky accepted a position dealing with correspondence in the Office of Legislative Affairs on November 13, 1995, but did not start the job (and, thus, continued her internship) until November 26.[134] She remained a White House employee until April 1996, when—in her view, because of her intimate relationship with the President—she was dismissed from the White House and transferred to the Pentagon.[135]

B. FIRST MEETINGS WITH THE PRESIDENT

The month after her White House internship began, Ms. Lewinsky and the President began what she characterized as "intense flirting."[136] At departure ceremonies and other events, she

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[131] 828–DC–00000012 (resume); Lewinsky 7/27/98 Int. at 1; Walter Kaye 5/21/98 GJ at 34, 51–52; Marcia Lewis 4/3/98 Depo. at 90; Abramson 2/20/98 Int. at 1; Footlik 3/19/98 Int. at 1; 827–DC–00000003 (White House entry records for Ms. Lewinsky). President Clinton testified that Mr. Kaye is "a good friend of mine and a good friend of our administration." Clinton 1/17/98 Depo. at 61. Ms. Lewinsky turned 22 on July 23. 812–DC–00000002 (passport showing birthdate).

[132] Lewinsky 8/6/98 GJ at 8; Lewinsky 8/20/98 GJ at 8; Bobowick 2/12/98 Int. at 1; Currie 1/27/98 GJ at 23–24; Panetta 1/28/98 GJ at 121–23; Palmieri 2/24/98 GJ at 12; V006–DC–00000020 (White House employee data form).

[133] Lewinsky 8/3/98 Int. at 2.

[134] Lewinsky 8/3/98 Int. at 2; 828–DC–00000012 (resume); V006–DC–00000225 (employment approval for the Legislative Affairs Office); V006–DC–00000198 (1995 White House intern directory); V006–DC–00002287 (record of Ms. Lewinsky's transfer).

[135] Lewinsky 8/26/98 Depo. at 60.

[136] Lewinsky 8/6/98 GJ at 10.

made eye contact with him, shook hands, and introduced herself.[137] When she ran into the President in the West Wing basement and introduced herself again, according to Ms. Lewinsky, he responded that he already knew who she was.[138] Ms. Lewinsky told her aunt that the President "seemed attracted to her or interested in her or something," and told a visiting friend that "she was attracted to [President Clinton], she had a big crush on him, and I think she told me she at some point had gotten his attention, that there was some mutual eye contact and recognition, mutual acknowledgment."[139]

In the autumn of 1995, an impasse over the budget forced the federal government to shut down for one week, from Tuesday, November 14, to Monday, November 20.[140] Only essential federal employees were permitted to work during the furlough, and the White House staff of 430 shrank to about 90 people for the week. White House interns could continue working because of their unpaid status, and they took on a wide range of additional duties.[141]

During the shutdown, Ms. Lewinsky worked in Chief of Staff Panetta's West Wing office, where she answered phones and ran errands.[142] The President came to Mr. Panetta's office frequently because of the shutdown, and he sometimes talked with Ms. Lewinsky.[143] She characterized these encounters as "continued flirtation."[144] According to Ms. Lewinsky, a Senior Adviser to the Chief of Staff, Barry Toiv, remarked to her that she was getting a great deal of "face time" with the President.[145]

C. NOVEMBER 15 SEXUAL ENCOUNTER

Ms. Lewinsky testified that Wednesday, November 15, 1995—the second day of the government shutdown—marked the beginning of her sexual relationship with the President.[146] On that date, she entered the White House at 1:30 p.m., left sometime thereafter (White House records do not show the time), reentered at 5:07 p.m., and departed at 12:18 a.m. on November 16.[147] The President was in the Oval Office or the Chief of Staff's office (where Ms. Lewinsky worked during the furlough) for almost the identical pe-

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[137] Lewinsky 8/6/98 GJ at 9; Lewinsky 7/27/98 Int. at 2; Lewinsky 8/3/98 Int. at 1; V006–DC–00001826 (photo showing President and Ms. Lewinsky).

[138] Lewinsky 8/26/98 Depo. at 16–17 & Ex. ML–7.

[139] Finerman 3/18/98 Depo. at 10–11; Ungvari 3/19/98 GJ at 15–17.

[140] Facts on File 852, 868 (1995).

[141] *Washington Post,* 11/20/95 at A19; *Los Angeles Times,* 11/14/95 at A15; *USA Today,* 11/17/95 at 4A.

[142] Lewinsky 8/6/98 GJ at 10–11; Byrne 6/25/98 Depo. at 18; Byrne 7/30/98 GJ at 36; Palmieri 2/24/98 GJ at 16–19; Panetta 1/28/98 GJ at 122.

[143] Goodin 2/17/98 GJ at 48–50; Griffin 5/11/98 Int. at 1; Lewinsky 8/6/98 GJ at 10–11; Palmieri 2/24/98 GJ at 20–22; Raines 1/29/98 GJ at 35–36; V006–DC–00003737–3744 (White House photos showing President and Ms. Lewinsky during furlough).

[144] Lewinsky 8/6/98 GJ at 11.

[145] Lewinsky 8/3/98 Int. at 2; Barry Toiv 3/11/98 Int. at 1 (job title).

[146] Lewinsky 8/6/98 GJ at 10; Lewinsky 7/27/98 Int. at 1–2. She told others that her physical relationship with the President began during the November 1995 shutdown. Raines 1/29/98 GJ at 38; Tripp 7/2/98 GJ at 38–39. To one friend, Ms. Lewinsky specified that the relationship began on November 15, 1995. Tripp 6/30/98 GJ at 138; Tripp 7/2/98 GJ at 38–39, 80–82.

[147] 827–DC–00000008. According to records, it was one of only two times during Ms. Lewinsky's tenure at the White House that she exited after midnight. 827–DC–00000003–16. (The other post-midnight exit was not during the furlough; it was the night of December 6–7, 1995.) As the omission of Ms. Lewinsky's November 15 afternoon exit time illustrates, White House Epass and WAVES records do not reflect all entries and exits of staff and visitors. Secret Service Representatives Barry Smith *et al.* 3/16/98 Int. at 3–5. *See also* Appendix, Tab I.

riod that Ms. Lewinsky was in the White House that evening, from 5:01 p.m. on November 15 to 12:35 a.m. on November 16.[148]

According to Ms. Lewinsky, she and the President made eye contact when he came to the West Wing to see Mr. Panetta and Deputy Chief of Staff Harold Ickes, then again later at an informal birthday party for Jennifer Palmieri, Special Assistant to the Chief of Staff.[149] At one point, Ms. Lewinsky and the President talked alone in the Chief of Staff's office. In the course of flirting with him, she raised her jacket in the back and showed him the straps of her thong underwear, which extended above her pants.[150]

En route to the restroom at about 8 p.m., she passed George Stephanopoulos's office. The President was inside alone, and he beckoned her to enter.[151] She told him that she had a crush on him. He laughed, then asked if she would like to see his private office.[152] Through a connecting door in Mr. Stephanopoulos's office, they went through the President's private dining room toward the study off the Oval Office. Ms. Lewinsky testified: "We talked briefly and sort of acknowledged that there had been a chemistry that was there before and that we were both attracted to each other and then he asked me if he could kiss me." Ms. Lewinsky said yes. In the windowless hallway adjacent to the study, they kissed.[153] Before returning to her desk, Ms. Lewinsky wrote down her name and telephone number for the President.[154]

At about 10 p.m., in Ms. Lewinsky's recollection, she was alone in the Chief of Staff's office and the President approached.[155] He invited her to rendezvous again in Mr. Stephanopoulos's office in a few minutes, and she agreed.[156] (Asked if she knew why the President wanted to meet with her, Ms. Lewinsky testified: "I had an idea." [157]) They met in Mr. Stephanopoulos's office and went again to the area of the private study.[158] This time the lights in the study were off.[159]

According to Ms. Lewinsky, she and the President kissed. She unbuttoned her jacket; either she unhooked her bra or he lifted her bra up; and he touched her breasts with his hands and mouth.[160] Ms. Lewinsky testified: "I believe he took a phone call * * * and so we moved from the hallway into the back office. * * * [H]e put his hand down my pants and stimulated me manually in the genital area." [161] While the President continued talking on the phone (Ms. Lewinsky understood that the caller was a Member of Con-

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[148] 1222–DC–00000156, 1222–DC–00000083–85 (movement logs). Times are approximate, as different logs of the President's movements sometimes vary by a few minutes. With occasional exceptions, these logs do not distinguish the President's private study from the Oval Office.
[149] Lewinsky 7/27/98 Int. at 2; Lewinsky 8/24/98 Int. at 5.
[150] Lewinsky 7/30/98 Int. at 5; Lewinsky 8/11/98 Int. at 7; Erbland 2/12/98 GJ at 24–25.
[151] Lewinsky 8/6/98 GJ at 11; Lewinsky 7/27/98 Int. at 2; Lewinsky 7/30/98 Int. at 5.
[152] Lewinsky 8/6/98 GJ at 11; Lewinsky 7/27/98 Int. at 2; Lewinsky 7/30/98 Int. at 5.
[153] Lewinsky 8/6/98 GJ at 11; Lewinsky 8/26/98 Depo. at 7. Ms. Lewinsky later told confidants that the relationship began with kissing. Catherine Davis 3/17/98 GJ at 19; Finerman 3/18/98 Depo. at 31–35; Tripp 7/7/98 GJ at 151–52.
[154] Lewinsky 7/30/98 Int. at 5.
[155] Lewinsky 8/26/98 Depo. at 7.
[156] Lewinsky 8/6/98 GJ at 12; Lewinsky 7/30/98 Int. at 5.
[157] Lewinsky 8/26/98 Depo. at 7.
[158] Lewinsky 8/26/98 Depo. at 7; Lewinsky 8/6/98 GJ at 12, 13.
[159] Lewinsky 8/26/98 Depo. at 8; Lewinsky 7/30/98 Int. at 5.
[160] Lewinsky 8/26/98 Depo. at 7–8.
[161] Lewinsky 8/26/98 Depo. at 8. *See also id.* at 21. Earlier in the evening, Ms. Lewinsky had removed her underwear. Lewinsky Int. 9/3/98 at 1.

gress or a Senator), she performed oral sex on him.[162] He finished his call, and, a moment later, told Ms. Lewinsky to stop. In her recollection: "I told him that I wanted * * * to complete that. And he said * * * that he needed to wait until he trusted me more. And then I think he made a joke * * * that he hadn't had that in a long time." [163]

Both before and after their sexual contact during that encounter, Ms. Lewinsky and the President talked.[164] At one point during the conversation, the President tugged on the pink intern pass hanging from her neck and said that it might be a problem. Ms. Lewinsky thought that he was talking about access—interns were not supposed to be in the West Wing without an escort—and, in addition, that he might have discerned some "impropriety" in a sexual relationship with a White House intern.[165]

White House records corroborate details of Ms. Lewinsky's account. She testified that her November 15 encounters with the President occurred at about 8 p.m. and 10 p.m., and that in each case the two of them went from the Chief of Staff's office to the Oval Office area.[166] Records show that the President visited the Chief of Staff's office for one minute at 8:12 p.m. and for two minutes at 9:23 p.m., in each case returning to the Oval Office.[167] She recalled that the President took a telephone call during their sexual encounter, and she believed that the caller was a Member of Congress or a Senator.[168] White House records show that after returning to the Oval Office from the Chief of Staff's office, the President talked to two Members of Congress: Rep. Jim Chapman from 9:25 p.m. to 9:30 p.m., and Rep. John Tanner from 9:31 p.m. to 9:35 p.m.[169]

D. NOVEMBER 17 SEXUAL ENCOUNTER

According to Ms. Lewinsky, she and the President had a second sexual encounter two days later (still during the government furlough), on Friday, November 17. She was at the White House until 8:56 p.m., then returned from 9:38 to 10:39 p.m.[170] At 9:45 p.m., a few minutes after Ms. Lewinsky's reentry, the President went from the Oval Office to the Chief of Staff's office (where Ms. Lewinsky worked during the furlough) for one minute, then returned to the Oval Office for 30 minutes. From there, he went back to the Chief of Staff's office until 10:34 p.m. (approximately when Ms. Lewinsky left the White House), then went by the Oval Office and the Ground Floor before retiring to the Residence at 10:40 p.m.[171]

Ms. Lewinsky testified:

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[162] Lewinsky 8/6/98 GJ at 12–14; Lewinsky 8/26/98 Depo. at 9–10; Lewinsky 7/30/98 Int. at 6.
[163] Lewinsky 8/26/98 Depo. at 10.
[164] Lewinsky 8/26/98 Depo. at 11.
[165] Lewinsky 9/3/98 Int. at 3; Lewinsky 8/24/98 Int. at 5; Lewinsky 7/30/98 Int. at 6.
[166] Lewinsky 8/6/98 GJ at 11–12; Lewinsky 8/26/98 Depo. at 7.
[167] 1362–DC–00000549 (movement logs).
[168] Lewinsky 7/30/98 Int. at 6.
[169] 1472–DC–00000006–08. Starting 11 minutes later, the President talked with other Members of Congress. *Id.*
[170] 827–DC–00000008 (Epass records).
[171] 1222–DC–00000085 (movement logs).

> We were again working late because it was during the furlough and Jennifer Palmieri * * * had ordered pizza along with Ms. Currie and Ms. Hernreich. And when the pizza came, I went down to let them know that the pizza was there and it was at that point when I walked into Ms. Currie's office that the President was standing there with some other people discussing something.
>
> And they all came back to the office and Mr.—I think it was Mr. Toiv, somebody accidentally knocked pizza on my jacket, so I went to go use the restroom to wash it off and as I was coming out of the restroom, the President was standing in Ms. Currie's doorway and said, "You can come out this way." [172]

Ms. Lewinsky and the President went into the area of the private study, according to Ms. Lewinsky. There, either in the hallway or the bathroom, she and the President kissed. After a few minutes, in Ms. Lewinsky's recollection, she told him that she needed to get back to her desk. The President suggested that she bring him some slices of pizza.[173]

A few minutes later, she returned to the Oval Office area with pizza and told Ms. Currie that the President had requested it. Ms. Lewinsky testified: "[Ms. Currie] opened the door and said, 'Sir, the girl's here with the pizza.' He told me to come in. Ms. Currie went back into her office and then we went into the back study area again." [174] Several witnesses confirm that when Ms. Lewinsky delivered pizza to the President that night, the two of them were briefly alone.[175]

Ms. Lewinsky testified that she and the President had a sexual encounter during this visit.[176] They kissed, and the President touched Ms. Lewinsky's bare breasts with his hands and mouth.[177] At some point, Ms. Currie approached the door leading to the hallway, which was ajar, and said that the President had a telephone call.[178] Ms. Lewinsky recalled that the caller was a Member of Congress with a nickname.[179] While the President was on the telephone, according to Ms. Lewinsky, "he unzipped his pants and exposed himself," and she performed oral sex.[180] Again, he stopped her before he ejaculated.[181]

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[172] Lewinsky 8/6/98 GJ at 14. *See also* Lewinsky 7/30/98 Int. at 6–7.

[173] Lewinsky 8/6/98 GJ at 14–15; Lewinsky 7/30/98 Int. at 7.

[174] Lewinsky 8/6/98 GJ at 15–16.

[175] In Ms. Currie's recollection, Ms. Lewinsky and the President were alone together for about 30 seconds. Currie 1/27/98 GJ at 33–34; Currie 5/14/98 GJ at 36–38. Ms. Hernreich testified that when delivering food during the government shutdown, Ms. Lewinsky was alone with the President for two to four minutes. Hernreich 2/26/98 GJ at 36–37. *See also* Hernreich 2/25/98 GJ at 12–17. Other witnesses also remembered Ms. Lewinsky's pizza delivery during the furlough. Keating 2/25/98 GJ at 31–32; Palmieri 2/24/98 GJ at 20, 53, 62. The President and Ms. Lewinsky (as well as others) appear in eight White House photographs taken on November 17; in three of them, the President is eating pizza. V006–DC–00003737–3744.

[176] Lewinsky 8/6/98 GJ at 16; Lewinsky 8/26/98 GJ at 11–15; Lewinsky 7/30/98 Int. at 7.

[177] Lewinsky 8/26/98 Depo. at 12–13; Lewinsky 7/30/98 Int. at 7.

[178] Lewinsky 8/26/98 Depo. at 12; Lewinsky 7/30/98 Int. at 7.

[179] Lewinsky 7/30/98 Int. at 7.

[180] Lewinsky 8/26/98 Depo. at 13–14.

[181] Lewinsky 8/26/98 Depo. at 13–14; Lewinsky 7/30/98 Int. at 7. One friend understood that Ms. Lewinsky and the President kissed when she brought pizza, and that Ms. Lewinsky performed oral sex on him in a later encounter. Ungvari 3/19/98 GJ at 18–19, 20, 23. One of Ms. Lewinsky's counselors understood that the relationship with the President began at a pizza party. Estep 8/23/98 Int. at 2.

During this visit, according to Ms. Lewinsky, the President told her that he liked her smile and her energy. He also said: "I'm usually around on weekends, no one else is around, and you can come and see me." [182]

Records corroborate Ms. Lewinsky's recollection that the President took a call from a Member of Congress with a nickname. While Ms. Lewinsky was at the White House that evening (9:38 to 10:39 p.m.), the President had one telephone conversation with a Member of Congress: From 9:53 to 10:14 p.m., he spoke with Rep. H.L. "Sonny" Callahan.[183]

In his *Jones* deposition on January 17, 1998, President Clinton—who said he was unable to recall most of his encounters with Ms. Lewinsky—did remember her "back there with a pizza" during the government shutdown. He said, however, that he did not believe that the two of them were alone.[184] Testifying before the grand jury on August 17, 1998, the President said that his first "real conversation" with Ms. Lewinsky occurred during the November 1995 furlough. He testified: "One night she brought me some pizza. We had some remarks." [185]

E. DECEMBER 31 SEXUAL ENCOUNTER

According to Ms. Lewinsky, she and the President had their third sexual encounter on New Year's Eve. Ms. Lewinsky—by then a member of the staff of the Office of Legislative Affairs—was at the White House on Sunday, December 31, 1995, until 1:16 p.m.; her time of arrival is not shown.[186] The President was in the Oval Office area from 12:11 p.m. until about the time that Ms. Lewinsky left, 1:15 p.m., when he went to the Residence.[187]

Sometime between noon and 1 p.m., in Ms. Lewinsky's recollection, she was in the pantry area of the President's private dining room talking with a White House steward, Bayani Nelvis. She told Mr. Nelvis that she had recently smoked her first cigar, and he offered to give her one of the President's cigars. Just then, the President came down the hallway from the Oval Office and saw Ms. Lewinsky. The President dispatched Mr. Nelvis to deliver something to Mr. Panetta.[188]

According to Ms. Lewinsky, she told the President that Mr. Nelvis had promised her a cigar, and the President gave her one.[189] She told him her name—she had the impression that he had forgotten it in the six weeks since their furlough encounters because, when passing her in the hallway, he had called her "Kiddo." [190] The President replied that he knew her name; in fact, he added, having

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[182] Lewinsky 7/30/98 Int. at 7. *See also* Lewinsky 8/26/98 Depo. at 15.

[183] 1472–DC–00000015 (phone logs). Ms. Lewinsky said that this probably was the name she heard on that date. Lewinsky 8/11/98 Int. at 5. She testified that she could not recall whether the President was on the telephone the whole time that she performed oral sex. Lewinsky 8/26/98 Depo. at 14.

[184] Clinton 1/17/98 Depo. at 58.

[185] Clinton 8/17/98 GJ at 31–32.

[186] 827–DC–00000011 (Epass records).

[187] 1222–DC–00000179 (movement logs). The President had one telephone call during this period, from 12:53 to 12:58 p.m. 1506–DC–00000029 (phone logs).

[188] Lewinsky 8/26/98 Depo. at 15–16; Lewinsky 7/27/98 Int. at 3–4; Lewinsky 7/30/98 Int. at 8.

[189] Lewinsky 8/26/98 Depo. at 16.

[190] Lewinsky 8/26/98 Depo. at 16; Lewinsky 7/27/98 Int. at 3–4; Lewinsky 7/30/98 Int. at 8.

lost the phone number she had given him, he had tried to find her in the phonebook.[191]

According to Ms. Lewinsky, they moved to the study. "And then . . . we were kissing and he lifted my sweater and exposed my breasts and was fondling them with his hands and with his mouth."[192] She performed oral sex.[193] Once again, he stopped her before he ejaculated because, Ms. Lewinsky testified, "he didn't know me well enough or he didn't trust me yet."[194]

According to Ms. Lewinsky, a Secret Service officer named Sandy was on duty in the West Wing that day.[195] Records show that Sandra Verna was on duty outside the Oval Office from 7 a.m. to 2 p.m.[196]

F. PRESIDENT'S ACCOUNT OF 1995 RELATIONSHIP

As noted, the President testified before the grand jury that on November 17, 1995, Ms. Lewinsky delivered pizza and exchanged "some remarks" with him, but he never indicated that anything sexual occurred then or at any other point in 1995.[197] Testifying under oath before the grand jury, the President said that he engaged in "conduct that was wrong" involving "inappropriate intimate contact" with Ms. Lewinsky "on certain occasions in early 1996 and once in early 1997."[198] By implicitly denying any sexual contact in 1995, the President indicated that he and Ms. Lewinsky had no sexual involvement while she was an intern.[199] In the President's testimony, his relationship with Ms. Lewinsky "began as a friendship," then later "came to include this conduct."[200]

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[191] Lewinsky 8/26/98 Depo. at 16.
[192] Lewinsky 8/26/98 Depo. at 16–17. *See also* Lewinsky 7/30/98 Int. at 8.
[193] Lewinsky 7/27/98 Int. at 3–4; Lewinsky 7/30/98 Int. at 8.
[194] Lewinsky 8/26/98 Depo. at 17. *See also* Finerman 3/18/98 Depo. at 30–32, 35.
[195] Lewinsky 7/30/98 Int. at 3.
[196] 1222–DC–00000325 (Secret Service duty logs).
[197] Clinton 8/17/98 GJ at 31–32.
[198] Clinton 8/17/98 GJ at 9–10.
[199] Ms. Lewinsky understood that the President may have thought there was something improper in having a sexual relationship with an intern. Lewinsky 8/24/98 Int. at 5.
[200] Clinton 8/17/98 GJ at 10.

III. JANUARY–MARCH 1996: CONTINUED SEXUAL ENCOUNTERS

President Clinton and Ms. Lewinsky had additional sexual encounters near the Oval Office in 1996. After their sixth sexual encounter, the President and Ms. Lewinsky had their first lengthy conversation. On President's Day, February 19, the President terminated their sexual relationship, then revived it on March 31.

A. JANUARY 7 SEXUAL ENCOUNTER

According to Ms. Lewinsky, she and the President had another sexual encounter on Sunday, January 7, 1996. Although White House records do not indicate that Ms. Lewinsky was at the White House that day, her testimony and other evidence indicate that she was there.[201] The President, according to White House records, was in the Oval Office most of the afternoon, from 2:13 to 5:49 p.m.[202]

According to Ms. Lewinsky, the President telephoned her early that afternoon. It was the first time he had called her at home.[203] In her recollection: "I asked him what he was doing and he said he was going to be going into the office soon. I said, oh, do you want some company? And he said, oh, that would be great." [204] Ms. Lewinsky went to her office, and the President called to arrange their rendezvous:

> [W]e made an arrangement that * * * he would have the door to his office open, and I would pass by the office with some papers and then * * * he would sort of stop me and invite me in. So, that was exactly what happened. I passed by and that was actually when I saw [Secret Service Uniformed Officer] Lew Fox who was on duty outside the Oval Office, and stopped and spoke with Lew for a few minutes, and then the President came out and said, oh, hey, Monica * * * come on in * * *. And so we spoke for about 10 minutes in the [Oval] office. We sat on the sofas. Then we went into the back study and we were intimate in the bathroom.[205]

Ms. Lewinsky testified that during this bathroom encounter, she and the President kissed, and he touched her bare breasts with his hands and his mouth.[206] The President "was talking about performing oral sex on me," according to Ms. Lewinsky.[207] But she stopped him because she was menstruating and he did not.[208] Ms. Lewinsky did perform oral sex on him.[209]

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[201] As noted above, White House entry and exit records are incomplete.
[202] 1222–DC–00000183 (movement logs).
[203] Lewinsky 8/26/98 Depo. at 18. *See also* Lewinsky 7/30/98 Int. at 2, 8.
[204] Lewinsky 8/26/98 Depo. at 18.
[205] Lewinsky 8/26/98 Depo. at 19.
[206] Lewinsky 8/26/98 Depo. at 19.
[207] Lewinsky 8/26/98 Depo. at 19.
[208] Lewinsky 8/26/98 Depo. at 19.
[209] Lewinsky 8/26/98 Depo. at 20. They engaged in oral-anal contact as well. *Id.*

Afterward, she and the President moved to the Oval Office and talked. According to Ms. Lewinsky: "[H]e was chewing on a cigar. And then he had the cigar in his hand and he was kind of looking at the cigar in * * * sort of a naughty way. And so * * * I looked at the cigar and I looked at him and I said, we can do that, too, some time." [210]

Corroborating aspects of Ms. Lewinsky's recollection, records show that Officer Fox was posted outside the Oval Office the afternoon of January 7.[211] Officer Fox (who is now retired) testified that he recalled an incident with Ms. Lewinsky one weekend afternoon when he was on duty by the Oval Office: [212]

> [T]he President of the United States came out, and he asked me, he says, "Have you seen any young congressional staff members here today?" I said, "No, sir." He said, "Well, I'm expecting one." He says, "Would you please let me know when they show up?" And I said, "Yes, sir." [213]

Officer Fox construed the reference to "congressional staff members" to mean White House staff who worked with Congress—i.e., staff of the Legislative Affairs Office, where Ms. Lewinsky worked.[214]

Talking with a Secret Service agent posted in the hallway, Officer Fox speculated on whom the President was expecting: "I described Ms. Lewinsky, without mentioning the name, in detail, dark hair—you know, I gave a general description of what she looked like." [215] Officer Fox had gotten to know Ms. Lewinsky during her tenure at the White House, and other agents had told him that she often spent time with the President.[216]

A short time later, Ms. Lewinsky approached, greeted Officer Fox, and said, "I have some papers for the President." Officer Fox admitted her to the Oval Office. The President said: "You can close the door. She'll be here for a while." [217]

B. JANUARY 21 SEXUAL ENCOUNTER

On Sunday, January 21, 1996, according to Ms. Lewinsky, she and the President had another sexual encounter. Her time of White House entry is not reflected in records. She left at 3:56 p.m.[218] The President moved from the Residence to the Oval Office at 3:33 p.m. and remained there until 7:40 p.m.[219]

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[210] Lewinsky 8/26/98 Depo. at 38.

[211] 1222–DC–00000325, 1362–DC–00001171 (Secret Service duty logs).

[212] Fox 2/17/98 GJ at 33. Although Mr. Fox believed that the incident occurred in late 1995, the totality of the evidence suggests that it was on this date, January 7, 1996.

[213] Fox 2/17/98 GJ at 31.

[214] Fox 2/17/98 GJ at 60–61, 66–67.

[215] Fox 2/17/98 GJ at 33.

[216] Fox 2/17/98 GJ at 19–20, 42, 49–50.

[217] Fox 2/17/98 GJ at 34–35. Officer Fox testified that the President and Ms. Lewinsky were alone. Fox 2/17/98 GJ 36–37. His sworn testimony on this point differs from the public statements of his attorney, who told reporters that Officer Fox did not know whether the two were alone. *Chicago Tribune*, 2/17/98 at 1C.

[218] 827–DC–00000013 (Epass records).

[219] 1222–DC–00000189 (movement logs). While Ms. Lewinsky was in the White House, the President had a single phone call, at 3:47 p.m. for one minute. 1506–DC–00000050 (phone logs).

On that day, according to Ms. Lewinsky, she saw the President in a hallway by an elevator, and he invited her to the Oval Office.[220] According to Ms. Lewinsky:

> We had * * * had phone sex for the first time the week prior, and I was feeling a little bit insecure about whether he had liked it or didn't like it. * * * I didn't know if this was sort of developing into some kind of a longer-term relationship than what I thought it initially might have been, that maybe he had some regular girlfriend who was furloughed. * * * [221]

According to Ms. Lewinsky, she questioned the President about his interest in her. "I asked him why he doesn't ask me any questions about myself, and * * * is this just about sex * * * or do you have some interest in trying to get to know me as a person?"[222] The President laughed and said, according to Ms. Lewinsky, that "he cherishes the time that he had with me."[223] She considered it "a little bit odd" for him to speak of cherishing their time together "when I felt like he didn't really even know me yet."[224]

They continued talking as they went to the hallway by the study. Then, with Ms. Lewinsky in mid-sentence, "he just started kissing me."[225] He lifted her top and touched her breasts with his hands and mouth.[226] According to Ms. Lewinsky, the President "unzipped his pants and sort of exposed himself," and she performed oral sex.[227]

At one point during the encounter, someone entered the Oval Office. In Ms. Lewinsky's recollection, "[The President] zipped up real quickly and went out and came back in. * * * I just remember laughing because he had walked out there and he was visibly aroused, and I just thought it was funny."[228]

A short time later, the President got word that his next appointment, a friend from Arkansas, had arrived.[229] He took Ms. Lewinsky out through the Oval Office into Ms. Hernreich's office, where he kissed her goodbye.[230]

C. FEBRUARY 4 SEXUAL ENCOUNTER AND SUBSEQUENT PHONE CALLS

On Sunday, February 4, according to Ms. Lewinsky, she and the President had their sixth sexual encounter and their first lengthy and personal conversation. The President was in the Oval Office from 3:36 to 7:05 p.m.[231] He had no telephone calls in the Oval Of-

[220] Lewinsky 7/30/98 Int. at 9; Lewinsky 8/24/98 Int. at 6.
[221] Lewinsky 8/26/98 Depo. at 22–23.
[222] Lewinsky 8/26/98 Depo. at 23.
[223] Lewinsky 8/26/98 Depo. at 23.
[224] Lewinsky 8/26/98 Depo. at 23–24. *See also* Lewinsky 7/30/98 Int. at 10.
[225] Lewinsky 8/26/98 Depo. at 24–25.
[226] Lewinsky 8/26/98 Depo. at 25.
[227] Lewinsky 8/26/98 Depo. at 26.
[228] Lewinsky 8/26/98 Depo. at 26. This interruption may have been occasioned by the President's one-minute phone call at 3:47 p.m. 1506–DC–00000050 (phone logs).
[229] Lewinsky 8/26/98 Depo. at 26–27. Ms. Lewinsky stated that the Blairs from Arkansas were visiting the President. Lewinsky 7/30/98 Int. at 10. This is confirmed by a Secret Service itinerary for January 21, 1996, where Diane Blair is listed as a houseguest. 1222–DC–00000024 (presidential itinerary).
[230] Lewinsky 8/26/98 Depo. at 27–28; Lewinsky 7/30/98 Int. at 10; Tripp 7/7/98 GJ at 124–26, 139–143; Tripp 7/9/98 GJ at 4–5; 845–DC–00000004 (Tripp notes).
[231] 1222–DC–00000196 (movement logs).

fice before 4:45 p.m.[232] Records do not show Ms. Lewinsky's entry or exit.

According to Ms. Lewinsky, the President telephoned her at her desk and they planned their rendezvous. At her suggestion, they bumped into each other in the hallway, "because when it happened accidentally, that seemed to work really well," then walked together to the area of the private study.[233]

There, according to Ms. Lewinsky, they kissed. She was wearing a long dress that buttoned from the neck to the ankles. "And he unbuttoned my dress and he unhooked my bra, and sort of took the dress off my shoulders and * * * moved the bra. * * * [H]e was looking at me and touching me and telling me how beautiful I was."[234] He touched her breasts with his hands and his mouth, and touched her genitals, first through underwear and then directly.[235] She performed oral sex on him.[236]

After their sexual encounter, the President and Ms. Lewinsky sat and talked in the Oval Office for about 45 minutes. Ms. Lewinsky thought the President might be responding to her suggestion during their previous meeting about "trying to get to know me."[237] It was during that conversation on February 4, according to Ms. Lewinsky, that their friendship started to blossom.[238]

When she prepared to depart, according to Ms. Lewinsky, the President "kissed my arm and told me he'd call me, and then I said, yeah, well, what's my phone number? And so he recited both my home number and my office number off the top of his head."[239] The President called her at her desk later that afternoon and said he had enjoyed their time together.[240]

D. PRESIDENT'S DAY (FEBRUARY 19) BREAK-UP

According to Ms. Lewinsky, the President terminated their relationship (only temporarily, as it happened), on Monday, February 19, 1996—President's Day. The President was in the Oval Office from 11 a.m. to 2:01 p.m. that day.[241] He had no telephone calls between 12:19 and 12:42 p.m.[242] Records do not reflect Ms. Lewinsky's presence at the White House.

In Ms. Lewinsky's recollection, the President telephoned her at her Watergate apartment that day. From the tone of his voice, she could tell something was wrong. She asked to come see him, but he said he did not know how long he would be there.[243] Ms. Lewinsky went to the White House, then walked to the Oval Office sometime between noon and 2 p.m. (the only time she ever went to the Oval Office uninvited).[244] Ms. Lewinsky recalled that she

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[232] 1506–DC–00000068 (phone logs).
[233] Lewinsky 8/26/98 Depo. at 28–29; Lewinsky 8/24/98 Int. at 6.
[234] Lewinsky 8/26/98 Depo. at 29–30.
[235] Lewinsky 8/26/98 Depo. at 30–31.
[236] Lewinsky 8/26/98 Depo. at 31–32. They engaged in oral-anal contact as well. *Id.* at 30–31.
[237] Lewinsky 8/26/98 Depo. at 33.
[238] Lewinsky 8/26/98 Depo. at 33–34.
[239] Lewinsky 8/26/98 Depo. at 33.
[240] Lewinsky 8/26/98 Depo. at 33–34; Lewinsky 8/24/98 Int. at 6; Tripp 7/7/98 GJ at 169–71; 845–DC–00000006 (Tripp notes).
[241] 1222–DC–00000197, 1222–DC–00000102 (movement logs).
[242] 1506–DC–00000102 (phone logs).
[243] Lewinsky 7/30/98 Int. at 11; Lewinsky 8/24/98 Int. at 6.
[244] Lewinsky 7/30/98 Int. at 3, 11–12.

was admitted by a tall, slender, Hispanic plainclothes agent on duty near the door.[245]

The President told her that he no longer felt right about their intimate relationship, and he had to put a stop to it.[246] Ms. Lewinsky was welcome to continue coming to visit him, but only as a friend. He hugged her but would not kiss her.[247] At one point during their conversation, the President had a call from a sugar grower in Florida whose name, according to Ms. Lewinsky, was something like "Fanuli." In Ms. Lewinsky's recollection, the President may have taken or returned the call just as she was leaving.[248]

Ms. Lewinsky's account is corroborated in two respects. First, Nelson U. Garabito, a plainclothes Secret Service agent, testified that, on a weekend or holiday while Ms. Lewinsky worked at the White House (most likely in the early spring of 1996), Ms. Lewinsky appeared in the area of the Oval Office carrying a folder and said, "I have these papers for the President."[249] After knocking, Agent Garabito opened the Oval Office door, told the President he had a visitor, ushered Ms. Lewinsky in, and closed the door behind her.[250] When Agent Garabito's shift ended a few minutes later, Ms. Lewinsky was still in the Oval Office.[251]

Second, concerning Ms. Lewinsky's recollection of a call from a sugar grower named "Fanuli," the President talked with Alfonso Fanjul of Palm Beach, Florida, from 12:42 to 1:04 p.m.[252] Mr. Fanjul had telephoned a few minutes earlier, at 12:24 p.m.[253] The Fanjuls are prominent sugar growers in Florida.[254]

E. CONTINUING CONTACTS

After the break-up on February 19, 1996, according to Ms. Lewinsky, "there continued to sort of be this flirtation * * * when we'd see each other."[255] After passing Ms. Lewinsky in a hallway one night in late February or March, the President telephoned her at home and said he was disappointed that, because she had already left the White House for the evening, they could not get together. Ms. Lewinsky testified that the call "sort of implied to me that he was interested in starting up again."[256] On March 10, 1996, Ms. Lewinsky took a visiting friend, Natalie Ungvari, to the White House. They bumped into the President, who said to Ms. Ungvari when Ms. Lewinsky introduced them: "You must be her

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[245] Lewinsky 7/30/98 Int. at 3, 11.
[246] Lewinsky 8/6/98 GJ at 24; Lewinsky 7/29/98 Int. at 3.
[247] Lewinsky 7/30/98 Int. at 11. Ms. Lewinsky later recounted the episode to several others. Erbland 2/12/98 GJ at 46–47; Finerman 3/18/98 Depo. at 47; Tripp 7/7/98 GJ at 175–76; Ungvari 3/19/98 GJ at 80.
[248] Lewinsky 8/24/98 Int. at 6. *See also* Lewinsky 7/30/98 Int. at 11.
[249] Garabito 7/30/98 GJ at 16–17, 23–24. According to a colleague, Agent Garabito is over six feet tall, slender, and Hispanic. OIC Memo of Interview with Special Agent Thomas M. Powers, 9/7/98.
[250] Garabito 7/30/98 GJ at 25, 30–31.
[251] Garabito 7/30/98 GJ at 32. Agent Garabito later recounted the incident to Larry L. Cockell, the head of the Presidential Protective Division of the Secret Service. The OIC learned of the episode from Agent Cockell's testimony. Cockell 7/23/98 GJ at 25–26.
[252] 1472–DC–00000017 (call logs).
[253] 1506–DC–00000017 (call logs).
[254] *Forbes*, 9/22/97 at 2.
[255] Lewinsky 8/6/98 GJ at 90.
[256] Lewinsky 8/6/98 GJ at 91. *See also* Lewinsky 8/26/98 Depo. at 34; Tripp 7/7/98 GJ at 179–80. Ms. Lewinsky offered to return to the White House to see him, but the President said he needed to stay in the Residence because his daughter was ill. Lewinsky 7/30/98 Int. at 12; Lewinsky 8/24/98 Int. at 6.

friend from California."[257] Ms. Ungvari was "shocked" that the President knew where she was from.[258]

Ms. Lewinsky testified that on Friday, March 29, 1996, she was walking down a hallway when she passed the President, who was wearing the first necktie she had given him. She asked where he had gotten the tie, and he replied: "Some girl with style gave it to me."[259] Later, he telephoned her at her desk and asked if she would like to see a movie. His plan was that she would position herself in the hallway by the White House Theater at a certain time, and he would invite her to join him and a group of guests as they entered. Ms. Lewinsky responded that she did not want people to think she was lurking around the West Wing uninvited.[260] She asked if they could arrange a rendezvous over the weekend instead, and he said he would try.[261] Records confirm that the President spent the evening of March 29 in the White House Theater.[262] Mrs. Clinton was in Athens, Greece.[263]

F. MARCH 31 SEXUAL ENCOUNTER

On Sunday, March 31, 1996, according to Ms. Lewinsky, she and the President resumed their sexual contact.[264] Ms. Lewinsky was at the White House from 10:21 a.m. to 4:27 p.m. on that day.[265] The President was in the Oval Office from 3:00 to 5:46 p.m.[266] His only call while in the Oval Office was from 3:06 to 3:07 p.m.[267] Mrs. Clinton was in Ireland.[268]

According to Ms. Lewinsky, the President telephoned her at her desk and suggested that she come to the Oval Office on the pretext of delivering papers to him.[269] She went to the Oval Office and was admitted by a plainclothes Secret Service agent.[270] In her folder was a gift for the President, a Hugo Boss necktie.[271]

In the hallway by the study, the President and Ms. Lewinsky kissed. On this occasion, according to Ms. Lewinsky, "he focused on me pretty exclusively," kissing her bare breasts and fondling her genitals.[272] At one point, the President inserted a cigar into Ms. Lewinsky's vagina, then put the cigar in his mouth and said: "It

[257] Ungvari 3/19/98 GJ at 29–31; Lewinsky 8/3/98 Int. at 3; Ungvari 3/18/98 Int. at 4; Verna 6/11/98 Depo. at 10; 845–DC–00000009 (Tripp notes).
[258] Ungvari 3/19/98 GJ at 30.
[259] Lewinsky 8/11/98 Int. at 2.
[260] Lewinsky 8/20/98 GJ at 19; Lewinsky 7/30/98 Int. at 12; 845–DC–00000010—11 (Tripp notes).
[261] Lewinsky 8/26/98 Depo. at 34–35.
[262] 1222–DC–00000112 (movement logs). The President and 32 guests saw *Executive Decision* that evening. 1506–DC–00000558 (White House daily diary).
[263] 968–DC–00003459 (Hillary Clinton calendar).
[264] Lewinsky 7/29/98 Int. at 3; Lewinsky 7/30/98 Int. at 12–13.
[265] 827–DC–00000016 (Epass records).
[266] 1222–DC–00000216—217; 1222–DC–00000112–113 (movement logs).
[267] 1506–DC–00000139 (phone logs).
[268] 968–DC–00003459 (Hillary Clinton calendar). Mrs. Clinton returned that evening. 1506–DC–00000559 (White House diary); 1222–DC–00000041 (Secret Service itinerary).
[269] Lewinsky 8/26/98 Depo. at 35–36.
[270] Lewinsky 8/26/98 Depo. at 36; Lewinsky 7/30/98 Int. at 12.
[271] Lewinsky 8/26/98 Depo. at 38–39.
[272] Lewinsky 8/26/98 Depo. at 37.

tastes good."[273] After they were finished, Ms. Lewinsky left the Oval Office and walked through the Rose Garden.[274]

[273] Lewinsky 7/30/98 Int. at 12–13; Lewinsky 8/26/98 Depo. at 37–38. In the grand jury, the President declined to answer whether Ms. Lewinsky would be lying if she said he had used a cigar as a sexual aid with her. Clinton 8/17/98 GJ at 110–11.

[274] Lewinsky 7/30/98 Int. at 13.

IV. APRIL 1996: MS. LEWINSKY'S TRANSFER TO THE PENTAGON

With White House and Secret Service employees remarking on Ms. Lewinsky's frequent presence in the West Wing, a deputy chief of staff ordered Ms. Lewinsky transferred from the White House to the Pentagon. On April 7—Easter Sunday—Ms. Lewinsky told the President of her dismissal. He promised to bring her back after the election, and they had a sexual encounter.

A. EARLIER OBSERVATIONS OF MS. LEWINSKY IN THE WEST WING

Ms. Lewinsky's visits to the Oval Office area had not gone unnoticed. Officer Fox testified that "it was pretty commonly known that she did frequent the West Wing on the weekends."[275] Another Secret Service uniformed officer, William Ludtke III, once saw her exit from the pantry near the Oval Office; she seemed startled and possibly embarrassed to be spotted.[276] Officer John Muskett testified that "if the President was known to be coming into the Diplomatic Reception Room, a lot of times [Ms. Lewinsky] just happened to be walking down the corridor, you know, maybe just to see the President."[277] Ms. Lewinsky acknowledged that she tried to position herself to see the President.[278]

Although they could not date them precisely, Secret Service officers and agents testified about several occasions when Ms. Lewinsky and the President were alone in the Oval Office. William C. Bordley, a former member of the Presidential Protective Detail, testified that in late 1995 or early 1996, he stopped Ms. Lewinsky outside the Oval Office because she did not have her pass.[279] The President opened the Oval Office door, indicated to Agent Bordley that Ms. Lewinsky's presence was all right, and ushered Ms. Lewinsky into the Oval Office.[280] Agent Bordley saw Ms. Lewinsky leave about half an hour later.[281]

Another former member of the Presidential Protective Detail, Robert C. Ferguson, testified that one Saturday in winter, the President told him that he was expecting "some staffers."[282] A short time later, Ms. Lewinsky arrived and said that "[t]he President needs me."[283] Agent Ferguson announced Ms. Lewinsky and admitted her to the Oval Office.[284] About 10 or 15 minutes later, Agent Ferguson rotated to a post on the Colonnade outside the

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[275] Fox 2/17/98 GJ at 42–43.
[276] Ludtke 6/5/98 Int. at 1–2.
[277] Muskett 7/21/98 GJ at 124. Others also noted that Ms. Lewinsky spent time around the West Wing. Byrne 3/13/98 Depo. at 22–25; Byrne 6/25/98 Depo. at 23, 39–44, 55–62, 104–113; Byrne 7/30/98 GJ at 8, 39–40; Hannie 4/6/98 Int. at 2–3; Keating 2/25/98 GJ at 52.
[278] Lewinsky 8/20/98 GJ at 12.
[279] Bordley 8/13/98 GJ at 9–16.
[280] Bordley 8/13/98 GJ at 20–23, 29.
[281] Bordley 8/13/98 GJ at 25–29.
[282] Ferguson 7/17/98 GJ at 14–17, 27–28; Ferguson 7/23/98 GJ at 14–17, 20.
[283] Ferguson 7/17/98 GJ at 27.
[284] Ferguson 7/17/98 GJ at 27–28; Ferguson 7/23/98 GJ at 20–21.

Oval Office.[285] He glanced through the window into the Oval Office and saw the President and Ms. Lewinsky go through the door leading toward the private study.[286]

Deeming her frequent visits to the Oval Office area a "nuisance," one Secret Service Officer complained to Evelyn Lieberman, the Deputy Chief of Staff for Operations.[287] Ms. Lieberman was already aware of Ms. Lewinsky. In December 1995, according to Ms. Lewinsky, Ms. Lieberman chided her for being in the West Wing and told her that interns are not permitted around the Oval Office. Ms. Lewinsky (who had begun her Office of Legislative Affairs job) told Ms. Lieberman that she was not an intern anymore. After expressing surprise that Ms. Lewinsky had been hired, Ms. Lieberman said she must have Ms. Lewinsky confused with someone else.[288] Ms. Lieberman confirmed that she reprimanded Ms. Lewinsky, whom she considered "what we used to call a 'clutch' * * * always someplace she shouldn't be."[289]

In Ms. Lewinsky's view, some White House staff members seemed to think that she was to blame for the President's evident interest in her:

> [P]eople were wary of his weaknesses, maybe, and * * * they didn't want to look at him and think that he could be responsible for anything, so it had to all be my fault * * * I was stalking him or I was making advances towards him.[290]

B. DECISION TO TRANSFER MS. LEWINSKY

Ms. Lieberman testified that, because Ms. Lewinsky was so persistent in her efforts to be near the President, "I decided to get rid of her."[291] First she consulted Chief of Staff Panetta. According to Mr. Panetta, Ms. Lieberman told him about a woman on the staff who was "spending too much time around the West Wing." Because of "the appearance that it was creating," Ms. Lieberman proposed to move her out of the White House. Mr. Panetta—who testified that he valued Ms. Lieberman's role as "a tough disciplinarian" and "trusted her judgment"—replied, "Fine."[292]

Although Ms. Lieberman said she could not recall having heard any rumors linking the President and Ms. Lewinsky, she acknowledged that "the President was vulnerable to these kind of rumors * * * yes, yes, that was one of the reasons" for moving Ms.

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285 Ferguson 7/17/98 GJ at 29, 31.

286 Ferguson 7/17/98 GJ at 29. In addition, Officer Lewis Fox and Agent Nelson Garabito testified about admitting Ms. Lewinsky to the Oval Office on one occasion each, as recounted above. Fox 2/17/98 GJ at 32–37; Garabito 7/30/98 GJ at 16–32. Officer Fox also saw Ms. Lewinsky exit the Oval Office on another occasion, but he did not know how long she had been inside. Fox 2/17/98 GJ at 43–46. Officer Gary Byrne also testified about having seen Ms. Lewinsky in the Oval Office with the President, though some details of his account varied in different tellings. Byrne 7/30/98 GJ at 7–32; Byrne 7/17/98 GJ at 4–10.

287 Byrne 3/13/98 Depo. at 27–28, 46–47, 51–55; Byrne 6/25/98 Depo. at 31.

288 Lewinsky 8/20/98 GJ at 10–11; Lewinsky 7/31/98 Int. at 6.

289 Lieberman 1/30/98 GJ at 36–37. Ms. Lieberman testified that she continued to disapprove of Ms. Lewinsky. When she saw Ms. Lewinsky back in the White House after she no longer worked there, Ms. Lieberman asked Ms. Currie, "What is she doing here?" She also may have said to Ms. Currie, who told Ms. Lewinsky that she could watch a Presidential helicopter departure, "What are you—nuts?" or otherwise "expressed my displeasure." Lieberman 1/30/98 GJ at 50–52.

290 Lewinsky 8/20/98 GJ at 8.

291 Lieberman 1/30/98 GJ at 41.

292 Panetta 1/28/98 GJ at 139–42.

Lewinsky out of the White House.[293] Later, in September 1997, Marcia Lewis (Ms. Lewinsky's mother) complained about her daughter's dismissal to Ms. Lieberman, whom she met at a Voice of America ceremony. Ms. Lieberman, according to Ms. Lewis, responded by "saying something about Monica being cursed because she's beautiful." Ms. Lewis gathered from the remark that Ms. Lieberman, as part of her effort to protect the President, "would want to have pretty women moved out." [294]

Most people understood that the principal reason for Ms. Lewinsky's transfer was her habit of hanging around the Oval Office and the West Wing.[295] In a memo in October 1996, John Hilley, Assistant to the President and Director of Legislative Affairs, reported that Ms. Lewinsky had been "got[ten] rid of" in part "because of 'extracurricular activities' " (a phrase, he maintained in the grand jury, that meant only that Ms. Lewinsky was often absent from her work station).[296]

White House officials arranged for Ms. Lewinsky to get another job in the Administration.[297] "Our direction is to make sure she has a job in an Agency," Patsy Thomasson wrote in an email message on April 9, 1996.[298] Ms. Thomasson's office (Presidential Personnel) sent Ms. Lewinsky's resume to Charles Duncan, Special Assistant to the Secretary of Defense and White House Liaison, and asked him to find a Pentagon opening for her.[299] Mr. Duncan was told that, though Ms. Lewinsky had performed her duties capably, she was being dismissed for hanging around the Oval Office too much.[300] According to Mr. Duncan—who had received as many as 40 job referrals per day from the White House—the White House had never given such an explanation for a transfer.[301]

C. MS. LEWINSKY'S NOTIFICATION OF HER TRANSFER

On Friday, April 5, 1996, Timothy Keating, Staff Director for Legislative Affairs, informed Ms. Lewinsky that she would have to leave her White House job.[302] According to Mr. Keating, he told her that she was not being fired, merely "being given a different opportunity." In fact, she could tell people it was a promotion if she

[293] Lieberman 1/30/98 GJ at 45. *See also* Panetta 1/28/98 GJ at 143 (describing precautions taken "to protect the President's office and protect his integrity," including preventing President from meeting alone with female acquaintances in circumstances that "could be misinterpreted").

[294] Lewis 2/11/98 GJ at 37–40. *See also* T3 at 15; Lewinsky 7/31/98 Int. at 7. Ms. Lieberman testified that the conversation occurred in September 1997. Lieberman 1/30/98 GJ at 66. In her recollection, the exchange began with Ms. Lewis coming up to her and saying, "You ruined [Ms. Lewinsky's] life on the basis of something that she never did." According to Ms. Lieberman, she made no response, and Ms. Lewis walked away. Later Ms. Lewis returned and said that she understood what Ms. Lieberman had done and why. Lieberman 1/30/98 GJ at 64–66.

[295] Abramson 2/20/98 Int. at 3; Band 2/25/98 Int. at 2–3; Currie 5/6/98 GJ at 40–41; Ganong 2/12/98 Int. at 2; Keating 2/25/98 GJ at 73; Panetta 1/28/98 GJ at 139–42.

[296] 1089–DC–00000970 (memo from Mr. Hilley to Ms. Lieberman); Hilley 5/19/98 GJ at 34–35, 47–50. Mr. Hilley testified that "extracurricular activities"—which applied to Ms. Lewinsky and one of her colleagues who was also transferred—did not refer to anything sexual in nature. Hilley 5/19/98 GJ at 49–50. *See also* Byrne 6/25/98 Depo. at 22–25, 27–28, 38, 43, 54–55; Currie 5/14/98 GJ at 19–35; Fox 2/17/98 GJ at 46–48; Maes 5/7/98 GJ at 34–42.

[297] Duncan 2/18/98 GJ at 24.

[298] V006–DC–00001347.

[299] Duncan 2/18/98 GJ at 13–14.

[300] Duncan 2/18/98 GJ at 23, 41.

[301] Duncan 2/18/98 GJ at 8, 23–24.

[302] Lewinsky 8/6/98 GJ at 61. The President was traveling to Oklahoma City on that day. V006–DC–00000694 (President's schedule); 968–DC–00000841 (same).

cared to do so.[303] Upon hearing of her dismissal, Ms. Lewinsky burst into tears and asked if there was any way for her to stay in the White House, even without pay.[304] No, Mr. Keating said. According to Ms. Lewinsky, "He told me I was too sexy to be working in the East Wing and that this job at the Pentagon where I'd be writing press releases was a sexier job." [305]

Ms. Lewinsky was devastated. She felt that she was being transferred simply because of her relationship with the President. [306] And she feared that with the loss of her White House job, "I was never going to see the President again. I mean, my relationship with him would be over." [307]

D. CONVERSATIONS WITH THE PRESIDENT ABOUT HER TRANSFER

1. Easter Telephone Conversations and Sexual Encounter

On Easter Sunday, April 7, 1996, Ms. Lewinsky told the President of her dismissal and they had a sexual encounter. Ms. Lewinsky entered the White House at 4:56 and left at 5:28 p.m.[308] The President was in the Oval Office all afternoon, from 2:21 to 7:48 p.m.[309]

According to Ms. Lewinsky, the President telephoned her at home that day. After they spoke of the death of the Commerce Secretary the previous week, she told him of her dismissal:

> I had asked him * * * if he was doing okay with Ron Brown's death, and then after we talked about that for a little bit I told him that my last day was Monday. And * * * he seemed really upset and sort of asked me to tell him what had happened. So I did and I was crying and I asked him if I could come see him, and he said that that was fine.[310]

At the White House, according to Ms. Lewinsky, she told Secret Service Officer Muskett that she needed to deliver papers to the President.[311] Officer Muskett admitted her to the Oval Office, and she and the President proceeded to the private study.[312]

According to Ms. Lewinsky, the President seemed troubled about her upcoming departure from the White House:

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[303] Keating 2/25/98 GJ at 76. The Pentagon position had a higher salary than Ms. Lewinsky's White House job. Lewinsky 8/3/98 Int. at 5. Ms. Lewinsky's supervisor, Jocelyn Jolley, was also transferred that day. Keating 2/25/98 GJ at 76–79; Lewinsky 8/6/98 GJ at 171. Unlike Ms. Lewinsky, Ms. Jolley was given a demotion: a temporary job at the General Services Administration. Jolley 2/24/98 GJ at 36–39; Keating 2/25/98 GJ at 79.

[304] Keating 2/25/98 GJ at 78–79; Lewinsky 8/3/98 Int. at 3; Capps 3/23/98 Int. at 2; Fox 2/17/98 GJ at 47; Lynn 8/5/98 GJ at 14–16; Verna 7/21/98 GJ at 21–23.

[305] Lewinsky 8/6/98 GJ at 171. *See also* Lewinsky 8/3/98 Int. at 3. Ms. Lewinsky testified that Mr. Keating led her to believe that she could probably return to work at the White House after the election. Lewinsky 8/3/98 Int. at 4. Mr. Keating testified that he told her that if she performed well at the Pentagon, "she may be able to get a job back in the White House. But not now." Keating 2/25/98 GJ at 79.

[306] Lewinsky 8/26/98 Depo. at 60.

[307] Lewinsky 8/6/98 GJ at 62.

[308] 827–DC–00000016 (Epass records).

[309] 1222–DC–00000219 (movement log).

[310] Lewinsky 8/6/98 GJ at 62. *See also* Lewinsky 8/26/98 Depo. at 39; Lewinsky 7/27/98 Int. at 4; Tripp 7/9/98 GJ at 29–30.

[311] In Ms. Lewinsky's recollection, Officer Muskett first said he needed to get Evelyn Lieberman's authorization before admitting Ms. Lewinsky to the Oval Office, but Ms. Lewinsky talked him out of it. Lewinsky 8/6/98 GJ at 91; Lewinsky 8/20/98 GJ at 42; Lewinsky 8/26/98 Depo. at 39–40; Lewinsky 7/27/98 Int. at 4; Lewinsky 7/30/98 Int. at 13; Lewinsky 7/31/98 Int. at 6.

[312] Lewinsky 7/27/98 Int. at 4.

> He told me that he thought that my being transferred had something to do with him and that he was upset. He said, "Why do they have to take you away from me? I trust you." And then he told me—he looked at me and he said, "I promise you if I win in November I'll bring you back like that." [313]

He also indicated that she could have any job she wanted after the election.[314] In addition, the President said he would find out why Ms. Lewinsky was transferred and report back to her.[315]

When asked if he had promised to get Ms. Lewinsky another White House job, the President told the grand jury:

> What I told Ms. Lewinsky was that * * * I would do what I could to see, if she had a good record at the Pentagon, and she assured me she was doing a good job and working hard, that I would do my best to see that the fact that she had been sent away from the Legislative Affairs section did not keep her from getting a job in the White House, and that is, in fact, what I tried to do. * * * But I did not tell her I would order someone to hire her, and I never did, and I wouldn't do that. It wouldn't be right.[316]

Ms. Lewinsky, when asked if the President had said that he would bring her back to the White House only if she did a good job at the Pentagon, responded: "No." [317]

After this Easter Sunday conversation, the President and Ms. Lewinsky had a sexual encounter in the hallway, according to Ms. Lewinsky.[318] She testified that the President touched her breasts with his mouth and hands.[319] According to Ms. Lewinsky: "I think he unzipped [his pants] * * * because it was sort of this running joke that I could never unbutton his pants, that I just had trouble with it." [320] Ms. Lewinsky performed oral sex. The President did not ejaculate in her presence.[321]

During this encounter, someone called out from the Oval Office that the President had a phone call.[322] He went back to the Oval Office for a moment, then took the call in the study. The President indicated that Ms. Lewinsky should perform oral sex while he

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[313] Lewinsky 8/6/98 GJ at 63. *See also* Lewinsky 8/26/98 Depo. at 40; Lewinsky 7/30/98 Int. at 13; Erbland 2/12/98 GJ at 37; Tripp 7/9/98 GJ at 31; 833–DC–00001070 (document recovered from Ms. Lewinsky's computer referring to President's promise to arrange for her return); MSL–DC–00001052 (another recovered computer file, saying in part: "You promised you would bring me back after the election with a snap of [your] fingers."); Lewinsky Statement 2/1/98 at 1 ("he promised to bring her back to the WH after the election"); Tripp 7/9/98 GJ at 31, 37–38, 42.

[314] In a recorded conversation, Ms. Lewinsky recounted part of this discussion:

> [H]e said, "I promise you," you know, something like, "if I win in November, I'll have you back like that. You can do anything you want. You can be anything you want." And then I made a joke and I said, "Well, can I be Assistant to the President for Blow Jobs?" He said, "I'd like that."

T7 at 34–35.

[315] Lewinsky 8/6/98 GJ at 64.

[316] Clinton 8/17/98 GJ at 130.

[317] Lewinsky 8/26/98 Depo. at 40.

[318] Lewinsky 8/6/98 GJ at 94–97.

[319] Lewinsky 8/26/98 Depo. at 40–41.

[320] Lewinsky 8/26/98 Depo. at 41.

[321] Lewinsky 8/26/98 Depo. at 41.

[322] Lewinsky 8/6/98 GJ at 20, 95–97; Lewinsky 7/30/98 Int. at 13.

talked on the phone, and she obliged.[323] The telephone conversation was about politics, and Ms. Lewinsky thought the caller might be Dick Morris.[324] White House records confirm that the President had one telephone call during Ms. Lewinsky's visit: from "Mr. Richard Morris," to whom he talked from 5:11 to 5:20 p.m.[325]

A second interruption occurred a few minutes later, according to Ms. Lewinsky. She and the President were in the study.[326] Ms. Lewinsky testified:

> Harold Ickes has a very distinct voice and * * * I heard him holler "Mr. President," and the President looked at me and I looked at him and he jetted out into the Oval Office and I panicked and * * * thought that maybe because Harold was so close with the President that they might just wander back there and the President would assume that I knew to leave.[327]

Ms. Lewinsky testified that she exited hurriedly through the dining room door.[328] That evening, the President called and asked Ms. Lewinsky why she had run off. "I told him that I didn't know if he was going to be coming back. * * * [H]e was a little upset with me that I left."[329]

In addition to the record of the Dick Morris phone call, the testimony of Secret Service Officer Muskett corroborates Ms. Lewinsky's account. Officer Muskett was posted near the door to the Oval Office on Easter Sunday.[330] He testified that Ms. Lewinsky (whom he knew) arrived at about 4:45 p.m. carrying a manila folder and seeming "a little upset."[331] She told Officer Muskett that she needed to deliver documents to the President.[332] Officer Muskett or the plainclothes agent on duty with him opened the door, and Ms. Lewinsky entered.[333]

About 20 to 25 minutes later, according to Officer Muskett, the telephone outside the Oval Office rang. The White House operator said that the President had an important call but he was not picking up.[334] The agent working alongside Officer Muskett knocked on the door to the Oval Office. When the President did not respond, the agent entered. The Oval Office was empty, and the door leading to the study was slightly ajar.[335] (Ms. Lewinsky testified that the President left the door ajar during their sexual encounters.[336]) The agent called out, "Mr. President?" There was no response. The

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[323] Lewinsky 8/6/98 GJ at 95; Lewinsky 8/26/98 Depo. at 41–44; Lewinsky 7/27/98 Int. at 4–5; Lewinsky 7/30/98 Int. at 13.

[324] Lewinsky 8/6/98 GJ at 92; Lewinsky 7/27/98 Int. at 4–5; Lewinsky 7/30/98 Int. at 13.

[325] 1248–DC–00000008 (phone logs).

[326] Lewinsky 8/6/98 GJ at 93, 97.

[327] Lewinsky 8/6/98 GJ at 93. *See also* Lewinsky 8/26/98 Depo. at 43; Lewinsky 7/27/98 Int. at 5; Lewinsky 7/30/98 Int. at 13. Ms. Lewinsky testified that she did not see Mr. Ickes but recognized his voice. Lewinsky 8/6/98 GJ at 97.

[328] Lewinsky 8/6/98 GJ at 93; Lewinsky 8/26/98 Depo. at 45; Lewinsky 7/27/98 Int. at 5; Lewinsky 7/30/98 Int. at 13.

[329] Lewinsky 8/6/98 GJ at 94. *See also* Lewinsky 7/30/98 Int. at 11; Tripp 7/9/98 GJ at 30–36; 845–DC–00000012–13 (Tripp notes).

[330] Muskett 7/21/98 GJ at 9–13.

[331] Muskett 7/21/98 GJ at 22–24.

[332] Muskett 7/21/98 GJ at 25–26, 83.

[333] Muskett 7/21/98 GJ at 27–28, 91–93.

[334] Muskett 7/21/98 GJ at 28, 31–33.

[335] Muskett 7/21/98 GJ at 34–37.

[336] Lewinsky 8/6/98 GJ at 36–37; Lewinsky 7/27/98 Int. at 2.

agent stepped into the Oval Office and called out more loudly, "Mr. President?" This time there was a response from the study area, according to Officer Muskett: "Huh?" The agent called out that the President had a phone call, and the President said he would take it.[337]

A few minutes later, according to Officer Muskett, Mr. Ickes approached and said he needed to see President Clinton. Officer Muskett admitted him through Ms. Currie's office.[338] Less than a minute after Mr. Ickes entered Ms. Currie's reception area, according to Officer Muskett, the pantry or dining room door closed audibly. Officer Muskett stepped down the hall to check and saw Ms. Lewinsky walking away briskly.[339]

At 5:30 p.m., two minutes after Ms. Lewinsky left the White House, the President called the office of the person who had decided to transfer Ms. Lewinsky, Evelyn Lieberman.[340]

2. April 12–13: Telephone Conversations

Ms. Lewinsky testified that the President telephoned her the following Friday, April 12, 1996, at home. They talked for about 20 minutes. According to Ms. Lewinsky, the President said he had checked on the reason for her transfer:

> [H]e had come to learn * * * that Evelyn Lieberman had sort of spearheaded the transfer, and that she thought he was paying too much attention to me and I was paying too much attention to him and that she didn't necessarily care what happened after the election but everyone needed to be careful before the election.[341]

According to Ms. Lewinsky, the President told her to give the Pentagon a try, and, if she did not like it, he would get her a job on the campaign.[342]

In the grand jury, Ms. Lieberman testified that the President asked her directly about Ms. Lewinsky's transfer:

> After I had gotten rid of her, when I was in there, during the course of a conversation, [President Clinton] said, "I got a call about—" I don't know if he said her name. He said maybe "—an intern you fired." And she was evidently very upset about it. He said, "Do you know anything about this?" I said, "Yes." He said, "Who fired her?" I said, "I did." And he said, "Oh, okay."[343]

According to Ms. Lieberman, the President did not pursue the matter further.[344]

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[337] Muskett 7/21/98 GJ at 36–37, 39–40. Officer Muskett recalled that the plainclothes agent on duty at the time was Reginald Hightower. Muskett 7/21/98 GJ at 22. While not "100 percent sure" that this incident occurred, Agent Hightower testified that "it probably did happen." Hightower 7/28/98 GJ at 46–49.

[338] Muskett 7/21/98 GJ at 42–46. Mr. Ickes testified that he cannot recall this incident but cannot rule it out. Ickes 8/5/98 GJ at 58–59.

[339] Muskett 7/21/98 GJ at 47–52, 89.

[340] 1506–DC–00000144 (phone logs).

[341] Lewinsky 8/6/98 GJ at 64–65. *See also* Lewinsky 2/1/98 Statement at 1; Lewinsky 7/31/98 Int. at 6–7; Lewinsky 8/3/98 Int. at 5; Tripp 7/9/98 GJ at 72–73; 845–DC–00000014 (Tripp notes); T2 at 17.

[342] Lewinsky 8/6/98 GJ at 65; Lewinsky 7/29/98 Int. at 3–4; Lewinsky 8/3/98 Int. at 5.

[343] Lieberman 1/30/98 GJ at 62.

[344] Lieberman 1/30/98 GJ at 62.

Three other witnesses confirm that the President knew why Ms. Lewinsky was transferred to the Pentagon. In 1997, the President told Chief of Staff Erskine Bowles "that there was a young woman—her name was Monica Lewinsky—who used to work at the White House; that Evelyn * * * thought she hung around the Oval Office too much and transferred her to the Pentagon."[345] According to Betty Currie, the President believed that Ms. Lewinsky had been unfairly transferred.[346] The President's close friend, Vernon Jordan, testified that the President said to him in December 1997 that "he knew about [Ms. Lewinsky's] situation, which was that she was pushed out of the White House."[347]

[345] Bowles 4/2/98 GJ at 66–67.
[346] Currie 5/7/98 GJ at 49–50.
[347] Jordan 3/3/98 GJ at 64–65.

V. April-December 1996: No Private Meetings

After Ms. Lewinsky began her Pentagon job on April 16, 1996, she had no further physical contact with the President for the remainder of the year. She and the President spoke by phone (and had phone sex) but saw each other only at public functions. Ms. Lewinsky grew frustrated after the election because the President did not bring her back to work at the White House.

A. PENTAGON JOB

On April 16, 1996, Ms. Lewinsky began working at the Pentagon as Confidential Assistant to the Assistant Secretary of Defense for Public Affairs.[348]

B. NO PHYSICAL CONTACT

According to Ms. Lewinsky, she had no physical contact with the President for the rest of 1996.[349] "I wasn't alone with him so when I saw him it was in some sort of event or group setting," she testified.[350]

C. TELEPHONE CONVERSATIONS

Ms. Lewinsky and the President did talk by telephone, especially in her first weeks at the new job.[351] By Ms. Lewinsky's estimate, the President phoned her (sometimes leaving a message) four or five times in the month after she started working at the Pentagon, then two or three times a month thereafter for the rest of 1996.[352] During the fall 1996 campaign, the President sometimes called from trips when Mrs. Clinton was not accompanying him.[353] During at least seven of the 1996 calls, Ms. Lewinsky and the President had phone sex.[354]

According to Ms. Lewinsky, the President telephoned her at about 6:30 a.m. on July 19, the day he was leaving for the 1996

[348] V006–DC–00002289 (email noting departures of White House employees); Lewinsky 8/6/98 GJ at 65. According to the job description for the position:

> The incumbent of this Schedule C position will have access to highly confidential, sensitive and frequently politically controversial information and must be a person in whom the [Assistant Secretary of Defense for Public Affairs] has complete trust and confidence.

833–DC–00002880. Ms. Lewinsky held clearance for Sensitive Compartmented Information. Lewinsky 8/24/98 Int. at 3. According to a regulation:

> Sensitive Compartmented Information is information that not only is classified for national security reasons as Top Secret, Secret, or Confidential, but also is subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods.

28 C.F.R. §17.18(a) (1998).

[349] Lewinsky 7/29/98 Int. at 1.

[350] Lewinsky 8/6/98 GJ at 66.

[351] Tripp 7/9/98 GJ at 94–98.

[352] Lewinsky 8/6/98 GJ at 28 & Ex. ML–7.

[353] Tripp 7/14/98 GJ at 3–4, 11–12; 845–DC–00000019 (Tripp notes).

[354] Lewinsky 7/29/98 Int. at 4–5.

Olympics in Atlanta, and they had phone sex, after which the President exclaimed, "[G]ood morning!" and then said: "What a way to start a day."[355] A call log shows that the President called the White House operator at 12:11 a.m. on July 19 and asked for a wake-up call at 7 a.m., then at 6:40 a.m., the President called and said he was already up.[356] In Ms. Lewinsky's recollection, she and the President also had phone sex on May 21, July 5 or 6, October 22, and December 2, 1996.[357] On those dates, Mrs. Clinton was in Denver (May 21), Prague and Budapest (July 5–6), Las Vegas (October 22), and en route to Bolivia (December 2).[358]

Ms. Lewinsky repeatedly told the President that she disliked her Pentagon job and wanted to return to the White House.[359] In a recorded conversation, Ms. Lewinsky recounted one call:

> [A] month had passed and—so he had called one night, and I said, "Well," I said, "I'm really unhappy," you know. And [the President] said, "I don't want to talk about your job tonight. I'll call you this week, and then we'll talk about it. I want to talk about other things"—which meant phone sex.[360]

She expected to talk with him the following weekend, and she was "ready to broach the idea of * * * going to the campaign," but he did not call.[361]

Ms. Lewinsky and the President also talked about their relationship. During a phone conversation on September 5, according to Ms. Lewinsky, she told the President that she wanted to have intercourse with him. He responded that he could not do so because of the possible consequences. The two of them argued, and he asked if he should stop calling her. No, she responded.[362]

D. PUBLIC ENCOUNTERS

During this period, Ms. Lewinsky occasionally saw the President in public. She testified:

> I'm an insecure person * * * and I was insecure about the relationship at times and thought that he would come to forget me easily and if I hadn't heard from him * * * it was very difficult for me. * * * [U]sually when I'd see him, it would kind of prompt him to call me. So I made an effort. I would go early and stand in the front so I could see him. * * *[363]

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[355] Lewinsky 7/30/98 Int. at 14. *See also* Lewinsky 7/29/98 Int. at 4; Lewinsky 8/6/98 GJ at 27–28; Tripp 7/9/98 GJ at 118–19 (mistakenly indicating that this occurred July 15, 1996); 845–DC–00000018 (Tripp notes).

[356] 1506–DC–00000275 (call log); 1506–DC–000000638.

[357] Lewinsky 7/29/98 Int. at 4–5; Lewinsky 7/30/98 Int. at 14–15; 845–DC–00000016–17 (Tripp notes); 845–DC–00000020–22 (same); Tripp 7/9/98 GJ at 102–04, 115–16; Tripp 7/14/98 GJ at 11–12, 35–37.

[358] 1506–DC–00000222 (5/21/96); 1506–DC–00000264 (7/5/96); 1506–DC–00000268 (7/6/96); 1506–DC–00000328 (10/22/96); 1506–DC–00000353 (12/2/96) (President's schedules).

[359] Lewinsky 7/29/98 Int. at 3; Finerman 3/18/98 Depo. at 49–50; Tripp 7/9/98 GJ at 53, 61–62, 94. Along with talking with the President, Ms. Lewinsky also contacted former White House colleagues for help returning to work there. Lewinsky 8/3/98 Int. at 5.

[360] T7 at 36.

[361] T7 at 36–37.

[362] Lewinsky 7/30/98 Int. at 14; Lewinsky 8/6/98 GJ at 21; Erbland 2/12/98 GJ at 30; Tripp 7/14/98 GJ at 4–6; 845–DC–00000020 (Tripp notes).

[363] Lewinsky 8/20/98 GJ at 25.

On May 2, 1996, Ms. Lewinsky saw the President at a reception for the Saxophone Club, a political organization.[364] On June 14, Ms. Lewinsky and her family attended the taping of the President's weekly radio address and had photos taken with the President.[365] On August 18, Ms. Lewinsky attended the President's 50th birthday party at Radio City Music Hall, and she got into a cocktail party for major donors where she saw the President.[366] According to Ms. Lewinsky, when the President reached past her at the rope line to shake hands with another guest, she reached out and touched his crotch in a "playful" fashion.[367] On October 23, according to Ms. Lewinsky, she talked with the President at a fundraiser for Senate Democrats.[368] The two were photographed together at the event.[369] The President was wearing a necktie she had given him, according to Ms. Lewinsky, and she said to him, "Hey, Handsome—I like your tie." [370] The President telephoned her that night. She said she planned to be at the White House on Pentagon business the next day, and he told her to stop by the Oval Office. At the White House the next day, Ms. Lewinsky did not see the President because Ms. Lieberman was nearby.[371] On December 17, Ms. Lewinsky attended a holiday reception at the White House.[372] A photo shows her shaking hands with the President.[373]

E. MS. LEWINSKY'S FRUSTRATIONS

Continuing to believe that her relationship with the President was the key to regaining her White House pass, Ms. Lewinsky hoped that the President would get her a job immediately after the election. "I kept a calendar with a countdown until election day," she later wrote in an unsent letter to him. The letter states:

> I was so sure that the weekend after the election you would call me to come visit and you would kiss me passionately and tell me you couldn't wait to have me back. You'd ask me where I wanted to work and say something akin to "Consider it done" and it would be. Instead I didn't hear from you for weeks and subsequently your phone calls became less frequent.[374]

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[364] Lewinsky 7/29/98 Int. at 3, 16; Tripp 7/9/98 GJ at 99–100; 845–DC–00000015 (Tripp notes). The President was at the Renaissance Hotel in Washington from 8:40 to 9:25 p.m. that day. 1506–DC–00000188—189 (President's schedules).

[365] V006–DC–00000534 (radio address guest list); 1222–DC–00000045 (itinerary); V006–DC–00001841—1847 (photographs); V006–DC–00003735 (photo requests); V006–DC–00001865 (videotape).

[366] Lewinsky 8/20/98 GJ at 28–31; Lewinsky 7/29/98 Int. at 16; Lewinsky 8/24/98 Int. at 6–7; V006–DC–00000682 (President's schedule for August 18); V006–DC–00003735 (photo request from Ms. Lewinsky); MSL–DC–0000489—490 (event invitation); Tripp 7/9/98 GJ at 125–26; 845–DC–00000019 (Tripp notes).

[367] Lewinsky 8/20/98 GJ at 28–31. *See also* Lewinsky 7/30/98 Int. at 17.

[368] Lewinsky 7/31/98 Int. at 7. Ms. Lewinsky thought that this might have been October 23 or 24. *Id.* The President was at the Sheraton Washington Hotel from 6:55 to 8:05 p.m. on October 23. 1506–DC–00000334—335 (President's schedule).

[369] *Newsweek*, 8/10/98, cover photo.

[370] Lewinsky 8/11/98 Int. at 2.

[371] Lewinsky 8/20/98 GJ at 26–27.

[372] Lewinsky 7/29/98 Int. at 5.

[373] V006–DC–00000007 (WAVES records); V006–DC–00001855—1856 (photos from the reception); V006–DC–00000391 (White House event attendance records).

[374] MSL–DC–00001052 (spelling and punctuation corrected). *See also* Lewinsky 2/1/98 Statement at 1–2; Tripp 7/14/98 GJ at 32–34. Ms. Lewinsky did not send this letter. Lewinsky 8/4/98 Int. at 5.

Ms. Lewinsky grew increasingly frustrated over her relationship with President Clinton.[375] One friend understood that Ms. Lewinsky complained to the President about not having seen each other privately for months, and he replied, "Every day can't be sunshine."[376] In email to another friend in early 1997, Ms. Lewinsky wrote: "I just don't understand what went wrong, what happened? How could he do this to me? Why did he keep up contact with me for so long and now nothing, now when we could be together?"[377]

[375] Catherine Davis 3/17/98 GJ at 23–24, 27; Finerman 3/18/98 Depo. at 12; Kassorla 8/28/98 Int. at 4; Raines 1/29/98 GJ at 31–32; Tripp 7/2/98 GJ at 41–43.
[376] Tripp 7/14/98 GJ at 39–40; 845–DC–00000022 (Tripp notes).
[377] 833–DC–00001974 (email to Ms. Tripp).

VI. EARLY 1997: RESUMPTION OF SEXUAL ENCOUNTERS

In 1997, President Clinton and Ms. Lewinsky had further private meetings, which now were arranged by Betty Currie, the President's secretary. After the taping of the President's weekly radio address on February 28, the President and Ms. Lewinsky had a sexual encounter. On March 24, they had what proved to be their final sexual encounter. Throughout this period, Ms. Lewinsky continued to press for a job at the White House, to no avail.

A. RESUMPTION OF MEETINGS WITH THE PRESIDENT

1. Role of Betty Currie

a. Arranging Meetings

In 1997, with the presidential election past, Ms. Lewinsky and the President resumed their one-on-one meetings and sexual encounters. The President's secretary, Betty Currie, acted as intermediary.

According to Ms. Currie, Ms. Lewinsky would often call her and say she wanted to see the President, sometimes to discuss a particular topic.[378] Ms. Currie would ask President Clinton, and, if he agreed, arrange the meeting.[379] Ms. Currie also said it was "not unusual" that Ms. Lewinsky would talk by phone with the President and then call Ms. Currie to set up a meeting.[380] At times, Ms. Currie placed calls to Ms. Lewinsky for President Clinton and put him on the line.[381]

The meetings between the President and Ms. Lewinsky often occurred on weekends.[382] When Ms. Lewinsky would arrive at the White House, Ms. Currie generally would be the one to authorize her entry and take her to the West Wing.[383] Ms. Currie acknowledged that she sometimes would come to the White House for the sole purpose of having Ms. Lewinsky admitted and bringing her to see the President.[384] According to Ms. Currie, Ms. Lewinsky and the President were alone together in the Oval Office or the study for 15 to 20 minutes on multiple occasions.[385]

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[378] Currie 5/7/98 GJ at 63.
[379] Currie 5/6/98 GJ at 97–98.
[380] Currie 5/6/98 GJ 14–15.
[381] Currie 5/6/98 GJ at 52–53, 94–96.
[382] 827–DC–00000002, 827–DC–00000018 (Ms. Lewinsky's WAVES records).
[383] Currie 5/6/98 GJ at 57–58.
[384] Currie 5/6/98 GJ at 84–85. In a later appearance before the grand jury, Ms. Currie testified that she could no longer recall any occasions when she came just to admit Ms. Lewinsky, but she could not rule it out. Currie 7/22/98 GJ at 24.
[385] Currie 1/27/98 GJ at 32–33. *See also* Currie 5/6/98 GJ at 98; Currie 7/22/98 GJ at 25–26, 41. Ms. Currie subsequently wavered on this point. Currie 7/22/98 GJ at 14 ("[t]he President, for all intents and purposes, is never alone"); *id.* at 15–16 (testifying that President and Ms. Lewinsky, in study together, were "not alone" so long as Ms. Currie was at her desk); *id.* at 25 (agreeing that Ms. Lewinsky and President were alone together); *id.* at 131 ("I was always there. And I considered them not to be alone * * *. I always thought that my presence there

Continued

Secret Service officers and agents took note of Ms. Currie's role. Officer Steven Pape once observed Ms. Currie come to the White House for the duration of Ms. Lewinsky's visit, then leave.[386] When calling to alert the officer at the West Wing lobby that Ms. Lewinsky was en route, Ms. Currie would sometimes say, "[Y]ou know who it is." [387] On one occasion, Ms. Currie instructed Officer Brent Chinery to hold Ms. Lewinsky at the lobby for a few minutes because she needed to move the President to the study.[388] On another occasion, Ms. Currie told Officer Chinery to have Ms. Lewinsky held at the gate for 30 to 40 minutes because the President already had a visitor.[389]

Ms. Lewinsky testified that she once asked the President why Ms. Currie had to clear her in, and why he could not do so himself. "[H]e said because if someone comes to see him, there's a list circulated among the staff members and then everyone would be questioning why I was there to see him." [390]

b. Intermediary for Gifts

Ms. Lewinsky also sent over a number of packages—six or eight, Ms. Currie estimated.[391] According to Ms. Currie, Ms. Lewinsky would call and say she was sending something for the President.[392] The package would arrive addressed to Ms. Currie.[393] Courier receipts show that Ms. Lewinsky sent seven packages to the White House between October 7 and December 8, 1997.[394] Evidence indicates that Ms. Lewinsky on occasion also dropped parcels off with Ms. Currie or had a family member do so,[395] and brought gifts to the President when visiting him.[396] Ms. Currie testified that most packages from Ms. Lewinsky were intended for the President.[397]

Although Ms. Currie generally opened letters and parcels to the President, she did not open these packages from Ms. Lewinsky.[398] She testified that "I made the determination not to open" such letters and packages because "I felt [they were] probably personal." [399] Instead, she would leave the package in the President's box, and "[h]e would pick it up." [400] To the best of her knowledge, such parcels always reached the President.[401]

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meant that they were not alone."). *Cf.* Clinton 8/17/98 GJ at 134 ("there were a lot of times when we were alone, but I never really thought we were").

[386] Pape 5/18/98 Int. at 3–4.

[387] Chinery 6/11/98 Depo. at 33.

[388] Chinery 6/11/98 Depo. at 44–45; Chinery 7/23/98 GJ at 49.

[389] Chinery 7/23/98 GJ at 8; Chinery 6/11/98 Depo. at 13–17. For other Secret Service corroboration of Ms. Currie's role, *see* Chinery 7/23/98 GJ at 49–50; Chinery 6/11/98 Depo. at 33, 37, 44; Garabito 7/30/98 GJ at 44–47; Shegogue 8/4/98 GJ at 11, 14–19, 24–27.

[390] Lewinsky 8/20/98 GJ at 5. *See also id.* at 14; Lewinsky 8/19/98 Int. at 5.

[391] Currie 5/6/98 GJ at 88–89. *See also id.* at 184; Currie 5/14/98 GJ at 78.

[392] Currie 5/6/98 GJ at 88–89.

[393] Currie 5/14/98 GJ at 72–74, 91; Currie 1/24/98 Int. at 3.

[394] 837–DC–00000001; 837–DC–00000004; 837–DC–00000006; 837–DC–0000008; 837–DC–00000011; 837–DC–00000014; 837–DC–00000018.

[395] Lewinsky 7/31/98 Int. at 13; Marcia Lewis 2/11/98 GJ at 28–30; T1 at 63–64.

[396] Dragotta 8/13/98 GJ at 10–11; Janney 8/13/98 GJ at 7, 9–11, 14; Niedzwiecki 7/30/98 GJ at 12–13, 20–21; Pape 8/5/98 GJ at 24; Keith Williams 7/23/98 GJ at 14.

[397] Currie 5/14/98 GJ at 72–73.

[398] Currie 5/14/98 GJ at 73–74, 86–89; Currie 7/22/98 GJ at 51–52.

[399] Currie 5/14/98 GJ at 88–89. *See also id.* at 91; Currie 7/22/98 GJ at 49–50 (testifying that she did not open sealed cards from Ms. Lewinsky to President but "may have read" unsealed ones).

[400] Currie 5/6/98 GJ at 88–89. *See also* Currie 5/14/98 GJ at 78.

[401] "The President got everything anyone sent him." Currie 5/6/98 GJ at 129.

c. Secrecy

Ms. Currie testified that she suspected impropriety in the President's relationship with Ms. Lewinsky.[402] She told the grand jury that she "had concern." In her words: "[H]e was spending a lot of time with a 24-year-old young lady. I know he has said that young people keep him involved in what's happening in the world, so I knew that was one reason, but there was a concern of mine that she was spending more time than most."[403] Ms. Currie understood that "the majority" of the President's meetings with Ms. Lewinsky were "more personal in nature as opposed to business."[404]

Ms. Currie also testified that she tried to avoid learning details of the relationship between the President and Ms. Lewinsky. On one occasion, Ms. Lewinsky said of herself and the President, "As long as no one saw us—and no one did—then nothing happened." Ms. Currie responded: "Don't want to hear it. Don't say any more. I don't want to hear any more."[405]

Ms. Currie helped keep the relationship secret. When the President wanted to talk with Ms. Lewinsky, Ms. Currie would dial the call herself rather than go through White House operators, who keep logs of presidential calls made through the switchboard.[406] When Ms. Lewinsky phoned and Ms. Currie put the President on the line, she did not log the call, though the standard procedure was to note all calls, personal and professional.[407] According to Secret Service uniformed officers, Ms. Currie sometimes tried to persuade them to admit Ms. Lewinsky to the White House compound without making a record of it.[408]

In addition, Ms. Currie avoided writing down or retaining most messages from Ms. Lewinsky to the President. In response to a grand jury subpoena, the White House turned over only one note to the President concerning Ms. Lewinsky—whereas evidence indicates that Ms. Lewinsky used Ms. Currie to convey requests and messages to the President on many occasions.[409]

When bringing Ms. Lewinsky in from the White House gate, Ms. Currie said she sometimes chose a path that would reduce the likelihood of being seen by two White House employees who disapproved of Ms. Lewinsky: Stephen Goodin and Nancy

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[402] Currie 5/14/98 GJ at 143–45; Currie 1/24/98 Int. at 8.

[403] Currie 5/6/98 GJ at 157–58.

[404] Currie 5/6/98 GJ at 156; Currie 7/22/98 GJ at 42–43.

[405] Currie 1/27/98 GJ at 63–64. *See also* Currie 5/6/98 GJ at 164; Currie 7/22/98 GJ at 31–33. According to Ms. Lewinsky, the President at one point told her similarly that "if the two people who are involved [in a relationship] say it didn't happen—it didn't happen." Lewinsky 2/1/98 Statement at 10, ¶ 11.

[406] Currie 5/14/98 GJ at 131–43. Ms. Currie testified: "I think * * * what I was trying to do was allow the President to have personal and private phone calls if he wanted to. And the appearance of any impropriety, I didn't want to have it." *Id.* at 141.

[407] Currie 7/22/98 GJ at 33–35.

[408] Dragotta 8/13/98 GJ at 8–10; Pape 8/5/98 GJ at 17–18. Asked if she had tried to persuade officers not to log in Ms. Lewinsky's visits, Ms. Currie testified: "I hope I didn't. I can't imagine—and I can't imagine that it could be." Currie 7/22/98 GJ at 115. None of the Uniformed Division officers interviewed by the OIC acknowledged having permitted Ms. Lewinsky to enter the White House without proper clearance. However, as noted elsewhere, there is clear evidence that Ms. Lewinsky was in the White House on days for which no records show her entry or exit.

[409] V006–DC–00003712 (2/24/97 message). Records show seven calls from Ms. Lewinsky's line to Ms. Currie's line on December 5, 1997, for example, and six calls the following day. 1216–DC–00000022.

Hernreich.[410] Ms. Currie testified that she once brought Ms. Lewinsky directly to the study, "sneaking her back" via a roundabout path to avoid running into Mr. Goodin.[411] When Ms. Lewinsky visited the White House on weekends and at night, being spotted was not a problem—in Ms. Currie's words, "there would be no need to sneak"—so Ms. Lewinsky would await the President in Ms. Currie's office.[412]

According to Ms. Lewinsky, she once expressed concern about records showing the President's calls to her, and Ms. Currie told her not to worry.[413] Ms. Lewinsky also suspected that Ms. Currie was not logging in all of her gifts to the President.[414] In Ms. Lewinsky's evaluation, many White House staff members tried to regulate the President's behavior, but Ms. Currie generally did as he wished.[415]

2. Observations by Secret Service Officers

Officers of the Secret Service Uniformed Division noted Ms. Lewinsky's 1997 visits to the White House. From radio traffic about the President's movements, several officers observed that the President often would head for the Oval Office within minutes of Ms. Lewinsky's entry to the complex, especially on weekends, and some noted that he would return to the Residence a short time after her departure.[416] "It was just like clockwork," according to one officer.[417] Concerned about the President's reputation, another officer suggested putting Ms. Lewinsky on a list of people who were not to be admitted to the White House. A commander responded that it was none of their business whom the President chose to see, and, in any event, nobody would ever find out about Ms. Lewinsky.[418]

B. VALENTINE'S DAY ADVERTISEMENT

On February 14, 1997, the Washington Post published a Valentine's Day "Love Note" that Ms. Lewinsky had placed. The ad said:

HANDSOME

With love's light wings did
I o'er perch these walls
For stony limits cannot hold love out,

[410] Currie 5/6/98 GJ at 16–17, 20–21, 68–70, 73–74, 85–86; Currie 5/7/98 GJ at 8. *See also* 1037–DC–00000341 (email).
[411] Currie 5/6/98 GJ at 73–74, 85–86. Ms. Currie later said that "I don't want the impression of sneaking, but it's just that I brought her in without anyone seeing her." *Id.* at 156. Ms. Lewinsky confirmed that Ms. Currie helped her avoid Mr. Goodin and others. Lewinsky 8/20/98 GJ at 15; Lewinsky 7/27/98 Int. at 4; Lewinsky 8/3/98 Int. at 5; Lewinsky 8/24/98 Int. at 7.
[412] Currie 5/6/98 GJ at 84–85.
[413] Lewinsky 7/31/98 Int. at 4.
[414] Lewinsky 8/5/98 Int. at 3.
[415] Lewinsky 7/31/98 Int. at 5. Ms. Lewinsky told confidants about Ms. Currie's role. Catherine Davis 3/17/98 GJ at 17, 33, 37–38; Erbland 2/12/98 GJ at 43; Finerman 3/18/98 Depo. at 39–40; Raines 1/29/98 GJ at 49; Ungvari 3/19/98 GJ at 38–40; 1037–DC–00000337–338 (email from Ms. Lewinsky); 1037–DC–00000001–02 (card from Ms. Lewinsky).
[416] Carbonetti 6/16/98 Int. at 2; Chinery 6/11/98 Depo. at 39–40; Janney 5/27/98 Int. at 2; LaDow 5/27/98 Int. at 3; Ludtke 6/5/98 Int. at 2; Pape 8/5/98 GJ at 23–24; Pape 5/18/98 Int. at 3–6.
[417] Chinery 7/23/98 GJ at 50.
[418] Pape 5/18/98 Int. at 5.

And what love can do that dares love attempt.—Romeo and Juliet 2:2

Happy Valentine's Day.
M [419]

C. FEBRUARY 24 MESSAGE

On February 24, Ms. Lewinsky visited the White House on Pentagon business.[420] She went by Ms. Currie's office.[421] Ms. Currie sent a note to the President—the only such note turned over by the White House in response to a grand jury subpoena: "Monica Lewinsky stopped by. Do you want me to call her?" [422]

D. FEBRUARY 28 SEXUAL ENCOUNTER

According to Ms. Lewinsky, she and the President had a sexual encounter on Thursday, February 28—their first in nearly 11 months. White House records show that Ms. Lewinsky attended the taping of the President's weekly radio address on February 28.[423] She was at the White House from 5:48 to 7:07 p.m.[424] The President was in the Roosevelt Room (where the radio address was taped) from 6:29 to 6:36 p.m., then moved to the Oval Office, where he remained until 7:24 p.m.[425] He had no telephone calls while Ms. Lewinsky was in the White House.[426]

Wearing a navy blue dress from the Gap, Ms. Lewinsky attended the radio address at the President's invitation (relayed by Ms. Currie), then had her photo taken with the President.[427] Ms. Lewinsky had not been alone with the President since she had worked at the White House, and, she testified, "I was really nervous." [428] President Clinton told her to see Ms. Currie after the photo was taken because he wanted to give her something.[429] "So I waited a little while for him and then Betty and the President and I went into the back office," Ms. Lewinsky testified.[430] (She later learned that the reason Ms. Currie accompanied them was that Stephen Goodin did not want the President to be alone with Ms. Lewinsky, a view that Mr. Goodin expressed to the President and Ms. Currie.[431]) Once they had passed from the Oval Office to-

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[419] *Washington Post,* 2/14/97, "Love Notes" at 44 (824–DC–00000013—14). *See also* 1078–DC–00000002. A copy of the ad was found in the box of gifts and other items that Ms. Lewinsky, after being subpoenaed in the *Jones* case, gave Ms. Currie for safekeeping. 824–DC–00000013—14; Lewinsky 8/20/98 GJ at 71–72. Ms. Lewinsky told several people about the ad. Catherine Davis 3/17/98 GJ at 28; Finerman 3/18/98 Depo. at 22–23; Marcia Lewis 2/10/98 GJ at 59–61; Raines 1/29/98 GJ at 109. In email on February 13, she said she planned to check her telephone messages from London (where she would be on Valentine's Day) "in the hopes that the creep will call and say 'Thank you for my love note. I love you. Will you run away with me?' What do ya think the likelihood of that happening is?" 833–DC–00001934. On February 19, she wrote in an email that the President had not left any message for her on Valentine's Day. 833–DC–00009446.

[420] 827–DC–00000018 (Epass records); Kessinger 2/24/98 Int. at 2.

[421] 833–DC–00001906 (email from Ms. Lewinsky to Ms. Tripp).

[422] V006–DC–00003712.

[423] V006–DC–00003720 (radio address attendance list).

[424] 827–DC–00000018; V006–DC–00000008; V006–DC–00001796.

[425] 1222–DC–00000234; 968–DC–00000073.

[426] 968–DC–00003506.

[427] Lewinsky 8/26/98 Depo. at 45–46, 48–49; Lewinsky 8/6/98 GJ at 30.

[428] Lewinsky 8/6/98 GJ at 45–46.

[429] Lewinsky 8/26/98 Depo. at 46.

[430] Lewinsky 8/6/98 GJ at 30.

[431] Lewinsky 8/6/98 GJ at 30–31, 46–47; Lewinsky 7/30/98 Int. at 15; Lewinsky 7/31/98 Int. at 5. Mr. Goodin and Ms. Currie confirmed that Ms. Lewinsky stayed behind and talked with

Continued

ward the private study, Ms. Currie said, "I'll be right back," and walked on to the back pantry or the dining room, where, according to Ms. Currie, she waited for 15 to 20 minutes while the President and Ms. Lewinsky were in the study.[432] Ms. Currie (who said she acted on her own initiative) testified that she accompanied the President and Ms. Lewinsky out of the Oval Office because "I didn't want any perceptions, him being alone with someone." [433]

In the study, according to Ms. Lewinsky, the President "started to say something to me and I was pestering him to kiss me, because * * * it had been a long time since we had been alone." [434] The President told her to wait a moment, as he had presents for her.[435] As belated Christmas gifts, he gave her a hat pin and a special edition of Walt Whitman's *Leaves of Grass.*[436] Ms. Lewinsky described the Whitman book as "the most sentimental gift he had given me * * * it's beautiful and it meant a lot to me." [437] During this visit, according to Ms. Lewinsky, the President said he had seen her Valentine's Day message in the *Washington Post,* and he talked about his fondness for "Romeo and Juliet." [438]

Ms. Lewinsky testified that after the President gave her the gifts, they had a sexual encounter:

> [W]e went back over by the bathroom in the hallway, and we kissed. We were kissing and he unbuttoned my dress and fondled my breasts with my bra on, and then

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the President after the radio address. Currie 1/27/98 GJ at 34; Goodin 2/17/98 GJ at 52, 55. Mr. Goodin testified that he approached the President and "basically offer[ed] to chase her away because I didn't know if that was a good use of his time," but the President replied that "she's a friend of a political supporter." Goodin 2/17/98 GJ at 56. Nancy Hernreich, who was not present at the radio address, testified that Mr. Goodin told her about Ms. Lewinsky's presence there on the following work day. Hernreich 2/26/98 GJ at 5–9.

[432] Currie 7/22/98 GJ at 130–31; Currie 1/27/98 GJ at 34–35; Lewinsky 8/6/98 GJ at 31; Lewinsky 7/30/98 Int. at 15.

[433] Currie 7/22/98 GJ at 131. Ms. Currie also maintained that the President and Ms. Lewinsky were "[n]ever out of eyesight." *Id.* at 135. The President, however, acknowledged "inappropriate intimate contact" with Ms. Lewinsky on February 28 and testified that, to the best of his knowledge, Ms. Currie never witnessed any such encounters between himself and Ms. Lewinsky. Clinton 8/17/98 GJ at 10, 53–54.

[434] Lewinsky 8/26/98 Depo. at 46–47.

[435] Lewinsky 8/26/98 Depo. at 46–47.

[436] Lewinsky 8/26/98 Depo. at 47; Lewinsky 8/6/98 GJ at 31. Ms. Currie testified that the President later asked her, "Did Monica show you the hat pin I gave her?" Currie 5/6/98 GJ at 142.

[437] Lewinsky 8/6/98 GJ at 156. *See also* Lewinsky 8/20/98 GJ at 72; Lewinsky 8/26/98 Depo. at 47; Currie 5/6/98 GJ at 101–102; Catherine Davis 3/17/98 GJ 30–31; Erbland 2/12/98 GJ at 40–41; Finerman 3/18/98 Depo. at 15–16; Marcia Lewis 2/10/98 GJ at 51–52; Raines 1/29/98 GJ at 53–55.

> A draft of Ms. Lewinsky's thank-you note (to "Dear Mr. P") was found in her apartment. It says in part:
>
> All of my life, everyone has always said that I am a difficult person for whom to shop, and yet, you managed to choose two absolutely perfect presents! A little phrase (with only eight letters) like "thank you" simply cannot begin to express what I feel for what you have given me. Art & poetry are gifts to my soul!
>
> I just *love* the hat pin. It is vibrant, unique and a beautiful piece of art. My only hope is that I have a hat fit to adorn it (ahhh, I see another excuse to go shopping)! I know that I am bound to receive compliments on it.
>
> I have only read excerpts from "Leaves of Grass" before—never in its entirety or in such a beautifully bound edition. Like Shakespeare, Whitman's writings are so timeless. I find solace in works from the past that remain profound and somehow always poignant. Whitman is so rich that one must read him like one tastes a fine wine or good cigar—take it in, roll it in your mouth, and savor it!
>
> I hope you know how very grateful I am for these gifts, especially your gift of friendship. I will treasure them all * * * always.

MSL–DC–00000621—622 (emphasis in original) (ellipsis in original). Ms. Lewinsky said she sent a version of this letter to the President and enclosed a necktie. Lewinsky 8/4/98 Int. at 5.

[438] Lewinsky 8/24/98 Int. at 7; Finerman 3/18/98 Depo. at 22; Raines 1/29/98 GJ at 109.

> took them out of my bra and was kissing them and touching them with his hands and with his mouth.
>
> And then I think I was touching him in his genital area through his pants, and I think I unbuttoned his shirt and was kissing his chest. And then * * * I wanted to perform oral sex on him * * * and so I did. And then * * * I think he heard something, or he heard someone in the office. So, we moved into the bathroom.
>
> And I continued to perform oral sex and then he pushed me away, kind of as he always did before he came, and then I stood up and I said * * * I care about you so much; * * * I don't understand why you won't let me * * * make you come; it's important to me; I mean, it just doesn't feel complete, it doesn't seem right.[439]

Ms. Lewinsky testified that she and the President hugged, and "he said he didn't want to get addicted to me, and he didn't want me to get addicted to him." They looked at each other for a moment.[440] Then, saying that "I don't want to disappoint you," the President consented.[441] For the first time, she performed oral sex through completion.[442]

When Ms. Lewinsky next took the navy blue Gap dress from her closet to wear it, she noticed stains near one hip and on the chest.[443] FBI Laboratory tests revealed that the stains are the President's semen.[444]

In his grand jury testimony, the President—who, because the OIC had asked him for a blood sample (and had represented that it had ample evidentiary justification for making such a request), had reason to suspect that Ms. Lewinsky's dress might bear traces of his semen—indicated that he and Ms. Lewinsky had had sexual contact on the day of the radio address. He testified:

> I was sick after it was over and I, I was pleased at that time that it had been nearly a year since any inappropriate contact had occurred with Ms. Lewinsky. I promised myself it wasn't going to happen again. The facts are complicated about what did happen and how it happened. But, nonetheless, I'm responsible for it.[445]

Later the President added, referring to the evening of the radio address: "I do believe that I was alone with her from 15 to 20 minutes. I do believe that things happened then which were inappropriate."[446] He said of the intimate relationship with Ms. Lewinsky: "I never should have started it, and I certainly shouldn't have started it back after I resolved not to in 1996."[447]

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[439] Lewinsky 8/26/98 Depo. at 47–48. *See also* Lewinsky 8/6/98 GJ at 31, 38–39.
[440] Lewinsky 8/26/98 Depo. at 47–48. *See also* Lewinsky 8/6/98 GJ at 31, 38–39.
[441] Lewinsky 7/30/98 Int. at 15.
[442] Lewinsky 8/26/98 Depo. at 48.
[443] Lewinsky 8/6/98 GJ at 32, 39–40. Ms. Lewinsky testified that she did not keep the soiled dress as a souvenir. She said she does not ordinarily clean her clothes until she is ready to wear them again. "I was going to clean it. I was going to wear it again." Lewinsky 8/6/98 GJ at 41. She also testified that she was not certain that the stains were semen. She had dined out after the radio address, "[s]o it could be spinach dip or something." Lewinsky 8/6/98 GJ at 40. *See also* Lewinsky 7/29/98 Int. at 17.
[444] FBI Lab Reports, 8/6/98, 8/17/98.
[445] Clinton 8/17/98 GJ at 55.
[446] Clinton 8/17/98 GJ at 138.
[447] Clinton 8/17/98 GJ at 136-37.

E. MARCH 29 SEXUAL ENCOUNTER

According to Ms. Lewinsky, she had what proved to be her final sexual encounter with the President on Saturday, March 29, 1997. Records show that she was at the White House from 2:03 to 3:16 p.m., admitted by Ms. Currie.[448] The President was in the Oval Office during this period (he left shortly after Ms. Lewinsky did, at 3:24 p.m.), and he did not have any phone calls during her White House visit.[449]

According to Ms. Lewinsky, Ms. Currie arranged the meeting after the President said by telephone that he had something important to tell her. At the White House, Ms. Currie took her to the study to await the President. He came in on crutches, the result of a knee injury in Florida two weeks earlier.[450]

According to Ms. Lewinsky, their sexual encounter began with a sudden kiss: "[T]his was another one of those occasions when I was babbling on about something, and he just kissed me, kind of to shut me up, I think." [451] The President unbuttoned her blouse and touched her breasts without removing her bra.[452] "[H]e went to go put his hand down my pants, and then I unzipped them because it was easier. And I didn't have any panties on. And so he manually stimulated me." [453] According to Ms. Lewinsky, "I wanted him to touch my genitals with his genitals," and he did so, lightly and without penetration. [454] Then Ms. Lewinsky performed oral sex on him, again until he ejaculated.[455]

According to Ms. Lewinsky, she and the President had a lengthy conversation that day. He told her that he suspected that a foreign embassy (he did not specify which one) was tapping his telephones, and he proposed cover stories. If ever questioned, she should say that the two of them were just friends. If anyone ever asked about their phone sex, she should say that they knew their calls were being monitored all along, and the phone sex was just a put-on.[456]

In his grand jury testimony, the President implicitly denied this encounter. He acknowledged "inappropriate intimate contact" with Ms. Lewinsky "on certain occasions in early 1996 and once in early 1997." [457] The President indicated that "the one occasion in 1997" was the radio address.[458]

F. CONTINUING JOB EFFORTS

With the 1996 election past, meanwhile, Ms. Lewinsky had continued striving to get a job at the White House. She testified that

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[448] V006–DC–00000008 (WAVES records); V006–DC–00001792 (WAVES request). Phone records indicate that Ms. Lewinsky called Ms. Currie for one minute at 8:37 a.m. that day. 1014–DC–00000022.

[449] 968–DC–00000236 (presidential diary); V006–DC–00002130 (movement log); 968–DC–00003510 (phone log). Mrs. Clinton was in Africa. 968–DC–00003843 (schedule).

[450] Lewinsky 7/30/98 Int. at 16; Lewinsky 8/20/98 GJ at 67–69; Lewinsky 8/24/98 Int. at 7.

[451] Lewinsky 8/26/98 Depo. at 49.

[452] Lewinsky 8/26/98 Depo. at 50.

[453] Lewinsky 8/26/98 Depo. at 50.

[454] Lewinsky 8/26/98 Depo. at 51. *See* also Lewinsky 8/20/98 GJ at 68–69; Lewinsky 7/30/98 Int. at 16. Ms. Lewinsky testified that their genitals only briefly touched: "[W]e sort of had tried to do that, but because he's so tall and he couldn't bend because of his knee, it didn't really work." Lewinsky 8/26/98 Depo. at 51.

[455] Lewinsky 8/20/98 GJ at 68–69; Lewinsky 8/26/98 Depo. at 50; Lewinsky 7/30/98 Int. at 16.

[456] Lewinsky 7/30/98 Int. at 16.

[457] Clinton 8/17/98 GJ at 10.

[458] Clinton 8/17/98 GJ at 54–55, 137–38.

she first broached the issue in a telephone call with the President in January 1997, and he said he would speak to Bob Nash, Director of Presidential Personnel.[459] She understood that Mr. Nash was supposed to "find a position for me to come back to the White House." [460]

Over the months that followed, Ms. Lewinsky repeatedly asked the President to get her a White House job. In her recollection, the President replied that various staff members were working on it, including Mr. Nash and Marsha Scott, Deputy Assistant to the President and Deputy Director for Presidential Personnel.[461] According to Ms. Lewinsky, the President told her:

> "Bob Nash is handling it," "Marsha's going to handle it" and "We just sort of need to be careful." You know, and * * * he would always sort of * * * validate what I was feeling by telling me something that I don't necessarily know is true. "Oh, I'll talk to her," "I'll—you know, I'll see blah, blah, blah," and it was just "I'll do," "I'll do," "I'll do." And didn't, didn't, didn't.[462]

Ms. Lewinsky came to wonder if she was being "strung along." [463]

Testifying before the grand jury, the President acknowledged that Ms. Lewinsky had complained to him about her job situation:

> You know, she tried for months and months to get a job back in the White House, not so much in the West Wing but somewhere in the White House complex, including the Old Executive Office Building. * * * She very much wanted to come back. And she interviewed for some jobs but never got one. She was, from time to time, upset about it.[464]

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[459] Lewinsky 8/6/98 GJ at 66; Lewinsky 7/27/98 Int. at 5; Lewinsky 7/31/98 Int. at 8; Lewinsky 2/1/98 Statement at 1–2; MSL–DC–00001052; T1 at 38. Mr. Nash said he had never heard of Ms. Lewinsky before January 1998. Nash 3/19/98 Int. at 1; Nash 9/2/98 Int. at 1.

[460] Lewinsky 8/6/98 GJ at 67.

[461] Lewinsky 8/6/98 GJ at 66–67; Lewinsky 7/27/98 Int. at 5; Lewinsky 8/5/98 Int. at 2.

[462] Lewinsky 8/6/98 GJ at 86–87.

[463] Lewinsky 8/26/98 Depo. at 62.

[464] Clinton 8/17/98 GJ at 113–14. Later the President said: "I didn't order her to be hired at the White House. I could have done so. I wouldn't do it." *Id.* at 124. But *see* Scott 3/19/98 GJ at 76 ("When Mr. Bowles came in, one of the agreements that I think he got from the President was that he would control the hiring within the White House and that no Assistant to the President would be forced to take people within their shop that they did not want and were not qualified.").

VII. MAY 1997: TERMINATION OF SEXUAL RELATIONSHIP

In May 1997, amid indications that Ms. Lewinsky had been indiscreet, President Clinton terminated the sexual relationship.

A. QUESTIONS ABOUT MS. LEWINSKY'S DISCRETION

In April or May 1997, according to Ms. Lewinsky, the President asked if she had told her mother about their intimate relationship. She responded: "No. Of course not." [465] (In truth, she had told her mother. [466]) The President indicated that Ms. Lewinsky's mother possibly had said something about the nature of the relationship to Walter Kaye, who had mentioned it to Marsha Scott, who in turn had alerted the President. [467]

Corroborating Ms. Lewinsky's account, Mr. Kaye testified that he told Ms. Lewinsky's aunt, Debra Finerman, that he understood that "her niece was very aggressive," a remark that angered Ms. Finerman. Ms. Finerman told Mr. Kaye that the President was the true aggressor: He was telephoning Ms. Lewinsky late at night. Ms. Finerman, in Mr. Kaye's recollection, attributed this information to Marcia Lewis, Ms. Lewinsky's mother (and Ms. Finerman's sister). Mr. Kaye—who had disbelieved stories he had heard from Democratic National Committee people about an affair between Ms. Lewinsky and the President—testified that he was "shocked" to hear of the late-night phone calls. [468]

B. MAY 24: BREAK-UP

On Saturday, May 24, 1997, according to Ms. Lewinsky, the President ended their intimate relationship. Ms. Lewinsky was at the White House that day from 12:21 to 1:54 p.m. [469] The President was in the Oval Office during most of this period, from 11:59 a.m. to 1:47 p.m. [470] He did not have any telephone calls. [471]

According to Ms. Lewinsky, she got a call from Ms. Currie at about 11 a.m. that day, inviting her to come to the White House at about 1 p.m. Ms. Lewinsky arrived wearing a straw hat with the hat pin the President had given her, and bringing gifts for him, including a puzzle and a Banana Republic shirt. She gave him the

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[465] Lewinsky 8/6/98 GJ at 97–99; Lewinsky 7/27/98 Int. at 3.

[466] Lewinsky 8/6/98 GJ at 87; Lewinsky 7/27/98 Int. at 3.

[467] Lewinsky 8/6/98 GJ at 98–99; Lewinsky 7/27/98 Int. at 3. *See also* Lewinsky 9/3/98 Int. at 1.

[468] Kaye 5/21/98 GJ at 103-108. Ms. Finerman testified that she did have a conversation along these lines with Mr. Kaye. Finerman 3/18/98 Depo. at 52–57. Mr. Kaye testified that he could not recall having discussed Ms. Lewinsky with Ms. Scott. Kaye 5/21/98 GJ at 44. Ms. Scott testified that she could not recall talking to Mr. Kaye about Ms. Lewinsky in this period, or talking to him about phone calls between Ms. Lewinsky and the President at any time. Scott 3/31/98 GJ at 53.

[469] 827–DC–00000018 (Epass records).

[470] 1222–DC–00000242.

[471] 968–DC–00003533.

gifts in the dining room, and they moved to the area of the study.[472]

According to Ms. Lewinsky, the President explained that they had to end their intimate relationship.[473] Earlier in his marriage, he told her, he had had hundreds of affairs; but since turning 40, he had made a concerted effort to be faithful.[474] He said he was attracted to Ms. Lewinsky, considered her a great person, and hoped they would remain friends. He pointed out that he could do a great deal for her. The situation, he stressed, was not Ms. Lewinsky's fault.[475] Ms. Lewinsky, weeping, tried to persuade the President not to end the sexual relationship, but he was unyielding, then and subsequently.[476] Although she and the President kissed and hugged thereafter, according to Ms. Lewinsky, the sexual relationship was over.[477]

Three days after this meeting, on May 27, 1997, the Supreme Court unanimously rejected President Clinton's claim that the Constitution immunized him from civil lawsuits. The Court ordered the sexual harassment case *Jones* v. *Clinton* to proceed.[478]

VIII. JUNE–OCTOBER 1997: CONTINUING MEETINGS AND CALLS

Ms. Lewinsky tried to return to the White House staff and to revive her sexual relationship with the President, but she failed at both.

A. CONTINUING JOB EFFORTS

Although Ms. Lewinsky was not offered another White House job, some testimony indicates that the President tried to get her one.

According to Betty Currie, the President instructed her and Marsha Scott to help Ms. Lewinsky find a White House job.[479] Ms. Currie testified that she resisted the request, because her opinion of Ms. Lewinsky had shifted over time. At first, she testified, she considered Ms. Lewinsky "a friend" who "had been wronged" and

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[472] Lewinsky 8/4/98 Int. at 2–3.
[473] Lewinsky 8/6/98 GJ at 24–25, 101.
[474] Lewinsky 8/4/98 Int. at 2; Lewinsky 7/31/98 Int. at 16.
[475] Lewinsky 8/4/98 Int. at 2–3.
[476] Lewinsky 8/4/98 Int. at 3. Ms. Lewinsky later told confidants about the May 24 breakup. Catherine Davis 3/17/98 GJ at 133–35; Erbland 2/12/98 GJ at 46–47; Kassorla 8/28/98 Int. at 4; Raines 1/29/98 GJ at 58–59; Tripp 7/14/98 GJ at 78–84; Ungvari 3/19/98 GJ at 80. Dr. Kassorla, Ms. Lewinsky's therapist, told Ms. Lewinsky that the President's statement sounded rehearsed and insincere. Kassorla 8/28/98 Int. at 4.

A fragment of a deleted file recovered from Ms. Lewinsky's home computer apparently refers to the President's May 24 announcement:

> . . . cannot do anything but accept that. However, I also cannot ignore what we have shared together. I don't care what you say, but if you were 100% fulfilled in your marriage I never would have seen that raw, intense sexuality that I saw a few times—watching your mouth on my breast or looking in your eyes while you explored the depth of my sex. Instead, it would have been a routine encounter void of anything but a sexual release. I do not want you to breach your moral standard . . . .

MSL–55–DC–0094; MSL–55–DC–0124 (spelling and punctuation corrected).

[477] Lewinsky 8/6/98 GJ at 25. *See also* Lewinsky 7/27/98 Int. at 3 (birthday kiss 8/16/97; Christmas kiss 12/28/97); *id.* at 7 (President told her that Christmas kiss was permissible). Ms. Lewinsky tried to initiate genital contact with the President on August 16, 1997, but he rebuffed her. Lewinsky 8/20/98 GJ at 70.
[478] *Clinton* v. *Jones,* 117 S. Ct. 1636 (1997).
[479] Currie 5/6/98 GJ at 31–33; Currie 5/7/98 GJ at 44, 68; Currie 5/14/98 GJ at 6–8, 148. Ms. Currie was uncertain when this occurred. Currie 5/6/98 GJ at 31.

had been "maligned improperly."[480] But "[l]ater on, I considered her as a pain in the neck, more or less."[481] The change of heart resulted in part from Ms. Currie's many phone calls in 1997 from Ms. Lewinsky, who was often distraught and sometimes in tears over her inability to get in touch with the President.[482] Deeming her "a little bit pushy," Ms. Currie argued against bringing Ms. Lewinsky back to work at the White House, but the President told her and Ms. Scott, in Ms. Currie's words, "to still pursue her coming back."[483] Indeed, according to Ms. Currie, the President "was pushing us hard" on the matter. [484] To the best of Ms. Currie's recollection, it was the only time the President instructed her to try to get someone a White House job.[485]

According to Ms. Lewinsky, the President told her to talk with Ms. Scott about a White House job in spring 1997.[486] On June 16, she met with Ms. Scott.[487] The meeting did not go as Ms. Lewinsky anticipated. She later recounted in an email message:

> There is most certainly a disconnect on what [the President] said he told her and how she acted. She didn't even know what my title or my job was * * * She didn't have any job openings to offer. Instead, she made me go over what happened when I had to leave (who told me), and then proceeded to confirm the Evelyn [Lieberman] story about my "inappropriate behavior." Then she asked me: with such nasty women there and people gossiping about me, why did I want to come back? I was so upset. I really did not feel it was her place to question me about that. Later on, I said something about being told I could come back after November and she wanted to know who told me that! So I have placed a call to him but I don't know what is going to happen.

Ms. Lewinsky added that she was inclined "to walk away from it all," but acknowledged that "I'm always saying this and then I change my mind."[488]

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[480] Currie 5/6/98 GJ at 45; Currie 5/14/98 GJ at 146.
[481] Currie 5/14/98 GJ at 146.
[482] Currie GJ 5/14/98 at 121; Currie GJ 5/6/98 at 13, 81.
[483] Currie 5/7/98 GJ at 43–44.
[484] Currie 5/7/98 GJ at 68.
[485] Currie 5/7/98 GJ at 69. Contrary to Ms. Currie's testimony, Ms. Scott testified that the President never asked her to help Ms. Lewinsky, though they may have discussed it. In Ms. Scott's account, she met with Ms. Lewinsky as a favor to Ms. Currie. Scott 3/19/98 GJ at 20, 32, 37, 78–79, 84–85; Scott 3/26/98 GJ at 13, 15; Scott 3/31/98 GJ at 43–44. For his part, the President testified that he talked with Ms. Scott about bringing Ms. Lewinsky back to work at the White House, though he did not order her to hire Ms. Lewinsky. Clinton 8/17/98 GJ at 130.
[486] Lewinsky 8/6/98 GJ at 67; Lewinsky 8/24/98 Int. at 7. Ms. Lewinsky also tried to get a White House job through other avenues. She applied for a position at the National Security Council and had interviews there on May 1 and June 11. Lewinsky 7/27/98 Int. at 5; Bailey 5/26/98 GJ at 23; Dimel 2/18/98 Int. at 1; Friedrich 7/17/98 Int. at 1; Stott 2/27/98 Int. at 2; V006–DC–00000008 (WAVES records); 827–DC–00000018 (Epass records); 833–DC–00001876 (Tripp email regarding a job announcement); V006–DC–00000221–224 (Dimel documents). She was not chosen for the job. V006–DC–00000223–224 (Dimel letter). She also pursued a job in the White House press office. Lewinsky 7/27/98 Int. at 5. At one point Ms. Lewinsky told the President that she had applied for these jobs, and he responded that he needed to know in advance if he was to help her. Lewinsky 7/27/98 Int. at 5.
[487] 827–DC–00000018 (Epass records); V006–DC–00000008 (WAVES records); Scott GJ 3/19/98 at 17.
[488] 1037–DC–00000265–266 (spelling and punctuation corrected). See also Finerman 3/18/98 Depo. at 50–51 (recounting this meeting); Tripp 7/14/98 GJ at 89–91 (recounting this meeting).

Though she characterized her recollection as "all jumbled," Ms. Scott corroborated much of Ms. Lewinsky's account.[489] Ms. Scott said that at some point she did ask Ms. Lewinsky why she wanted to return to the White House.[490] Ms. Scott also said that she was unaware of Ms. Lewinsky's job title before their meeting.[491]

Over the next three weeks, Ms. Lewinsky tried repeatedly, without success, to talk with the President about her job quest. In a draft of a letter to Ms. Currie, she wrote that the President "said to me that he had told [Ms. Scott] I had gotten a bum deal, and I should get a good job in the West Wing," but Ms. Scott did not seem eager to arrange for Ms. Lewinsky's return. Ms. Lewinsky wrote:

> I was surprised that she would question his judgment and not just do what he asked of her. Is it possible that, in fact, he did not tell her that? Does he really not want me back in the complex? He has not responded to my note, nor has he called me. Do you know what is going on? If so, are you able to share it with me?[492]

Ms. Currie testified to "a vague recollection" of having seen this letter.[493]

On June 29, 1997, Ms. Lewinsky wrote several notes. In a draft letter to Ms. Scott, Ms. Lewinsky wrote that "our last conversation was very upsetting to me," and added:

> Marsha, I was told that I could come back after the election. I knew why I had to leave last year by mid-April, and I have been beyond patient since then. I do not think it is fair to . . . be told by the person whom I was told would get me a job that there is nothing for me and she doesn't really hear about positions [in] the complex anyway. I know that in your eyes I am just a hindrance—a woman who doesn't have a certain someone's best interests at heart, but please trust me when I say I do. [494]

Ms. Lewinsky also drafted a note to the President pleading for a brief meeting the following Tuesday. Referring to her inability to get in touch with him, she wrote: "*Please do not do this to me.* I feel disposable, used and insignificant. I understand your hands are tied, but I want to talk to you and look at some options." [495] Around this time, Ms. Lewinsky told a friend that she was considering moving to another city or country.[496]

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[489] Scott 3/19/98 GJ at 52. See also Scott 3/26/98 GJ at 16–17.

[490] Scott 3/19/98 GJ at 74.

[491] Scott 3/19/98 GJ at 87.

[492] 833–DC–00001070.

[493] Currie 5/7/98 GJ at 35; *see id.* at 39.

[494] MSL-DC-00001176—1177. A revised version of the letter was also found in Ms. Lewinsky's apartment. MSL-DC-00001192. Consistent with a statement in the draft, Ms. Scott testified that "I don't hear about White House jobs." Scott 3/19/98 GJ at 90. Ms. Scott also testified that she recalled only a short thank-you note after her June 16 meeting with Ms. Lewinsky, though she did receive a "real pissy letter" from Ms. Lewinsky at some point, which she threw away. Scott 3/19/98 GJ at 77; Scott 3/26/98 GJ at 18.

[495] MSL–DC–00001227 (emphasis in original). Ms. Lewinsky sent a version of the note. Lewinsky 8/4/98 Int. at 6. Records indicate that Ms. Lewinsky was in Madrid the following week and in Los Angeles later in the month. MSL–DC–00001221; 852–DC–00000035; 929–DC–00000056; 852–DC–00000037.

[496] 1037–DC–00000103, 1037–DC–00000280, 1037–DC–00000296 (email from Catherine Davis to Ms. Lewinsky referring to "[y]our idea about working in another city or country") (multiple copies of same message).

B. JULY 3 LETTER

"[V]ery frustrated" over her inability to get in touch with the President to discuss her job situation, Ms. Lewinsky wrote him a peevish letter on July 3, 1997.[497] Opening "Dear Sir," the letter took the President to task for breaking his promise to get her another White House job.[498] Ms. Lewinsky also obliquely threatened to disclose their relationship. If she was not going to return to work at the White House, she wrote, then she would "need to explain to my parents exactly why that wasn't happening." Some explanation was necessary because she had told her parents that she would be brought back after the election.[499] (Ms. Lewinsky testified that she would not actually have told her father about the relationship—she had already told her mother—but she wanted to remind the President that she had "left the White House like a good girl in April of '96," whereas other people might have threatened disclosure in order to retain the job.[500])

Ms. Lewinsky also raised the possibility of a job outside Washington. If returning to the White House was impossible, she asked in this letter, could he get her a job at the United Nations in New York?[501] It was the first time that she had told the President that she was considering moving.[502]

Although not questioned about this particular letter, the President testified that he believed Ms. Lewinsky might disclose their intimate relationship once he stopped it. He testified:

> After I terminated the improper contact with her, she wanted to come in more than she did. She got angry when she didn't get in sometimes. I knew that that might make her more likely to speak, and I still did it because I had to limit the contact.[503]

After receiving the July 3 letter, though, the President agreed to see Ms. Lewinsky. In her account, Ms. Currie called that afternoon and told her to come to the White House at 9 a.m. the next day.[504]

C. JULY 4 MEETING

On Friday, July 4, 1997, Ms. Lewinsky had what she characterized as a "very emotional" visit with the President.[505] Records show that Ms. Lewinsky entered the White House at 8:51 a.m.; no exit time is recorded.[506] Logs indicate that the President was in the Oval Office from 8:40 until after 11 a.m.[507]

In Ms. Lewinsky's recollection, their meeting began contentiously, with the President scolding her: "[I]t's illegal to threaten

[497] Lewinsky 7/29/98 Int. at 8.
[498] Lewinsky 8/6/98 GJ at 68, 87; Lewinsky 7/29/98 Int. at 7–8; Lewinsky 8/11/98 Int. at 6.
[499] Lewinsky 8/6/98 GJ at 68, 87. *See also* Lewinsky 7/29/98 Int. at 7–8; Lewinsky 8/11/98 Int. at 6.
[500] Lewinsky 8/6/98 GJ at 68–69, 87–89. *See also* Lewinsky 8/26/98 Depo. at 62–63.
[501] Lewinsky 8/6/98 GJ at 68, 87; Lewinsky 7/29/98 Int. at 7–8; Lewinsky 8/11/98 Int. at 6.
[502] Lewinsky 7/29/98 Int. at 8; Lewinsky 8/13/98 Int. at 1. Ms. Lewinsky said she thought of the United Nations because a former Pentagon colleague worked there and liked it. Lewinsky 8/13/98 Int. at 1.
[503] Clinton 8/17/98 GJ at 124.
[504] Lewinsky 8/6/98 GJ at 69. *See also* Lewinsky 7/29/98 Int. at 8.
[505] Lewinsky 8/6/98 GJ at 69. *See also* Lewinsky 7/29/98 Int. at 7.
[506] 827–DC–00000018.
[507] V006–DC–00002140; V006–DC–00002214.

the President of the United States."[508] He then told her that he had not read her July 3 letter beyond the "Dear Sir" line; he surmised that it was threatening because Ms. Currie looked upset when she brought it to him. (Ms. Lewinsky suspected that he actually had read the whole thing.)[509] Ms. Lewinsky complained about his failure to get her a White House job after her long wait. Although the President claimed he wanted to be her friend, she said, he was not acting like it. Ms. Lewinsky began weeping, and the President hugged her. While they hugged, she spotted a gardener outside the study window, and they moved into the hallway by the bathroom.[510]

There, the President was "the most affectionate with me he'd ever been," Ms. Lewinsky testified. He stroked her arm, toyed with her hair, kissed her on the neck, praised her intellect and beauty.[511] In Ms. Lewinsky's recollection:

> [H]e remarked * * * that he wished he had more time for me. And so I said, well, maybe you will have more time in three years. And I was * * * thinking just when he wasn't President, he was going to have more time on his hands. And he said, well, I don't know, I might be alone in three years. And then I said something about * * * us sort of being together. I think I kind of said, oh, I think we'd be a good team, or something like that. And he * * * jokingly said, well, what are we going to do when I'm 75 and I have to pee 25 times a day? And * * * I told him that we'd deal with that * * * [512]

Ms. Lewinsky testified that "I left that day sort of emotionally stunned," for "I just knew he was in love with me."[513]

Just before leaving, according to Ms. Lewinsky, she told the President "that I wanted to talk to him about something serious and that while I didn't want to be the one to talk about this with him, I thought it was important he know."[514] She informed him that *Newsweek* was working on an article about Kathleen Willey, a former White House volunteer who claimed that the President had sexually harassed her during a private meeting in the Oval Office on November 23, 1993. (Ms. Lewinsky knew of the article from Ms. Tripp, who had worked at the White House at the time of the alleged incident and had heard about the incident from Ms. Willey. Michael Isikoff of *Newsweek* had talked with Ms. Tripp about the episode in March 1997 and again shortly before July 4, and Ms. Tripp had subsequently related the Isikoff conversations to Ms. Lewinsky.[515]) Ms. Lewinsky told the President what she had learned from Ms. Tripp (whom she did not name), including the

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[508] Lewinsky 8/6/98 GJ at 75. *See also* Lewinsky 7/29/98 Int. at 8; Lewinsky 8/4/98 Int. at 4.
[509] Lewinsky 7/29/98 Int. at 8–9.
[510] Lewinsky 8/26/98 Depo. at 54–55; Lewinsky 7/27/98 Int. at 3.
[511] Lewinsky 8/26/98 Depo. at 55–56.
[512] Lewinsky 8/26/98 Depo. at 56–57. *See also* Lewinsky 7/28/98 Int. at 6.
[513] Lewinsky 8/26/98 Depo. at 56–57. *See also* Catherine Davis 3/17/98 GJ at 180; Tripp 7/7/98 GJ at 55–56; 845–DC–00000193 (Tripp notes).
[514] Lewinsky 8/6/98 GJ at 72. See also Lewinsky 8/4/98 Int. at 4.
[515] Lewinsky 8/6/98 GJ at 70–71; Tripp 7/14/98 GJ at 107–116.

fact that Ms. Tripp had tried to get in touch with Deputy White House Counsel Bruce Lindsey, who had not returned her calls.[516]

Ms. Lewinsky testified about why she conveyed this information to the President: "I was concerned that the President had no idea this was going on and that this woman was going to be another Paula Jones and he didn't really need that."[517] She understood that Ms. Willey was looking for a job, and she thought that the President might be able to "make this go away" by finding her a job.[518]

The President responded that the harassment allegation was ludicrous, because he would never approach a small-breasted woman like Ms. Willey.[519] He further said that, during the previous week, Ms. Willey had called Nancy Hernreich to warn that a reporter was working on a story about Ms. Willey and the President; Ms. Willey wondered how she could get out of it.[520]

According to Ms. Lewinsky, the President had no telephone calls during her time with him. At 10:19 a.m., probably after her departure (her exit time is not shown on logs), he placed two calls, both potentially follow-ups to the conversation about the Newsweek article. First, he spoke with Bruce Lindsey for three minutes, then with Nancy Hernreich for 11 minutes.[521]

D. JULY 14–15 DISCUSSIONS OF LINDA TRIPP

On the evening of Monday, July 14, 1997, just after Ms. Lewinsky had returned from an overseas trip, the President had her come to the White House to discuss Linda Tripp and *Newsweek*.[522] Ms. Lewinsky entered the White House at 9:34 p.m. and exited at 11:22 p.m.[523] The President was in the Oval Office area from 9:28 to 11:25 p.m.[524]

Ms. Lewinsky testified that, at around 7:30 p.m. that evening, Ms. Currie telephoned and said that the President wanted to talk to her or see her. At about 8:30 or 9:00 p.m., Ms. Currie called again and asked Ms. Lewinsky to come to the White House.[525]

Ms. Lewinsky testified that the President met her in Ms. Currie's office, then took her into Ms. Hernreich's office.[526] (Records show that seven minutes after Ms. Lewinsky's entry to the White House complex, the President left the Oval Office for the appointment secretary's office.)[527] According to Ms. Lewinsky:

> It was an unusual meeting . * * * It was very distant and very cold. * * * [A]t one point he asked me if the

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[516] Lewinsky GJ 8/6/98 at 72, 77; Lewinsky 302 7/29/98 at 7. According to Ms. Tripp, she had tried to alert Mr. Lindsey about the contact from Mr. Isikoff, but Mr. Lindsey, with whom she had worked at the White House, did not return her calls and pages. Ms. Tripp testified that she tried to reach him because "he was one of the protectors" of the President. Tripp 7/14/98 GJ at 111. Mr. Lindsey testified that he returned a page from Ms. Tripp, but not until July or August. Lindsey 2/18/98 GJ at 132–33.

[517] Lewinsky 8/6/98 GJ at 71.

[518] Lewinsky 8/6/98 GJ at 73–74; Lewinsky 7/29/98 Int. at 7.

[519] Lewinsky 7/29/98 Int. at 7; Lewinsky 8/11/98 Int. at 5.

[520] Lewinsky 8/6/98 GJ at 73; Lewinsky 7/29/98 Int. at 7.

[521] 968–DC–00003546.

[522] Lewinsky 8/6/98 GJ at 75.

[523] 827–DC–00000018; see also Steven Pape 5/18/98 Depo. at 3.

[524] V006–DC–00002142 (movement logs).

[525] Lewinsky 8/6/98 GJ at 75–76; Lewinsky 7/29/98 Int. at 9. Ms. Currie did not recall Ms. Lewinsky's visit of July 14. Currie 7/22/98 GJ at 81.

[526] Lewinsky 8/6/98 GJ at 76.

[527] 1222–DC–00000251 (movement logs).

> woman that I had mentioned on July 4th was Linda Tripp. And I hesitated and then answered yes, and he talked about that there was some issue * * * to do with Kathleen Willey and that, as he called it, that there was something on the Sludge Report, that there had been some information.[528]

The President told Ms. Lewinsky that Ms. Willey had called the White House again, this time to report that Mr. Isikoff somehow knew of her earlier White House call.[529] The President wondered if Ms. Lewinsky had mentioned the Willey call to Ms. Tripp, who in turn might have told Mr. Isikoff. Ms. Lewinsky acknowledged that she had done so. Ms. Lewinsky testified: "[H]e was concerned about Linda, and I reassured him. He asked me if I trusted her, and I said yes."[530] The President asked Ms. Lewinsky to try to persuade Ms. Tripp to call Mr. Lindsey.[531] The President, according to Ms. Lewinsky, also asked if she had confided anything about their relationship to Ms. Tripp. Ms. Lewinsky said (falsely) that she had not.[532]

The President left to participate in a conference call, which Ms. Lewinsky understood was with his attorneys, while Ms. Lewinsky sat with Ms. Currie.[533] According to White House records, at 10:03 p.m. the President participated in a 51-minute conference call with Robert Bennett, his private attorney in the Jones case, and Charles Ruff, White House Counsel. Immediately after completing that call, the President had a six-minute phone conversation with Bruce Lindsey.[534]

Afterward, the President returned and told Ms. Lewinsky, in her recollection, to notify Ms. Currie the following day, "without getting into details with her, even mentioning names with her," whether Ms. Lewinsky had "'mission-accomplished' * * * with Linda."[535]

The next day, according to Ms. Lewinsky, she did talk with Ms. Tripp, then called Ms. Currie and said she needed to talk with the President. He called her that evening. She told him "that I had tried to talk to Linda and that she didn't seem very receptive to trying to get in touch with Bruce Lindsey again, but that I would continue to try."[536] The President was in a sour mood, according to Ms. Lewinsky, and their conversation was brief.[537]

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[528] Lewinsky 8/6/98 GJ at 76. The President was referring to the Drudge Report, carried on the Internet, which had reported on July 4 (the day of Ms. Lewinsky's previous White House visit) that Michael Isikoff of *Newsweek* was "hot on the trail" of a story involving "a federal employee sexually propositioned by the President on federal property." Drudge Report 7/4/97. *See also Washington Post,* 8/11/97 at D1 (on Drudge Report's scoop of *Newsweek*).

[529] Lewinsky 8/6/98 GJ at 76–77.

[530] Lewinsky 8/6/98 GJ at 77.

[531] Lewinsky 8/6/98 GJ at 77–78; Tripp 7/16/98 GJ at 12.

[532] Lewinsky 8/6/98 GJ at 78; Lewinsky 7/27/98 Int. at 3; Lewinsky 7/29/98 Int. at 10; Tripp 7/14/98 GJ at 117–19; Tripp 7/16/98 GJ at 9.

[533] Lewinsky 8/6/98 GJ at 78–79.

[534] 968–DC–00003550.

[535] Lewinsky 8/6/98 GJ at 79; Tripp 7/16/98 at 12.

[536] Lewinsky 8/6/98 GJ at 796–80.

[537] Lewinsky 7/29/98 Int. at 10–11. Subsequently, Ms. Tripp did call Mr. Lindsey. He urged her to contact Robert Bennett, but she never did so. Lindsey 3/12/98 GJ at 3, 13; Lindsey 2/18/98 GJ at 132–40; Tripp 7/16/98 GJ at 12–14, 54–67, 75–80; Lewinsky 7/29/98 Int. at 11; T29 at 16; 880–DC–0000002—8.

E. JULY 16 MEETING WITH MARSHA SCOTT

On July 16, 1997, Ms. Lewinsky met again with Ms. Scott about returning to the White House.[538] Ms. Scott said she would try to detail Ms. Lewinsky from the Pentagon to Ms. Scott's office on a temporary basis, according to Ms. Lewinsky.[539] In that way, Ms. Scott said, Ms. Lewinsky could prove herself. Ms. Scott also said that "they had to be careful and protect [the President]."[540] Both Ms. Scott and Ms. Currie confirmed that Ms. Scott talked with Ms. Lewinsky about the possibility of being detailed to work at the White House.[541] Ms. Scott testified that she tried to arrange the detail on her own, without any direction from the President; Ms. Currie, however, testified that the President instructed her and Ms. Scott to try to get Ms. Lewinsky a job.[542]

F. JULY 24 MEETING

On Thursday, July 24, 1997, the day after her 24th birthday, Ms. Lewinsky visited the White House from 6:04 to 6:26 p.m., admitted by Ms. Currie.[543] The President was in the Oval Office when she arrived; he moved to the study at 6:14 p.m. and remained there until her departure.[544] He had no telephone calls during Ms. Lewinsky's visit.G5545

According to Ms. Lewinsky, she went to the White House to pick up a photograph from Ms. Currie, who said the President might be available for a quick meeting. Ms. Currie put Ms. Lewinsky in the Cabinet Room while the President finished another meeting, then took her to see him. They chatted for five to ten minutes, and the President gave Ms. Lewinsky, as a birthday present, an antique pin.[546]

G. NEWSWEEK ARTICLE AND ITS AFTERMATH

Newsweek published the Kathleen Willey story in its August 11, 1997, edition (which appeared a week before the cover date). The article quoted Ms. Tripp as saying that Ms. Willey, after leaving the Oval Office on the day of the President's alleged advances, looked "disheveled," "flustered, happy, and joyful." The article also quoted Robert Bennett as saying that Ms. Tripp was "not to be believed."[547]

After the article appeared, Ms. Tripp wrote a letter to *Newsweek* charging that she had been misquoted, but the magazine did not publish it.[548] Ms. Lewinsky subsequently told the President about Ms. Tripp's letter. He replied, Ms. Lewinsky said in a recorded con-

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[538] Scott 3/19/98 GJ at 64–72.
[539] Lewinsky 7/31/98 Int. at 9.
[540] Lewinsky 2/1/98 Statement at 2.
[541] Scott 3/26/98 GJ at 18–21; Currie 5/7/98 GJ at 68. Ms. Lewinsky also conferred with her supervisor, Kenneth Bacon, about being detailed back to the White House. He gave his approval and sent a letter recommending her. Bailey 2/6/98 Int. at 3; Bacon 2/26/98 Int. at 2–3; 1012–DC–00000001; MSL–DC–00001230.
[542] Scott 3/19/98 GJ at 78–79; Scott 3/26/98 GJ at 13–15; Scott 3/31/98 GJ at 43–44; Currie 5/7/98 GJ at 68.
[543] 827–DC–00000018 (Epass records); V006–DC–00000008 (WAVES records); V006–DC–00001770 (WAVES request).
[544] 1222–DC–00000254 (movement logs).
[545] 968–DC–00003556 (phone logs).
[546] Lewinsky 8/6/98 GJ at 27–28 & Ex. ML–7; Lewinsky 8/24/98 Int. at 6.
[547] *Newsweek*, 8/11/97 at 30.
[548] 845–DC–00000190 (letter); Tripp 7/16/98 GJ at 85–88.

versation, "Well, that's good because it sure seemed like she screwed me from that article."[549]

H. AUGUST 16 MEETING

On Saturday, August 16, 1997, Ms. Lewinsky tried, unsuccessfully, to resume her sexual relationship with the President. She visited the White House on that day from 9:02 to 10:20 a.m.[550] The President moved from the Residence to the Oval Office at 9:20 a.m. and remained in the Oval Office until 10:03 a.m.[551] After a one-minute call to Betty Currie at her desk at 9:18 a.m., evidently from the Residence, the President had no calls while Ms. Lewinsky was at the White House[552] The next day he left for a vacation on Martha's Vineyard.[553]

Ms. Lewinsky testified that she brought birthday gifts for the President (his birthday is August 19):

> I had set up in his back office, I had brought an apple square and put a candle and had put his birthday presents out. And after he came back in and I sang happy birthday and he got his presents, I asked him * * * if we could share a birthday kiss in honor of our birthdays, because mine had been just a few weeks before. So, he said that that was okay and we could kind of bend the rules that day. And so * * * we kissed.[554]

Ms. Lewinsky touched the President's genitals through his pants and moved to perform oral sex, but the President rebuffed her.[555] In her recollection: "[H]e said, I'm trying not to do this and I'm trying to be good. * * * [H]e got visibly upset. And so * * * I hugged him and I told him I was sorry and not to be upset."[556] Later, in a draft note to "Handsome," Ms. Lewinsky referred to this visit: "It was awful when I saw you for your birthday in August. You were so distant that I missed you as I was holding you in my arms."[557]

I. CONTINUING JOB EFFORTS

Ms. Lewinsky and Ms. Scott talked by phone on September 3, 1997, for 47 minutes.[558] According to notes that Ms. Lewinsky

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[549] T30 at 166. Ms. Tripp responded: "Oh, God. He thinks I screwed him in the article. I'm dead." *Id.*

[550] V006–DC–00000008 (WAVES records).

[551] V006–DC–00002146 (movement logs). Secret Service Officer Steven Pape testified about Ms. Lewinsky's August 16 visit. When Ms. Lewinsky entered the complex through the Southwest Gate, Officer Pape, who was familiar with Ms. Lewinsky's visits, predicted to another officer that the President would move to the Oval Office shortly. Officer Pape's prediction proved accurate: The President moved to the Oval Office, according to records, 18 minutes after Ms. Lewinsky entered the White House. Pape 8/5/98 GJ at 20–24; Myrick 8/13/98 GJ at 5–9; V006–DC–00002146 (movement logs); V006–DC–00002095 (movement logs); V006–DC–00002147 (movement logs). *See also* Shegogue 8/4/98 GJ at 10–11, 14–15, 17–20 (Secret Service officer recalling that Ms. Currie escorted Ms. Lewinsky into West Wing the day before President left for Martha's Vineyard).

[552] 968–DC–00003558.

[553] 968–DC–00002947.

[554] Lewinsky 8/26/98 Depo. at 52. *See also* Lewinsky 8/20/98 GJ at 70.

[555] Lewinsky 8/20/98 GJ at 70; Lewinsky 8/26/98 Depo. at 51-53.

[556] Lewinsky 8/26/98 Depo. at 52.

[557] DB-DC-00000022 (note dated 11/12/97). Ms. Lewinsky said that she sent this or a similar note to the President. Lewinsky 7/31/98 Int. at 2. *See also* 1037-DC-00000583 (email to Catherine Davis).

[558] 1051-DC-00000003 (Pentagon phone records).

wrote to two friends, Ms. Scott told her that the detail slot in her office had been eliminated.[559] Ms. Lewinsky told one friend:

> So for now, there isn't any place for me to be detailed. So I should be PATIENT. I told her I was very upset and disappointed (even though I really didn't want to work for her) and then she and I got into it. She didn't understand why I wanted to come back when there were still people there who would give me a hard time and that it isn't the right political climate for me to come back. . . . She asked me why I kept pushing the envelope on coming back there—after all, I had the experience of being there already. So it's over. I don't know what I will do now but I can't wait any more and I can't go through all of this crap anymore. In some ways I hope I never hear from him again because he'll just lead me on because he doesn't have the balls to tell me the truth.[560]

Ms. Scott testified that "[t]he gist" of Ms. Lewinsky's email message describing the conversation "fits with what I remember telling her."[561]

Ms. Lewinsky expressed her escalating frustration in a note to the President that she drafted (but did not send).[562] She wrote:

> I believe the time has finally come for me to throw in the towel. My conversation with Marsha left me disappointed, frustrated, sad and angry. I can't help but wonder if you knew she wouldn't be able to detail me over there when I last saw you. Maybe that would explain your coldness. The only explanation I can reason for your not bringing me back is that you just plain didn't want to enough or care about me enough.

Ms. Lewinsky went on to discuss other women rumored to be involved with the President who enjoy "golden positions," above criticism, "because they have your approval." She continued: "I just loved you—wanted to spend time with you, kiss you, listen to you laugh—and I wanted you to love me back." She closed: "As I said in my last letter to you I've waited long enough. You and Marsha win. I give up. You let me down, but I shouldn't have trusted you in the first place.[563]

Ms. Lewinsky continued trying to discuss her situation with the President. On Friday, September 12, 1997, she arrived at the White House without an appointment, called Ms. Currie, and had a long wait at the gate. When Ms. Currie came to meet her, Ms. Lewinsky was crying. Ms. Currie explained that sometimes the President's hands are tied—but, she said, she had gotten his authorization to ask John Podesta, the Deputy Chief of Staff, to help Ms. Lewinsky return to work at the White House.[564]

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[559] 1037-DC-00000086–87, 1037-DC-00000167, 1037-DC-00000255—256, 1037-DC-00000258—259 (email to Catherine Davis); 1318-DC-00000001 (card to Dale Young).

[560] 1037-DC-00000086–87, 1037-DC-00000167, 1037-DC-00000255–256, 1037-DC-00000258—259 (email to Catherine Davis) (spelling and punctuation corrected).

[561] Scott 3/26/98 GJ at 142.

[562] Lewinsky 8/4/98 Int. at 5.

[563] MSL-DC-00001052 (spelling and punctuation corrected).

[564] Lewinsky 8/3/98 Int. at 6-7; Lewinsky 8/11/98 Int. at 5. *See also* 1037-DC-00000168 (email recounting episode). In mid or late September, according to Ms. Lewinsky, Ms. Currie told Ms.

J. BLACK DOG GIFTS

Before the President had left for vacation, Ms. Lewinsky had sent a note asking if he could bring her a T-shirt from the Black Dog, a popular Vineyard restaurant.[565] In early September, Ms. Currie gave several Black Dog items to Ms. Lewinsky.[566] In an email message to Catherine Davis, Ms. Lewinsky wrote: "Well, I found out from Betty yesterday that he not only brought me a t-shirt, he got me 2 t-shirts, a hat and a dress!!!! Even though he's a big schmuck, that is surprisingly sweet—even that he remembered!"[567]

K. LUCY MERCER LETTER AND INVOLVEMENT OF CHIEF OF STAFF

A letter dated September 30, 1997, styled as an official memo, was found in Ms. Lewinsky's apartment. According to Ms. Lewinsky, she sent this letter or a similar one to the President.[568] Addressed to "Handsome" and bearing the subject line "The New Deal," the faux memo proposed a visit that evening after "everyone else goes home." Ms. Lewinsky wrote: "You will show me that you will let me visit you sans a crisis, and I will be on my best behavior and not stressed out when I come (to see you, that is)." She closed with an allusion to a woman rumored to have been involved with an earlier President: "Oh, and Handsome, remember FDR would never have turned down a visit with Lucy Mercer!"[569]

Ms. Lewinsky did not visit the White House the night of September 30, but the President called her late the night of September 30 or October 1.[570] According to Ms. Lewinsky, he may have mentioned during this call that he would get Erskine Bowles to help her find a White House job.[571]

At around this time, the President did ask the White House Chief of Staff to help in the job search. Mr. Bowles testified about

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Lewinsky that she had spoken with Mr. Podesta. Lewinsky 7/31/98 Int. at 9; Lewinsky 8/13/98 Int. at 2; Lewinsky 2/1/98 Statement at 2. (Ms. Lewinsky thought that the President was having Ms. Currie do the "legwork" of getting her a job out of concern about appearances. Lewinsky 8/13/98 Int. at 3.) Mr. Podesta testified that he told Ms. Currie to have Ms. Lewinsky call him. Podesta 2/5/98 GJ at 35; Podesta 6/16/98 GJ at 12-19. Ms. Currie testified that she does not remember getting that response from Mr. Podesta, and, if she had gotten it, she would have passed it on to Ms. Lewinsky. Currie 5/14/98 GJ at 149-51. According to Ms. Lewinsky, Ms. Currie mentioned Mr. Podesta to her in September 1997, but never told her to call him. Lewinsky 8/24/98 Int. at 7. Subsequently, Ms. Currie asked Mr. Podesta to help Ms. Lewinsky get a New York job. Lewinsky 2/1/98 Statement at 2-3; Podesta 2/5/98 GJ at 40-43; Podesta 6/16/98 GJ at 13.

[565] 1037-DC-00000038–040; 1037-DC-00000167–169 (email to Catherine Davis).

[566] Lewinsky 8/6/98 GJ at 27-28 & Ex. ML-7.

[567] 1037-DC-00000038, 1037-DC-00000040, 1037-DC-00000167–169. Ms. Lewinsky told several people about the gifts. Catherine Davis 3/17/98 GJ at 31-32, 109-111; Erbland 2/12/98 GJ at 39-42; Finerman 3/18/98 Depo. at 14-15; Raines 1/29/98 GJ at 53-55; Tripp 7/16/98 GJ at 119-120; 845-DC-00000193 (Tripp notes). According to the President and Ms. Currie, he gave the Black Dog items to Ms. Currie to distribute as she wished; he did not bring them specifically for Ms. Lewinsky. Clinton 1/17/98 Depo. at 75-76; Currie 5/7/98 GJ at 73-78. Ms. Currie acknowledged, though, that in presenting the items to Ms. Lewinsky, she might have implied that President Clinton had gotten them especially for her. Currie 5/7/98 GJ at 78.

[568] Lewinsky 7/29/98 Int. at 16; Lewinsky 8/4/98 Int. at 5.

[569] MSL-DC-00001050. Beneath the text of the document, at the bottom of the page, Ms. Lewinsky added: "JUST A REMINDER TO THROW THIS AWAY AND *NOT* SEND IT BACK TO THE STAFF SECRETARY!" *Id.* The statement that Ms. Lewinsky and the President had not spent time together in six weeks evidently refers to her August 16 visit, before his vacation.

[570] Lewinsky 8/6/98 GJ at 27-28 & Ex. ML-7. On September 30, the President signed, under penalty of perjury, interrogatory responses in the sexual harassment case, answering Ms. Jones's allegations against him. V002-DC-00000008–15.

[571] Lewinsky 8/13/98 Int. at 1. In email, Ms. Lewinsky indicated that it was Ms. Currie who told her that the President was going to talk to the Chief of Staff. 1037-DC-00000168.

a conversation with the President in the Oval Office: "He told me that there was a young woman—her name was Monica Lewinsky—who used to work at the White House; that Evelyn . . . thought she hung around the Oval Office too much and transferred her to the Pentagon."[572] The President asked Mr. Bowles to try to find Ms. Lewinsky a job in the Old Executive Office Building.[573] Mr. Bowles assigned his deputy, John Podesta, to handle it.[574]

L. NEWS OF JOB SEARCH FAILURE

On October 6, 1997, according to Ms. Lewinsky, she was told that she would never work at the White House again. Ms. Tripp conveyed the news, which she indicated had come from a friend on the White House staff. Ms. Lewinsky testified:

> Linda Tripp called me at work on October 6th and told me that her friend Kate in the NSC * * * had heard rumors about me and that I would never work in the White House again. * * * [Kate's] advice to me was "get out of town."[575]

For Ms. Lewinsky, who had previously considered moving to New York, this call was the "straw that broke the camel's back."[576] She was enraged.[577]

In a note she drafted (but did not send), Ms. Lewinsky expressed her frustration. She wrote:

> Any normal person would have walked away from this and said, "He doesn't call me, he doesn't want to see me—screw it. It doesn't matter." I can't let go of you. * * * I want to be a source of pleasure and laughter and energy to you. I want to make you smile.

She went on to relate that she had heard second-hand from a White House employee "that I was 'after the President' and would never be allowed to work [in] the complex." Ms. Lewinsky said she could only conclude "that all you have promised me is an empty promise. * * * I am once again totally humiliated. It is very clear that there is no way I am going to be brought back." She closed the note: "I will never do anything to hurt you. I am simply not that kind of person. Moreover, I love you."[578]

When terminating their sexual relationship on May 24, the President had told Ms. Lewinsky that he hoped they would remain friends, for he could do a great deal for her.[579] Now, having learned that he could not (or would not) get her a White House job, Ms.

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[572] Bowles 4/2/98 GJ at 12, 65-73.

[573] Bowles 4/2/98 GJ at 67-68.

[574] Bowles 4/2/98 GJ at 70, 74-75. Mr. Bowles placed this incident in late summer or early fall of 1997. Bowles 4/2/98 GJ at 65-66. Mr. Podesta's account largely matches Mr. Bowles's, except that Mr. Podesta placed the incident in late spring or summer of 1997; he understood that Ms. Lewinsky wanted a job in the White House or an agency; and he recalled being told by Mr. Bowles that Ms. Lewinsky, according to the President, "thought that she hadn't been treated fairly" in being transferred to the Pentagon. Podesta 2/5/98 GJ at 21-22.

[575] Lewinsky 8/6/98 GJ at 102. *See also* Lewinsky GJ 8/6/98 at 102; Lewinsky 7/29/98 Int. at 13; Lewinsky 7/31/98 Int. at 9; Tripp 7/28/98 GJ at 110-111, 125-26. Ms. Tripp's friend Kate Friedrich, however, has denied having made the remarks that Ms. Tripp attributed to her. Friedrich 7/17/98 Int. at 1.

[576] Lewinsky 7/31/98 Int. at 10.

[577] Lewinsky 8/13/98 Int. at 1.

[578] MSL–55–DC–0178 (spelling and punctuation corrected).

[579] Lewinsky 8/4/98 Int. at 2–3.

Lewinsky decided to ask him for a job in New York, perhaps at the United Nations—a possibility that she had mentioned to him in passing over the summer. On the afternoon of October 6, Ms. Lewinsky spoke of this plan to Ms. Currie, who quoted the President as having said earlier: "Oh, that's no problem. We can place her in the UN like that."[580]

In a recorded conversation later on October 6, Ms. Lewinsky said she wanted two things from the President. The first was contrition: He needed to "acknowledge * * * that he helped fuck up my life."[581] The second was a job, one that she could obtain without much effort: "I don't want to have to work for this position. * * * I just want it to be given to me."[582] Ms. Lewinsky decided to write the President a note proposing that the two of them "get together and work on some way that I can come out of this situation not feeling the way I do."[583] After composing the letter, she said: "I want him to feel a little guilty, and I hope that this letter did that."[584]

In this letter, which was sent via courier on October 7, Ms. Lewinsky said she understood that she would never be given a White House job, and she asked for a prompt meeting to discuss her job situation.[585] She went on to advance a specific request:

> I'd like to ask you to help me secure a position in NY beginning 1 December. I would be very grateful, and I am hoping this is a solution for both of us. I want you to know that it has always been and remains more important to me to have you in my life than to come back. * * * Please don't let me down.[586]

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[580] T1 at 28.
[581] T1 at 24.
[582] T1 at 61.
[583] T1 at 25.
[584] T13 at 19.
[585] MSL–55–DC–00000001 (letter); 837–DC–00000001 (courier receipts); T1 at 97.
[586] MSL–55–DC–00000001.

IX. OCTOBER-NOVEMBER 1997: UNITED NATIONS' JOB OFFER

Having learned that she would not be able to return to the White House, Ms. Lewinsky sought the President's help in finding a job in New York City. The President offered to place her at the United Nations. After initial enthusiasm, Ms. Lewinsky cooled on the idea of working at the U.N., and she prodded the President to get her a job in the private sector.

A. OCTOBER 10: TELEPHONE CONVERSATION

According to Ms. Lewinsky, the President telephoned her at approximately 2:00 to 2:30 a.m. on Friday, October 10.[587] They spent much of the hour-and-a-half call arguing. "[H]e got so mad at me, he must have been purple," she later recalled.[588]

According to Ms. Lewinsky, the President said: "If I had known what kind of person you really were, I wouldn't have gotten involved with you."[589] He reminded Ms. Lewinsky that she had earlier promised, "[i]f you just want to stop doing this, I'll * * * be no trouble."[590] Ms. Lewinsky said she challenged the President: "[T]ell me * * * when I've caused you trouble."[591] The President responded, "I've never worried about you. I've never been worried you would do something to hurt me."[592]

When the conversation shifted to her job search, Ms. Lewinsky complained that the President had not done enough to help her. He responded that, on the contrary, he was eager to help.[593] The President said that he regretted Ms. Lewinsky's transfer to the Pentagon and assured her that he would not have permitted it had he foreseen the difficulty in returning her to the White House.[594] Ms. Lewinsky told him that she wanted a job in New York by the end of October, and the President promised to do what he could.[595]

B. OCTOBER 11 MEETING

At approximately 8:30 a.m. on Saturday, October 11, according to Ms. Lewinsky, Ms. Currie called and told her that the President wished to see her.[596] Ms. Lewinsky entered the White House at

[587] Lewinsky 8/6/98 GJ at 103; Lewinsky 7/31/98 Int. at 10. *See also* Lewinsky 7/29/98 Int. at 6; Lewinsky 8/6/98 GJ at 27–28 & Ex. ML–7.
[588] T13 at 20.
[589] T8 at 30. *See also* Lewinsky 7/31/98 Int. at 10. *See also* MSL–55–DC–0177 (draft letter from Ms. Lewinsky to the President referring to this remark); DB–DC–00000017 (another draft of same letter).
[590] T8 at 30.
[591] T8 at 30.
[592] T8 at 33.
[593] Lewinsky 7/31/98 Int. at 10; Lewinsky 7/27/98 Int. at 5.
[594] Lewinsky 7/31/98 Int. at 10.
[595] Lewinsky 7/31/98 Int. at 10.
[596] Lewinsky 7/31/98 Int. at 11.

9:36 a.m. and departed at 10:54 a.m.[597] The President entered the Oval Office at 9:52 a.m.[598]

Ms. Lewinsky met with the President in the study, and they discussed her job search.[599] Ms. Lewinsky told the President that she wanted to pursue jobs in the private sector, and he told her to prepare a list of New York companies that interested her.[600] Ms. Lewinsky asked the President whether Vernon Jordan, a well-known Washington attorney who she knew was a close friend of the President and had many business contacts, might help her find a job.[601] According to Ms. Lewinsky, the President was receptive to the idea.[602]

In a recorded conversation, Ms. Lewinsky said that, at the end of the October 11 meeting, she and the President joined Ms. Currie in the Oval Office. The President grabbed Ms. Lewinsky's arm and kissed her on the forehead.[603] He told her: "I talked to Erskine [Bowles] about * * * trying to get John Hilley to give you * * * a good recommendation for your work here."[604]

Later, Ms. Lewinsky and Ms. Tripp discussed their concerns about the President's involvement in Ms. Lewinsky's job search. Specifically, Ms. Lewinsky was nervous about involving the President's Chief of Staff:

> Ms. Lewinsky: Well, see, I don't really think—I'm going to tell him that I don't think Erskine should have anything to do with this. I don't think anybody who works there should.
>
> Ms. Tripp: I don't see how that's—how that's a problem.
>
> Ms. Lewinsky: Because look at what happened with Webb Hubbell.[605]

Ms. Lewinsky preferred that Vernon Jordan assist her in her job search:

> Ms. Tripp: Well, I don't remember during the Webb Hubbell thing, was Vernon mentioned?
>
> Ms. Lewinsky: Yeah, but there's a big difference. I think somebody could construe, okay? Somebody could construe or say, "Well, they gave her a job to shut her up. They made her happy * * *. And he [Mr. Bowles] works for the government and shouldn't have done that." And with the other one [Mr. Jordan] you can't say that.[606]

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[597] 827–DC–00000018 (Epass records). Ms. Lewinsky's aunt, Debra Finerman, wrote in a note that "Monica was called by Betty to come at 9:30 this a.m." MSL–DC–00000456 (document found in Ms. Lewinsky's apartment in the course of a consensual search on January 22, 1998).

[598] 952–DC–00000060 (movement logs).

[599] Lewinsky 8/6/98 GJ at 27–28 & Exh. ML–7.

[600] Lewinsky 8/6/98 GJ at 104; Lewinsky 8/13/98 Int. at 2–3; T2 at 5.

[601] Lewinsky 8/6/98 GJ at 104; Lewinsky 7/31/98 Int. at 11–12. Ms. Lewinsky was not certain whether it was during the October 11 visit or their October 10 phone conversation that she first asked the President to speak to Mr. Jordan on her behalf. Lewinsky 8/6/98 GJ at 104.

[602] Lewinsky 8/6/98 GJ at 104; Lewinsky 7/31/98 Int. at 11–12. Ms. Lewinsky later said that the President assured her that he would call her and give "a report." T13 at 17–18.

[603] T2 at 14. In the grand jury, Ms. Currie was shown a transcript of this recorded conversation and acknowledged that the meeting described by Ms. Lewinsky "probably happened." Currie 5/6/98 GJ at 187.

[604] T2 at 14. Although it is unclear whether the President spoke with Mr. Bowles about a recommendation for Ms. Lewinsky in October, there is evidence he did so on January 13, 1998. *See infra* at Section XIII.H.

[605] T2 at 10–11.

[606] T2 at 11–12.

C. OCTOBER 16–17: THE "WISH LIST"

On October 16, Ms. Lewinsky sent the President a packet, which included what she called a "wish list" describing the types of jobs that interested her in New York City.[607] The note began:

> My dream had been to work in Communications or Strategic Planning at the White House. I am open to any suggestions that you may have on work that is similar to that or may intrigue me. The most important things to me are that I am engaged and interested in my work, I am *not* someone's administrative/executive assistant, and my salary can provide me a comfortable living in NY.[608]

She identified five public relations firms where she would like to work.[609] Ms. Lewinsky concluded by saying of the United Nations:

> I do not have any interest in working there. As a result of what happened in April '96, I have already spent a year and a half at an agency in which I have no interest. I want a job where I feel challenged, engaged, and interested. I don't think the UN is the right place for me.[610]

In a recorded conversation, Ms. Lewinsky said she wanted the President to take her list seriously and not ask her to settle for a U.N. job.[611] She said she hoped "that if he starts to pick a bone with me and the U.N., he sure as hell doesn't do it on the phone * * *. I don't want to start getting into a screaming match with him on the phone."[612]

In addition to the "wish list," Ms. Lewinsky said she enclosed in the packet a pair of sunglasses and "a lot of things in a little envelope," including some jokes, a card, and a postcard.[613] She said that she had written on the card: "Wasn't I right that my hugs are better in person than in cards?"[614] The postcard featured a "very erotic" Egon Schiele painting.[615] Ms. Lewinsky also enclosed a note with her thoughts on education reform.[616]

Ms. Lewinsky testified that she felt that the President owed her a job for several reasons: Her relationship with him was the reason she had been transferred out of the White House; he had promised her a job and so far had done nothing to help her find one; and she had left the White House "quietly," without making an issue of her relationship with the President.[617]

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[607] Lewinsky 7/31/98 Int. at 12. Ms. Lewinsky produced a draft of this document to the OIC on July 31, 1998. Lewinsky 7/31/98 Int. at 3. *See also* Lewinsky 8/13/98 Int. at 3.

[608] DB–DC–00000027 (punctuation corrected) (emphasis in original). Ms. Lewinsky produced a draft of this document to the OIC on July 31, 1998. Lewinsky 7/31/98 GJ at 3.

[609] DB–DC–00000027. Ms. Lewinsky also indicated that she would consider a job at one of the networks; she mentioned "Kaplan," and added that "CNN has a NY office." DB–DC–00000027. In a recorded conversation, Ms. Lewinsky said that she had told the President about her interest in television during their October 11 meeting. The President had responded, "The only one I know in a network is Kaplan, * * * but his job is in Atlanta." T2 at 6. *See also* Lewinsky 7/31/98 Int. at 11. CNN President Rick Kaplan is a friend of the President.

[610] DB–DC–00000027.

[611] T7 at 26.

[612] T7 at 30.

[613] T2 at 21–27. *See also* Lewinsky 8/6/98 GJ at 27–28 & Ex. ML–7; Lewinsky 8/11/98 Int. at 4.

[614] T2 at 23. In her description, the card was "kind of cartoony" and said: "This is a test of the emergency insanity system." T2 at 21. *See also* Lewinsky 8/13/98 Int at 3.

[615] T2 at 26–27.

[616] T2 at 27–30. Ms. Lewinsky asked Ms. Currie to leave the packet under the President's desk. T2 at 3. In a recorded conversation on October 17, Ms. Lewinsky indicated that Ms. Currie had received the package. T13 at 33.

[617] Lewinsky 8/13/98 Int. at 4; Lewinsky 8/26/98 Depo. at 61–63.

D. THE PRESIDENT CREATES OPTIONS

At some point around this time in the fall of 1997, Ms. Currie asked John Podesta, the Deputy Chief of Staff, to help Ms. Lewinsky find a job in New York.[618] Mr. Podesta testified that, during a Presidential trip to Latin America, he approached then-U.N. Ambassador William Richardson while aboard Air Force One and asked the Ambassador to consider a former White House intern for a position at the U.N.[619] At the time, Mr. Podesta could not recall the intern's name.[620] Ambassador Richardson and the President both testified that they never discussed Ms. Lewinsky with each other.[621]

Ambassador Richardson returned from Latin America on Sunday, October 19.[622] Within a few days, his Executive Assistant, Isabelle Watkins, called Mr. Podesta's secretary and asked whether "she knew anything about a resume that John was going to send us."[623] Mr. Podesta's secretary knew nothing about it and asked Mr. Podesta what to do; he instructed her to call Ms. Currie.[624] At 3:09 p.m. on October 21, Ms. Currie faxed Ms. Lewinsky's resume to the United Nations.[625]

At 7:01 p.m., a six-minute call was placed to Ms. Lewinsky's apartment from a U.N. telephone number identified in State Department records as "Ambassador Richardson's line."[626] Ms. Lewinsky testified that she spoke to Ambassador Richardson. A woman called, Ms. Lewinsky testified, and said, "[H]old for Ambassador Richardson."[627] Then the Ambassador himself came on the line: "I remember, because I was shocked and I was * * * very nervous."[628] The purpose of the call was to schedule a job interview at a Watergate apartment the following week.[629] At odds with Ms. Lewinsky, the Ambassador and Ms. Watkins both testified that Ms. Watkins, not the Ambassador, spoke with Ms. Lewinsky.[630]

A few days later, according to Ms. Lewinsky, the President called her. She had been upset because no one at the White House had prepared her for the Ambassador's recent call and because she did not want the White House to railroad her into taking the U.N.

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[618] Podesta 2/5/98 GJ at 40–41. *See also* Lewinsky 7/31/98 Int. at 10. As previously discussed, Ms. Currie had earlier asked Mr. Podesta to help Ms. Lewinsky obtain a White House job.

[619] Podesta 2/5/98 GJ at 40–45; Richardson 4/30/98 Depo. at 28. On Sunday, October 12, 1997, the President traveled to Latin America for one week. *United States President, Weekly Compilations of Presidential Documents* at 1608, 1609, 1653. On that trip, the President was accompanied by, among others, then-U.N. Ambassador William Richardson and the Deputy Chief of Staff, John Podesta. Richardson 4/30/98 Depo. at 28–29; Podesta 2/5/98 GJ at 44. Ambassador Richardson recalled that Mr. Podesta had first made the request prior to the trip to Latin America. Richardson 4/30/98 Depo. at 28.

[620] Podesta 2/5/98 GJ at 45; Richardson 4/30/98 Depo. at 32.

[621] Richardson 4/30/98 Depo. at 160–61; Clinton 1/17/98 Depo. at 73.

[622] Richardson 4/30/98 Depo. at 26.

[623] Watkins 5/27/98 Depo. at 11–12, 18.

[624] Podesta 2/5/98 GJ at 46.

[625] 828–DC–00000012 (faxed copy of Ms. Lewinsky's resume, produced by the U.N.); Currie 5/6/98 GJ at 174.

[626] 828–DC–00000004 (U.N. phone records).

[627] Lewinsky 8/13/98 Int. at 3.

[628] Lewinsky 8/26/98 Depo. at 63–64. *See also* Lewinsky 8/26/98 Depo. at 63–64; Lewinsky 7/31/98 Int. at 12; Lewinsky 7/27/98 Int. at 5.

[629] Lewinsky 7/27/98 Int. at 5.

[630] Richardson 4/30/98 Depo. at 47–48; Watkins 5/27/98 Depo. at 27–29. Ms. Watkins further testified that she often placed calls from the Ambassador's line. Watkins 5/27/98 Depo. at 37–38.

job.[631] She reiterated that she was eager to pursue other opportunities, especially in the private sector.[632] The President reassured her, promising that a U.N. position was just one of many options.[633]

Ms. Lewinsky spoke to the President again one week later. Ms. Lewinsky testified that she told Ms. Currie to ask the President to call her to assuage her nervousness before the U.N. interview.[634]

According to Ms. Lewinsky, on October 30, the night before the interview, the President did call. She characterized the conversation as a "pep talk": "[H]e was trying to kind of build my confidence and reassure me."[635] The President told her to call Ms. Currie after the interview.[636] In his *Jones* deposition, the President indicated that he learned of her interview with Ambassador Richardson not from Ms. Lewinsky herself but from Ms. Currie.[637]

E. THE U.N. INTERVIEW AND JOB OFFER

On Friday morning, October 31, Ambassador Richardson and two of his assistants, Mona Sutphen and Rebecca Cooper, interviewed Ms. Lewinsky at the Watergate.[638] According to Ambassador Richardson, he "listen[ed] while Mona and Rebecca were interviewing her."[639] Neither Ambassador Richardson nor any of his staff made inquiries, before or after the interview, about Ms. Lewinsky's prior work performance.[640]

On Sunday, November 2, Ms. Lewinsky drafted a letter to Ms. Currie asking what to do in the event she received an offer from the U.N.[641] She wrote:

> I became a bit nervous this weekend when I realized that Amb. Richardson said his staff would be in touch with me *this week*. As you know, the UN is supposed to be my back-up, but because VJ [Vernon Jordan] has been out of town, this is my only option right now. What should I say to Richardson's people this week when they call?[642]

Ms. Lewinsky asked Ms. Currie to speak to the President about her problem: "If you feel it's appropriate, maybe you could ask 'the big guy' what he wants me to do. Ahhhhh * * * anxiety!!!!!"[643] Ms. Lewinsky also mentioned the President's promise to involve Vernon Jordan in her job search:

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[631] Lewinsky 8/13/98 Int. at 3–4.
[632] Lewinsky 8/13/98 Int. at 4.
[633] Lewinsky 8/13/98 Int. at 4. *See* also Lewinsky 7/31/98 Int. at 12.
[634] Lewinsky 8/26/98 Depo. at 64–65; Lewinsky 7/31/98 Int. at 13.
[635] Lewinsky 8/26/98 Depo. at 65. Ms. Lewinsky wrote an email to her friend Catherine Allday Davis: "It was nice; the big creep called Thursday night to give me a pep talk because I was so afraid I'd sound like an idiot." 1037–DC–00000022 (spelling corrected).
[636] Lewinsky 7/31/98 Int. at 13. *See also* Lewinsky 8/26/98 Depo. at 65.
[637] Clinton 1/17/98 Depo. at 74.
[638] 828–DC–00000023 (Ambassador Richardson's diary reflecting 7:30 a.m. meeting with Monica Lewinsky). *See also* Ambassador Richardson 4/30/98 Depo. at 66–68; Sutphen 5/27/98 Depo. at 7; Cooper 1/27/98 Int. at 1–2; Lewinsky 7/31/98 Int. at 13–14. After meeting with Ms. Lewinsky, Ambassador Richardson spent the remainder of the day meeting individually with Senators and Members of Congress. 828–DC–00000023 (Ambassador Richardson's itinerary for October 31).
[639] Richardson 4/30/98 Depo. at 68; Cooper 1/27/98 Int. at 1–2.
[640] Richardson 4/30/98 Depo. at 39; Sutphen 5/27/98 Depo. at 15–16; Cooper 1/27/98 Int. at 2.
[641] The draft was retrieved from Ms. Lewinsky's computer in the course of a consensual search on January 22, 1998.
[642] MSL–55–DC–0179 (punctuation added) (italics in original).
[643] MSL–55–DC–0179.

I don't think I told you that in my conversation last Thursday night with him that he said that he would ask you to set up a meeting between VJ and myself, once VJ got back. I assume he'll mention this to you at some point—hopefully sooner rather than later! [644]

Before Ms. Lewinsky sent this letter, in her recollection, she received an offer from the U.N.[645] Phone records reflect that, at 11:02 a.m. on November 3, a three-minute call was placed to Ms. Lewinsky from the U.N. line identified in State Department records as Ambassador Richardson's.[646] Ms. Lewinsky stated that she believes she spoke to Ambassador Richardson, who extended her a job offer.[647]

According to his assistant, Ambassador Richardson made the decision to hire Ms. Lewinsky. Ms. Sutphen testified:

I said, are you sure; and he said, yeah, yeah, I'm sure, why. And I said * * * are you sure, though you don't want to talk to anyone else * * *. And he said, no, no, I think it's fine; why don't you go ahead and give her an offer? [648]

Ambassador Richardson and Ms. Sutphen both testified that Ms. Sutphen, not the Ambassador, extended the job offer to Ms. Lewinsky. They recalled that the offer was made a week or 10 days after the interview, though Ms. Sutphen, when shown the phone records, testified that the November 3 call to Ms. Lewinsky probably was the job offer.[649]

Ms. Lewinsky testified that she told Ms. Currie about the offer and she probably also told the President directly.[650] Ms. Currie first testified that she had "probably" told the President about Ms. Lewinsky's U.N. offer, then testified that she had in fact told him, then testified that she could not remember, though she acknowledged that the President was interested in Ms. Lewinsky's getting a job.[651]

When the President was asked in the *Jones* deposition whether he knew that Ms. Lewinsky had received the offer of a job at the U.N., he testified: "I know that she interviewed for one. I don't know if she was offered one or not." [652]

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[644] MSL–55–DC–0179. Ms. Lewinsky concluded the letter, "I was pleased the UN interview went well, but I'm afraid it will be like being at the Pentagon in NY . . . YUCK!" MSL–55–DC–0179 (ellipsis in original).

[645] Lewinsky 8/13/98 Int. at 4–5; Lewinsky 7/31/98 Int. at 14; Lewinsky 7/27/98 Int. at 5.

[646] 828–DC–00000003.

[647] Lewinsky 8/26/98 Depo. at 67; Lewinsky 7/27/98 Int. at 5; Lewinsky 7/31/98 Int. at 14; Lewinsky 8/13/98 Int. at 5.

According to Ambassador Richardson, the position offered to Ms. Lewinsky was not newly created. He testified that he intended to expand an open position in the U.N.'s Washington office and move it to New York. Richardson 4/30/98 Depo. at 39–40. Although Ambassador Richardson did not recall whether this opening was publicized, he testified that it would be common for the office not to post Schedule C (political appointment) positions. Richardson 4/30/98 Depo. at 71–72. Peter Aronsohn, who filled the position Ms. Lewinsky was offered, characterized the job as a "new position." Aronsohn 8/27/98 Int. at 2.

[648] Sutphen 5/27/98 Depo. at 26.

[649] Richardson 4/30/98 Depo. at 90–91; Sutphen 5/27/98 Depo. at 21–23.

[650] Lewinsky 8/26/98 Depo. at 65–66; Lewinsky 8/13/98 Int. at 4.

[651] Currie 5/6/98 GJ at 174–75, 181; Currie 5/14/98 GJ at 65–66.

[652] Clinton 1/17/98 Depo. at 73.

F. THE U.N. JOB OFFER DECLINED

Three weeks after she received an offer, on November 24, Ms. Lewinsky called Ms. Sutphen and asked for more time to consider the offer because she wanted to pursue possibilities in the private sector.[653] Ms. Sutphen told Ambassador Richardson, who, according to Ms. Sutphen, said the delay would be fine.[654] Over a month later, on January 5, 1998, Ms. Lewinsky finally turned down the job.[655]

[653] Sutphen 5/27/98 Depo. at 32–33; Lewinsky 8/13/98 Int. at 5.
[654] Sutphen 5/27/98 Depo. at 33. *See also* Richardson 4/30/98 Depo. at 110–11 (recalling Ms. Lewinsky's request for additional time to consider the offer).
[655] Lewinsky 7/27/98 Int. at 5; Sutphen 5/27/98 Depo. at 38; 1013–DC–00000095 (toll records for Debra Finerman).

X. NOVEMBER 1997: GROWING FRUSTRATION

Ms. Lewinsky met with Vernon Jordan, who promised to help her find a job in New York. November proved, however, to be a month of inactivity with respect to both Ms. Lewinsky's job search and her relationship with the President. Mr. Jordan did not meet with Ms. Lewinsky again, nor did he contact anyone in New York City on her behalf. Ms. Lewinsky became increasingly anxious about her inability to see the President. Except for a momentary encounter in mid-November, Ms. Lewinsky did not meet with the President between October 11 and December 5.

A. INTERROGATORIES ANSWERED

On November 3, 1997, the President answered Paula Jones's Second Set of Interrogatories. Two of those interrogatories asked the President to list any woman other than his wife with whom he had "had," "proposed having," or "sought to have" sexual relations during the time that he was Attorney General of Arkansas, Governor of Arkansas, and President of the United States.[656] President Clinton objected to the scope and relevance of both interrogatories and refused to answer them.[657]

B. FIRST VERNON JORDAN MEETING

In mid-October, the President had agreed to involve Vernon Jordan in Ms. Lewinsky's job search.[658] In a draft letter to Ms. Currie dated November 2, Ms. Lewinsky wrote that the President had "said he would ask you to set up a meeting between VJ and myself."[659] According to Ms. Lewinsky, on November 3 or November 4, Ms. Currie told her to call Vernon Jordan's secretary to arrange a meeting.[660] Ms. Currie said she had spoken with Mr. Jordan and he was expecting Ms. Lewinsky's call.[661] In Ms. Lewinsky's account, Ms. Currie sought Mr. Jordan's aid at the President's direction.[662] Mr. Jordan likewise testified that, in his understanding, the President was behind Ms. Currie's request.[663]

Ms. Currie testified at various points that she contacted Mr. Jordan on her own initiative; that the President "probably" talked with her about Ms. Lewinsky's New York job hunt; and that she

[656] 921–DC–00000101–118 (Second Set of Interrogatories from Plaintiff to Defendant Clinton).
[657] V002–DC–00000016; V002–DC–00000020–21.
[658] *See supra* at IX.B. *See also* Lewinsky 8/6/98 GJ at 104; Lewinsky 7/31/98 Int. at 11–12.
[659] MSL–55–DC–0179.
[660] Lewinsky 7/31/98 Int. at 14.
[661] Lewinsky 7/31/98 Int. at 14. Phone records reflect that on November 4 at 3:54 p.m., Ms. Lewinsky placed a three-and-a-half-minute call to Mr. Jordan's office; at 4:09 p.m., Mr. Jordan placed a one-minute call to Ms. Currie; and at 4:38 p.m., Mr. Jordan placed a one-minute call to Ms. Currie. 833–DC–00017875 (Ms Lewinsky's phone records); V004–DC–00000134 (Akin, Gump phone records).
[662] T2 at 11–12. *See also* Lewinsky 7/31/98 Int. at 11.
[663] Jordan 5/5/98 GJ at 47 (Mr. Jordan testified that he believed the President had told Ms. Currie to "[c]all Vernon and ask Vernon to help her").

could not recall whether the President was involved.[664] In his *Jones* deposition, the President was asked whether he did anything to facilitate a meeting between Mr. Jordan and Ms. Lewinsky. He testified:

> I can tell you what my memory is. My memory is that Vernon said something to me about her coming in, Betty had called and asked if he [Mr. Jordan] would see her [Ms. Lewinsky]. * * * I'm sure if he said something to me about it I said something positive about it. I wouldn't have said anything negative about it.[665]

When pressed, the President testified that he did not think that he was the "precipitating force" in arranging the meeting between Mr. Jordan and Ms. Lewinsky.[666]

At 8:50 a.m. on November 5, Mr. Jordan spoke with the President by telephone for five minutes.[667] Later that morning, Mr. Jordan and Ms. Lewinsky met in his office for about twenty minutes.[668] She told him that she intended to move to New York, and she named several companies where she hoped to work.[669] She showed him the "wish list" that she had sent the President on October 16.[670] Mr. Jordan said that he had spoken with the President about her and that she came "highly recommended."[671] Concerning her job search, Mr. Jordan said: "We're in business."[672]

In the course of the day, Mr. Jordan placed four calls to Ms. Hernreich (whom he acknowledged calling when he wished to speak to the President[673]) and one to Ms. Currie.[674] Mr. Jordan testified that he could not remember the calls, but "[i]t is entirely possible" that they concerned Monica Lewinsky.[675]

Mr. Jordan also visited the White House and met with the President at 2:00 p.m. that day.[676] Again, Mr. Jordan testified that he had "no recollection" of the substance of his conversation with the President.[677]

On November 6, the day after meeting with Mr. Jordan, Ms. Lewinsky wrote him a thank-you letter: "It made me happy to know that our friend has such a wonderful confidant in you."[678] Also on November 6, Ms. Lewinsky wrote in an email to a friend that she expected to hear from Mr. Jordan "later next week."[679]

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[664] Currie 5/6/98 GJ at 169–70, 176–78, 182–83, 198.
[665] Clinton 1/17/98 Depo. at 81.
[666] Clinton 1/17/98 Depo. at 82.
[667] 1178–DC–00000011 (call logs).
[668] Lewinsky 7/31/98 Int. at 14.
[669] Lewinsky 7/31/98 Int. at 14–15.
[670] Lewinsky 8/13/98 Int. at 3.
[671] Lewinsky 8/6/98 GJ at 106; Lewinsky 7/31/98 Int. at 14–15; Lewinsky 7/27/98 Int. at 8, 10. Ms. Lewinsky later quoted the remark in email to a friend. 1037–DC–00000017 (email to Catherine Davis).
[672] 1037–DC–00000017 (email retrieved from Catherine Davis's computer).
[673] Jordan 3/3/98 GJ at 13.
[674] V004–DC–00000135 (Akin, Gump phone records).
[675] Jordan 5/5/98 GJ at 54.
[676] 1178–DC–00000026 (WAVES record). Ms. Lewinsky would learn of the meeting between the President and Mr. Jordan. In email to a friend dated November 6, Ms. Lewinsky wrote that Mr. Jordan had "[seen] the big creep yesterday afternoon." 1037–DC–00000017 (spelling corrected) (email to Catherine Davis).
[677] Jordan 5/5/98 GJ at 34.
[678] 833–DC–00000980 (letter retrieved from Ms. Lewinsky's Pentagon computer) (spelling corrected).
[679] 1037–DC–00000017 (email retrieved from Catherine Davis's computer). Ms. Lewinsky wrote that she was "a little nervous to do the whole name of the BF. His first name is Vernon." *Id.* According to her aunt, Debra Finerman, Ms. Lewinsky used the code name "Gwen" when

The evidence indicates, though, that Mr. Jordan took no steps to help Ms. Lewinsky until early December, after she appeared on the witness list in the *Jones* case.

Mr. Jordan initially testified that he had "no recollection of having met with Ms. Lewinsky on November 5." [680] When shown documentary evidence demonstrating that his first meeting with Ms. Lewinsky occurred in early November, he acknowledged that an early November meeting was "entirely possible." [681] Mr. Jordan's failure to remember his November meeting with Ms. Lewinsky may indicate the low priority he attached to it at the time.

C. NOVEMBER 13: THE ZEDILLO VISIT

On Thursday, November 13, while Ernesto Zedillo, the President of Mexico, was in the White House, Ms. Lewinsky met very briefly with President Clinton in the private study.[682] Ms. Lewinsky's visit, which she described in an email as a "hysterical escapade," was the culmination of days of phone calls and notes to Ms. Currie and the President.[683]

Over the course of the week that preceded November 13, Ms. Lewinsky made several attempts to arrange a visit with the President. On Monday, November 10, in addition to making frequent calls to Ms. Currie, she sent the President a note asking for a meeting.[684]

She hoped to see him on Tuesday, November 11 (Veterans Day), but he did not respond.[685] By courier,[686] she sent the President another note:

> I asked you three weeks ago to please be sensitive to what I am going through right now and to keep in contact with me, and yet I'm still left writing notes in vain. I am not a moron. I know that what is going on in the world takes precedence, but I don't think what I have asked you for is unreasonable.[687]

She added: "This is so hard for me. I am trying to deal with so much emotionally, and I have nobody to talk to about it. I need you right now not as president, but as a man. PLEASE be my friend." [688]

That evening, November 12, according to Ms. Lewinsky, the President called and invited her to the White House the following

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discussing Mr. Jordan because "he's an important person" and Ms. Lewinsky "always had the feeling somebody was listening in" on their phone conversations, they did not want an eavesdropper to know that Mr. Jordan was helping her find a job. Finerman 3/18/98 Depo. at 60. *See also* Lewinsky 8/5/98 Int. at 3; Lewinsky 8/3/98 Int. at 9.

[680] Jordan 3/3/98 GJ at 50.

[681] Jordan 5/5/98 GJ at 26–30, 34.

[682] Epass records reflect that Ms. Lewinsky entered the White House at 6:20 p.m., admitted by Ms. Currie. 827–DC–00000018. Secret Service Movement logs show that the President entered the State Floor at 5:23 and moved to the Oval Office at 6:34. V006–DC–00002156.

[683] 1037–DC–00000318 (email retrieved from Catherine Davis's computer).

[684] Lewinsky 8/13/98 Int. at 5.

[685] Lewinsky 8/13/98 Int. at 5. Many of Ms. Lewinsky's previous visits with the President had occurred on holidays. *See, e.g.,* Lewinsky 7/30/98 Int. at 3, 13, 17 (describing visits on New Year's Eve, Presidents' Day, Easter Sunday, and July 4).

[686] 837–DC–00000008 (courier receipt).

[687] DB–DC–00000022. Ms. Lewinsky produced a draft of this letter to the OIC on July 31, 1998. *See also* Lewinsky 7/31/98 Int. at 1 (confirming that she delivered a substantially similar note).

[688] DB–DC–00000022.

day.[689] In an e-mail to a friend, Ms. Lewinsky wrote that she and the President "talked for almost an hour."[690] She added: "[H]e thought [N]ancy [Hernreich] (one of the meanies) would be out for a few hours on Thursday and I could come see him then."[691]

The following morning, November 13, Ms. Lewinsky tried to arrange a visit with the President. She called repeatedly but suspected that Ms. Currie was not telling the President of her calls.[692] Around noon, Ms. Currie told Ms. Lewinsky that the President had left to play golf. Ms. Lewinsky, in her own words, "went ballistic."[693]

After the President returned from the Army-Navy Golf Course in the late afternoon, Ms. Lewinsky told Ms. Currie that she was coming to the White House to give him some gifts.[694] Ms. Currie suggested that Ms. Lewinsky wait in Ms. Currie's car in the White House parking lot. Ms. Lewinsky went to the White House only to find that the doors to Ms. Currie's car were locked. Ms. Lewinsky waited in the rain.[695]

Ms. Currie eventually met her in the parking lot, and, in Ms. Lewinsky's words, they made a "bee-line" into the White House, sneaking up the back stairs to avoid other White House employees, particularly Presidential aide Stephen Goodin.[696] Ms. Lewinsky left two small gifts for the President with Ms. Currie, then waited alone for about half an hour in the Oval Office study.[697] In the study, Ms. Lewinsky saw several gifts she had given the President, including *Oy Vey! The Things They Say: A Guide to Jewish Wit,* Nicholson Baker's novel *Vox*, and a letter opener decorated with a frog.[698]

The President finally joined Ms. Lewinsky in the study, where they were alone for only a minute or two.[699] Ms. Lewinsky gave him an antique paperweight in the shape of the White House.[700] She also showed him an e-mail describing the effect of chewing Altoid mints before performing oral sex. Ms. Lewinsky was chewing Altoids at the time, but the President replied that he did not have

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[689] Lewinsky 8/13/98 Int. at 5–6. On November 12, 1997, the President responded to Paula Jones's Third Set of Interrogatories. In response to an interrogatory that asked the President to provide information about all individuals who have discoverable and relevant information regarding the disputed facts at issue in the case, the President provided a list of names that did *not* include Ms. Lewinsky. 849–DC–0000090–97.

[690] 1037–DC–00000318 (e-mail retrieved from Catherine Davis's computer).

[691] 1037–DC–00000318 (spelling corrected). Lewinsky 8/13/98 Int. at 6. On November 13, Ms. Hernreich was testifying before Congress. Walsh, "Democratic Donor Chung Invokes 5th Amendment; House Members Informally Interview Businessman Edward Walsh," *Washington Post,* November 15, 1997, at A6.

[692] MSL–1240–DC–0140; Lewinsky 8/13/98 Int. at 6.

[693] 1037–DC–00000318 (e-mail retrieved from Catherine Davis's computer).

[694] Lewinsky 8/13/98 Int. at 6; 1234–DC–00000050 (movement log); 986–DC–00003799 (Kearney Diary).

[695] Lewinsky 8/13/98 Int. at 6.

[696] Lewinsky 8/13/98 Int. at 6; 1037–DC–00000318 (e-mail to Catherine Davis).

[697] In a note to the President the next week, Ms. Lewinsky would write of the gifts: "I forgot to tell you: * * * The Gingko Blowjoba or whatever it is called and the Zinc lozenges were from me." MSL–55–DC–0140 (spelling and grammar corrected).

[698] Lewinsky 8/6/98 GJ at 183–85; Lewinsky 8/2/98 Int. at 4. Ms. Lewinsky also saw a clipping of the Valentine's Day ad she had placed in the *Washington Post* on the President's desk. Lewinsky 8/6/98 GJ at 183–84. In a document composed soon after this visit, Ms. Lewinsky wrote: "When I was hiding out in your office for a half-hour, I noticed you had the new Sarah McLachlan CD. I have it, too, and it's wonderful. Whenever I listen to song #5 I think of you. That song and Billie Holiday's version of 'I'll be Seeing You' are guaranteed to put me to tears when it comes to you!" MSL–1249–DC–0140–41 (deleted file from Ms. Lewinsky's home computer) (spelling and grammar corrected).

[699] 1037–DC–00000318 (e-mail to Catherine Davis).

[700] Lewinsky 8/13/98 Int. at 6.

enough time for oral sex.[701] They kissed, and the President rushed off for a State Dinner with President Zedillo.[702]

D. NOVEMBER 14–DECEMBER 4: INABILITY TO SEE THE PRESIDENT

After this brief November 13 meeting, Ms. Lewinsky did not see the President again until the first week in December. Hoping to arrange a longer rendezvous, she sent the President several notes, as well as a cassette on which she recorded a message.[703]

Along with her chagrin over not seeing the President, Ms. Lewinsky was frustrated that her job search had apparently stalled. A few days before Thanksgiving, she complained to Ms. Currie that she had not heard from Mr. Jordan.[704] Ms. Currie arranged for her to speak with him "before Thanksgiving," while Ms. Lewinsky was in Los Angeles. Mr. Jordan told her to call him the following week to arrange another meeting.[705]

In draft letters to the President, which were recovered from her Pentagon computer, Ms. Lewinsky reflected on the change in their relationship: "[B]oth professionally and personally, * * * our personal relationship changing has caused me more pain. Do you realize that?"[706] She asked for the President's understanding: "I don't want you to think that I am not grateful for what you are doing for me now—I'd probably be in a mental institute without it—but I am consumed with this disappointment, frustration, and anger." Ms. Lewinsky rued the brevity of her November 13 visit with the President: "All you * * * ever have to do to pacify me is see me and hold me," she wrote. "Maybe that's asking too much."[707]

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[701] OIC 8/27/98 Memo.

[702] 968–DC–00000187 (presidential schedule); 968–DC–00000303 (Kearney Diary). Ms. Currie initially testified that she could not recall Ms. Lewinsky's November 13 visit. Currie 5/6/98 GJ at 12, 15. After viewing documentary evidence, she recalled that this was the only time she surreptitiously escorted Ms. Lewinsky into the White House. *Id.* at 85.

[703] Lewinsky 8/11/98 Int. at 1; Lewinsky 7/31/98 Int. at 1–2; 837–DC–00000011 (courier receipt); MSL–1240–DC–0140–41 (document recovered from Ms. Lewinsky's home computer).

On November 17, 1997, the President responded to Paula Jones's First Set of Requests for Production of Documents and Things. One request sought documents sent to President Clinton by any woman (other than Mrs. Clinton) with whom President Clinton had sexual relations. V002–DC–00000056–92. President Clinton objected to this request as one designed "solely to harass, embarrass, and humiliate the President and the Office he occupies." V002–DC–00000075. Nonetheless, the President answered that he did not have any documents responsive to that request.

[704] Lewinsky 8/6/98 GJ at 105.

[705] Lewinsky 8/6/98 GJ at 105. Phone and pager records corroborate these contacts. 1205–DC–00000016; V004–DC–00000143; 831–DC–00000011. (Note that Ms. Lewinsky's pager records reflect Pacific Time; throughout this referral, time has been adjusted to Eastern Standard Time.)

[706] MSL–1249–DC–0140 (spelling and punctuation corrected).

[707] MSL–1249–DC–0139 (spelling and punctuation corrected).

XI. DECEMBER 5–18, 1997: THE WITNESS LIST AND JOB SEARCH

On Friday, December 5, Paula Jones's attorneys faxed a list of their potential witnesses—including Ms. Lewinsky—to the President's personal attorneys. The following day, President Clinton saw Ms. Lewinsky in an unscheduled visit and then discussed the *Jones* case with his attorneys and Deputy White House Counsel Bruce Lindsey. A few days later, Ms. Lewinsky met with Mr. Jordan at his office, and he arranged interviews for Ms. Lewinsky at three companies. In the middle of the night on December 17, the President called and informed Ms. Lewinsky that she was on the witness list and that she might have to testify under oath in the *Jones* case.

A. DECEMBER 5: THE WITNESS LIST

On Friday December 5, 1997, attorneys for Paula Jones identified Ms. Lewinsky as a potential witness in Ms. Jones's sexual harassment case.[708] At 5:40 p.m., they faxed their witness list to the President's attorney, Robert Bennett.[709] Ms. Lewinsky, however, would not learn of her potential involvement in the *Jones* case for twelve more days, when the President informed her.[710]

President Clinton was asked in the grand jury when he learned that Ms. Lewinsky's name was on the witness list. The President responded: "I believe that I found out late in the afternoon on the sixth." [711]

B. DECEMBER 5: CHRISTMAS PARTY AT THE WHITE HOUSE

On Friday, December 5, Ms. Lewinsky returned from Department of Defense travel in Europe.[712] She asked Ms. Currie if the President could see her the next day, but Ms. Currie said he was busy meeting with his lawyers.[713] In the late afternoon, she attended a Christmas party at the White House with a Defense Department colleague.[714] Ms. Lewinsky exchanged a few words with the President in the reception line.[715]

The Christmas reception encounter heightened Ms. Lewinsky's frustration. On the evening of December 5, she drafted an anguished letter to the President.[716] "[Y]ou want me out of your life,"

[708] 849–DC–00000128.
[709] 849–DC–00000121–37.
[710] *See infra* at Section XI.F. *See also* Lewinsky 8/6/98 GJ at 121–26.
[711] Clinton 8/17/98 GJ at 84–85. In his *Jones* deposition, the President acknowledged that he may have heard of the witness list before he actually saw it. Clinton 1/17/98 Depo. at 70.
[712] 833–DC–00003207 (Travel Voucher DOD).
[713] Lewinsky 8/6/98 GJ at 107; Lewinsky 7/31/98 Int. at 1.
[714] V006–DC–00000521 (guest list); VOO6–DC–00001859 (photograph of Ms. Lewinsky and the President at the reception).
[715] Lewinsky 7/31/98 Int. at 1.
[716] Lewinsky 7/31/98 Int. at 2; MSL–55–DC–0177. The wording of the letter resembles, in part, a message on a cassette found during the consensual search of Ms. Lewinsky's apartment: "Hi. [Sniffling, crying.] I was so sad seeing you last night. I was so angry with you that once again you had rejected me. . . . I wanted to feel the warmth of you and the smell of you and the touch

she wrote. “I guess the signs have been made clear for awhile—not wanting to see me and rarely calling. I used to think it was you putting up walls.”[717] She had purchased several gifts for him, and, she wrote, “I wanted to give them to you in person, but that is obviously not going to happen.”[718] Ms. Lewinsky reminded the President of his words during their October 10 telephone argument:

> I will never forget what you said that night we fought on the phone—if you had known what I was really like you would never have gotten involved with me. I'm sure you're not the first person to have felt that way about me. I am sorry that this has been such a bad experience.[719]

She concluded the letter: “I knew it would hurt to say goodbye to you; I just never thought it would have to be on paper. Take care.”[702]

C. DECEMBER 6: THE NORTHWEST GATE INCIDENT

1. Initial Visit and Rejection

On the morning of Saturday, December 6, Ms. Lewinsky went to the White House to deliver the letter and gifts to the President. The gifts included a sterling silver antique cigar holder, a tie, a mug, a “Hugs and Kisses” box, and an antique book about Theodore Roosevelt.[721] Ms. Lewinsky planned to leave the parcel with Ms. Currie, who had told Ms. Lewinsky that the President would be busy with his lawyers and unable to see her.[722]

Ms. Lewinsky arrived at the White House at approximately 10:00 a.m. She told the Secret Service uniformed officers at the Northwest Gate that she had gifts to drop off for the President, but that Ms. Currie did not know she was coming.[723] Ms. Lewinsky and the officers made several calls in an attempt to locate Ms. Currie.[724] The officers eventually invited Ms. Lewinsky inside the guard booth.[725] When Ms. Currie learned that Ms. Lewinsky was at the Northwest Gate, she sent word that the President “already had a guest in the [O]val,” so the officers should have Ms. Lewinsky wait there for about 40 minutes.[726]

While Ms. Lewinsky was waiting, one officer mentioned that Eleanor Mondale was in the White House.[727] Ms. Lewinsky correctly

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of you. And it made me sad. And I—you confuse me so much. I mean I [sigh]. I thought I—I thought I fell in love with this person that—that I really felt was such a good—such a good person, such a good heart, someone who's had a life with a lot of experiences.” *See* Document Supplement B, Tab 36.

[717] MSL–55–DC–0177 (punctuation corrected).

[718] MSL–55–DC–0177 (punctuation corrected).

[719] MSL–DC–55–0177 (punctuation corrected).

[720] MSL–55–DC–0177 (punctuation corrected).

[721] Lewinsky 8/6/98 GJ at 108–09; Lewinsky 8/6/98 GJ at 27–29 Exh. ML–7. The cigar holder, the tie, the mug, and the book have been produced to the OIC. V002–PHOTOS–0011 (holder, tie, and book); V002–PHOTOS–0005 (mug).

[722] Lewinsky 8/6/98 GJ at 111–12.

[723] Bryan Hall 5/21 98 Int. at 2; Bryan Hall 7/23/98 GJ at 10–11, 15–16; Niedzwiecki 7/30/98 GJ at 12–13; Lewinsky 8/6/98 GJ at 109–11.

[724] Lewinsky 8/6/98 GJ at 110–11; Niedzwiecki 7/30/98 GJ at 13–14.

[725] Byran Hall 7/23/98 GJ at 12–13; Niedzwiecki 7/30/98 GJ at 13, 15. Officer Hall recognized Ms. Lewinsky from a previous occasion, when she was greeted by, and delivered something to, Ms. Currie. Byran Hall 7/23/98 GJ at 6–10.

[726] Tyler 7/28/98 GJ at 40; Chinery 7/23/98 GJ at 8.

[727] Lewinsky 8/6/98 GJ at 111–12. Ms. Mondale recalled visiting the President that morning. Mondale 7/16/98 Int. at 1. *See also* 843–DC–00000004 (Epass records reflect that Ms. Mondale entered the White House at 9:33 a.m.).

surmised that the President was meeting with Ms. Mondale, rather than his lawyers, and she was "livid."[728] She stormed away, called and berated Ms. Currie from a pay phone, and then returned to her Watergate apartment.[729]

Hands shaking and almost crying, Ms. Currie informed several Secret Service officers that the President was "irate" that someone had disclosed to Ms. Lewinsky whom he was meeting with.[730] Ms. Currie told Sergeant Keith Williams, a supervisory uniformed Secret Service Officer, that if he "didn't find out what was going on, someone could be fired."[731] She also told Captain Jeffrey Purdie, the Secret Service watch commander for the uniformed division at the time, that the President was "so upset he wants somebody fired over this."[732]

2. Ms. Lewinsky Returns to the White House

From her apartment, Ms. Lewinsky reached the President on the phone.[733] According to Ms. Lewinsky, the President was angry that she had "made a stink" and said that "it was none of my business * * * what he was doing."[734]

Then, to Ms. Lewinsky's surprise, the President invited her to visit him.[735] She testified that "none of the other times that we had really fought on the phone did it end up resulting in a visit that day."[736] WAVES records reflect that Ms. Lewinsky was cleared to enter the White House at 12:52 p.m. and exited at 1:36 p.m.[737]

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[728] Lewinsky 8/6/98 GJ at 111–12. *See also* Currie 7/22/98 GJ at 88–89. Ms. Lewinsky suspected that Ms. Mondale was romantically involved with the President. Lewinsky 8/6/98 GJ at 111–12.

[729] Lewinsky 8/6/98 GJ at 112–13. Ms. Currie testified that Ms. Lewinsky angrily told her: "'You had lied to me, that the President is in the office, and he's meeting with someone.' And I said, 'Yeah, you're right.' She was not too happy about it, and words were exchanged." Currie 1/27/98 GJ at 37.

[730] Keith Williams 7/23/98 GJ at 24. *See also* Chinery 7/23/98 GJ at 10; Purdie 7/23/98 GJ at 13.

[731] Keith Williams 7/23/98 GJ at 12. Some testimony indicates that the President directly told Sergeant Williams about the Northwest Gate incident. Three officers testified that Sergeant Williams told them that the President had spoken to him and had indicated that he wanted the officer responsible for the disclosure of information fired. Niedzwiecki 7/30/98 GJ at 29, 37; Byran Hall 7/23/98 GJ at 25–26; Porter 8/13/98 GJ at 16–18. For example, Officer Niedzwiecki testified that soon after the incident, Sergeant Williams came to the Northwest Gate and said, "[t]he President wants somebody's job." Niedzwiecki 7/30/98 GJ at 29. Sergeant Williams testified, however, that the President did not speak to him directly about the incident. Keith Williams 7/23/98 GJ at 31–32. According to Sergeant Williams, when he met alone with Ms. Currie, he noticed that the door leading to the Oval Office was at first shut but then was cracked open. Keith Williams 7/23/98 GJ at 22, 30. Sergeant Williams testified that he heard what he assumed to be a male voice coming from within the Oval Office saying "[t]his person needs to be fired." Keith Williams 7/30/98 GJ at 10–11. Sergeant Williams told the officers at the gate that he spoke to the President only to get their attention. Keith Williams 7/30/98 GJ at 16–17. However, Sergeant Williams also told the supervisor who replaced him that afternoon that the President had spoken to him directly about the incident at the Northwest Gate. Deardoff 9/3/98 Depo. at 8–9.

[732] Purdie 7/23/98 GJ at 13, 18–19. Captain Purdie testified that he thought that the remedy of firing was "out of proportion to the incident . . . [e]specially without doing an investigation or a fact-finding mission." Purdie 7/23/98 GJ at 19.

[733] Lewinsky 8/6/98 GJ at 113.

[734] Lewinsky 8/6/98 GJ at 113–14.

[735] Lewinsky 8/6/98 GJ at 114.

[736] Lewinsky 8/6/98 GJ at 114.

[737] 827–DC–00000018. Secret Service logs reflect that the President was in the area of the Oval Office throughout this period. V006–DC–00002158.

During their meeting, Ms. Lewinsky told the President that Mr. Jordan had done nothing to help her find a job.[738] The President responded, "Oh, I'll talk to him. I'll get on it." [739]

Ms. Lewinsky testified that, overall, she had a "really nice" and "affectionate" visit with the President.[740] In an email to a friend a few days later, she wrote that, although "things have been crazy with the creep * * * I did have a wonderful visit with him on Saturday. When he doesn't put his walls up, it is always heavenly." [741]

3. "Whatever Just Happened Didn't Happen"

Later that day (December 6), the uniformed Secret Service officers at the Northwest Gate were told that no one would be fired—so long as they remained quiet. According to Sergeant Williams, Ms. Currie said that, if the officers did not "tell a lot of people what had happened, then nothing would happen." [742]

The President told Captain Jeffrey Purdie, the Secret Service watch commander for the uniformed division at the time, "I hope you use your discretion." [743] Captain Purdie interpreted the President's remark to mean that Captain Purdie "wasn't going to say anything," and he in turn told all of the officers involved not to discuss the incident.[744] One officer recalled that Captain Purdie told him and other officers, "Whatever just happened didn't happen." [745] Captain Purdie told another officer, "I was just in the Oval Office with the President and he wants somebody's ass out here.* * * As far as you're concerned, * * * [t]his never happened." [746] In response, that officer, who considered the Northwest Gate incident a "major event," "just shook [his] head" and "started making a set of [his] own notes" in order to document the incident.[747]

Captain Purdie recommended to his supervisor, Deputy Chief Charles O'Malley, that "no paperwork be generated" regarding the Northwest Gate incident because "Ms. Currie was satisfied with the way things were handled." [748] According to Captain Purdie, Deputy Chief O'Malley agreed, and no record of the incident was made.[749] Deputy Chief O'Malley testified that the meeting between

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[738] Lewinsky 8/6/98 GJ at 115–16. Specifically, Ms. Lewinsky told the President "that I was supposed to get in touch with Mr. Jordan the previous week and that things didn't work out and that nothing had really happened yet." *Id.*

[739] Lewinsky 8/6/98 GJ at 116. The President also told Ms. Lewinsky that he had already gotten a Christmas present for her and that he would give that to her during another visit. Lewinsky 8/1/98 Int. at 2.

[740] Lewinsky 8/6/98 GJ at 115.

[741] 1037–DC–00000011 (spelling corrected).

[742] Keith Williams 7/23/98 GJ at 25. Ms. Currie confirmed that she told an officer, "Okay. Fine. This never happened." However, she testified that she said this so that no officer would get in trouble. Currie 7/22/98 GJ at 91–92.

When Ms. Currie left work that day, she stopped by a Secret Service post and told an officer that "she spoke to the President * * * and * * * they decided that the incident never happened, they weren't going to pursue * * * discipline actions against them, that they just wanted it to go away." Chinery 7/23/98 GJ at 22–23. Later that week, Ms. Currie told that officer to inform one of his supervisors "that everything was okay and just to keep quiet about it." Keith Williams 7/23/98 GJ at 27–28.

[743] Purdie 7/23/98 GJ at 32; Purdie 7/17/98 GJ at 3.

[744] Purdie 7/17/98 GJ at 6; Bryan Hall 7/23/98 GJ at 31–32; Chinery 7/23/98 GJ at 21.

[745] Porter 8/13/98 GJ at 12.

[746] Niedzwiecki 7/30/98 GJ at 30–31.

[747] Niedzwiecki 7/30/98 GJ at 31, 44. *See also* Niedzwiecki 8/5/98 GJ at 4–6 (text of Niedzwiecki notes).

[748] Purdie 7/23/98 GJ at 35.

[749] Purdie 7/23/98 GJ at 34–36. While Deputy Chief O'Malley testified that Captain Purdie notified him of the incident, Deputy Chief O'Malley did not recall Captain Purdie discussing with

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the President and Captain Purdie was the only occasion he could recall in fourteen years at the White House where a President directly addressed a job performance issue with a uniformed division supervisor.[750]

The President was questioned in the grand jury about the incident at the Northwest Gate. He testified that he knew that Ms. Lewinsky had become upset upon learning that Ms. Mondale was in the White House "to see us that day."[751] He testified: "As I remember, I had some other work to do that morning. * * *"[752] The President said that the disclosure of information that day was "inappropriate" and "a mistake," but he could not recall whether he wanted a Secret Service officer fired or gave any such orders.[753] He thought that the officers "were * * * told not to let it happen again, and I think that's the way it should have been handled."[754] When asked if he told Captain Purdie that he hoped that he could count on his discretion, the President stated, "I don't remember anything I said to him in that regard."[755]

According to Ms. Lewinsky, the President later indicated to her that he had concerns about the discretion of the Secret Service uniformed officers. On December 28 she asked how Paula Jones's attorneys could have known enough to place her on the witness list. The President replied that the source might be Linda Tripp or "the uniformed officers."[756]

D. THE PRESIDENT CONFERS WITH HIS LAWYERS

Deputy Counsel Bruce Lindsey testified that he met with the President and the President's personal attorney, Robert Bennett, at around 5:00 p.m. on December 6 to discuss the *Jones* case.[757] According to Mr. Lindsey, it was "likely" that he learned about Ms. Lewinsky's appearance on the witness list in that meeting.[758]

Earlier in the day, at around 12:00 p.m. (after Ms. Lewinsky stormed away from the Northwest Gate but before she returned and saw the President), Mr. Lindsey had received a page: "Call Betty ASAP."[759] Mr. Lindsey testified that he did not recall the page, nor did he know, at the time, that Ms. Lewinsky had visited the White House.[760]

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him, at any time, a decision not to generate an incident report or a memorandum. Charles O'Malley 9/8/98 Depo. at 44, 47–48.

[750] O'Malley 9/8/98 Depo. at 22, 40–41.

[751] Clinton 8/17/98 GJ at 84–85, 87. Ms. Mondale stated that she met with the President alone in the Oval Office study that day. Mondale 7/16/98 Int. at 1.

[752] Clinton 8/17/98 GJ at 86.

[753] Clinton 8/17/98 GJ at 88–89.

[754] Clinton 8/17/98 GJ at 89–90.

[755] Clinton 8/17/98 GJ at 91–92.

[756] Lewinsky 8/6/98 GJ at 151–52; Lewinsky 2/1/98 Statement at 6. On December 23, Paula Jones's attorneys issued a subpoena to the Secret Service.

[757] Lindsey 3/12/98 GJ at 64–66; Lindsey 2/19/98 GJ at 9–10. WAVES records reflect that Robert Bennett entered the White House at 4:39 p.m. on Saturday, December 6. 1407–DC–00000005.

[758] Lindsey 3/12/98 GJ at 65.

[759] 964–DC–00000862 (Presidential mail notes).

[760] Lindsey 3/12/98 GJ at 63–64. Mr. Lindsey refused to answer questions about his December 6 meeting with the President, claiming attorney-client privilege and Executive (presidential communications) Privilege. *Id.* at 66. The U.S. District Court for the District of Columbia rejected Mr. Lindsey's claim of privilege, *In re Grand Jury Proceedings,* 5 F. Supp.2d 21 (D.D.C. 1998), and the Court of Appeals denied Mr. Lindsey's appeal, *In re Lindsey,* 148 F.3d 1100 (D.C. Cir. 1998). A petition for Supreme Court review is pending.

E. SECOND JORDAN MEETING

The next day (Sunday, December 7), Mr. Jordan visited the White House and met with the President.[761] Mr. Jordan testified that he was "fairly certain" that he did not discuss the *Jones* suit or Ms. Lewinsky.[762]

On Thursday, December 11, Ms. Lewinsky had her second meeting with Mr. Jordan.[763] Ms. Lewinsky testified that they discussed her job search, and Mr. Jordan told her to send letters to three business contacts that he provided her. Mr. Jordan noted that Ms. Lewinsky was anxious to get a job as quickly as possible, and he took action.[764] In the course of the day, Mr. Jordan placed calls on her behalf to Peter Georgescu, Chairman and Chief Executive Officer at Young & Rubicam; Richard Halperin, Executive Vice President and Special Counsel to the Chairman of MacAndrews & Forbes Holdings, Inc. (majority stockholder of Revlon); and Ursula Fairbairn, Executive Vice-President, Human Resources and Quality, of American Express.[765] Mr. Jordan told Ms. Lewinsky to keep him informed of the progress of her job search.[766]

At one point in the conversation, according to Ms. Lewinsky, Mr. Jordan said, "[Y]ou're a friend of the President."[767] This prompted Ms. Lewinsky to reveal that she "didn't really look at him as the President"; rather, she "reacted to him more as a man and got angry at him like a man and just a regular person."[768] When Mr. Jordan asked why Ms. Lewinsky got angry at the President, she replied that she became upset "when he doesn't call me enough or see me enough."[769] Ms. Lewinsky testified that Mr. Jordan advised her to take her frustrations out on him rather than the Presi-

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[761] WAVES records reflect that Mr. Jordan entered the White House at 5:21 p.m. on Sunday, December 7. 1178–DC–00000026.

[762] Jordan 5/5/98 GJ at 83. He later testified that the conversation was "[a]bsolutely not" about Ms. Lewinsky. Jordan 5/5/98 GJ at 116.

[763] V004–DC–00000171 (Akin, Gump visitor records) (recording visit of "Malensky"). Ms. Lewinsky recalled arranging the meeting on December 8 or 9. Lewinsky 8/1/98 Int. at 3. *See also* 833–DC–00017886 (reflecting Ms. Lewinsky's call to Mr. Jordan on December 8).

On December 8, Ms. Lewinsky sent Mr. Jordan a hat, a box of chocolates, and a note gently reminding him of his promise to help her find a job. Lewinsky 7/31/98 Int. at 15. She also sent the President a note and some peach candies. Lewinsky 8/1/98 Int. at 2; Lewinsky 8/1/98 Int. at 2; 837–DC–00000017; 837–DC–00000020 (courier receipts).

[764] Jordan 3/3/98 GJ at 41–42.

[765] V004–DC–00000148 (Akin, Gump phone records). *See also* Jordan 3/3/98 GJ at 54, 62–63, 70.

Mr. Halperin testified that Mr. Jordan had told him that Ms. Lewinsky "was a bright young woman who was energetic and enthusiastic and * * * encouraged me to meet with her." Halperin 4/23/98 GJ at 13. Similarly, Ms. Fairbairn stated that Mr. Jordan had told her that he "would like to send [her] a resume of a talented young lady and see if she matches up with any company openings." Fairbairn 1/29/98 Int. at 1. Mr. Georgescu, however, stated that Mr. Jordan "did not engage in a 'sales pitch' about [Ms.] Lewinsky." Georgescu 3/25/98 Int. at 2.

[766] Lewinsky 8/6/98 GJ at 121. Ms. Lewinsky left the meeting with Mr. Jordan on December 8 with the impression that Mr. Jordan was going to get her a job. Lewinsky 8/1/98 Int. at 4.

[767] Lewinsky 8/6/98 GJ at 119.

[768] Lewinsky 8/6/98 GJ at 120.

[769] Lewinsky 8/6/98 GJ at 120.

dent.[770] According to Ms. Lewinsky, Mr. Jordan summed up the situation: "You're in love, that's what your problem is." [771]

Mr. Jordan recalled a similar conversation, in which Ms. Lewinsky complained that the President did not see her enough, although he thought it took place during a meeting eight days later. He testified that he felt the need to remind Ms. Lewinsky that the President is the "leader of the free world" and has competing obligations.[772]

Mr. Jordan is "certain" that he had a conversation with the President about Ms. Lewinsky at some point after this December 11 meeting. [773] He told the President that he would be trying to get Ms. Lewinsky a job in New York.[774] Mr. Jordan testified that the President "was aware that people were trying to get jobs for her, that Podesta was trying to help her, that Bill Richardson was trying to help her, but that she really wanted to work in the private sector." [775]

F. EARLY MORNING PHONE CALL

On December 15, 1997, Paula Jones's lawyers served President Clinton with her second set of document requests by overnight mail. These requests asked the President to "produce documents that related to communications between the President and Monica Lewisky" [sic].[776] This was the first Paula Jones discovery request to refer to Monica Lewinsky by name.

Ms. Lewinsky testified that in the early-morning hours of December 17, at roughly 2:00 or 2:30 a.m., she received a call from the President.[777] The call lasted about half an hour.[778]

The President gave Ms. Lewinsky two items of news: Ms. Currie's brother had died in a car accident, and Ms. Lewinsky's name had appeared on the witness list in the *Jones* case.[779] According to Ms. Lewinsky, the President said "it broke his heart" to see her name on the witness list.[780] The President told her that she would not necessarily be subpoenaed; if she were, he "suggested she could sign an affidavit to try to satisfy [Ms. Jones's] inquiry and not be deposed." [781]

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[770] Lewinsky 8/6/98 GJ at 120. In her handwritten proffer, Ms. Lewinsky gave a very similar account of her second meeting with Mr. Jordan: "Ms. L. met again with Mr. Jordan in the beginning of December '97, at which time he provided Ms. L. with a list of three people to contact and suggested language to use in her letters to them. At some point, Mr. Jordan remarked something about Ms. L. being a friend of the Pres. of the United States. Ms. L. responded that she never really saw him as "the President"; she spoke to him like a normal man and even got angry with him like a normal man. Mr. Jordan asked what Ms. L. got angry about. Ms. L. replied that the Pres. doesn't see or call her enough. Mr. Jordan said Ms. L. should take her frustrations out on him—not the President." Lewinsky 2/1/98 Statement at 3–4.

[771] Lewinsky 8/6/98 GJ at 120.

[772] Jordan 3/3/98 GJ at 154.

[773] Jordan 3/3/98 GJ at 64–65.

[774] Jordan 3/3/98 GJ at 65.

[775] Jordan 3/3/98 GJ at 65.

[776] 1414–DC–00001534—46 (Plaintiff's Second Request for Production of Documents and Things).

[777] Lewinsky 8/6/98 GJ at 121–26.

[778] Lewinsky 8/6/98 GJ at 126. Ms. Lewinsky testified that the call came as a surprise because Mrs. Clinton was in town. *Id.* at 122. *See also* 968–DC–00003479 (Mrs. Clinton's schedule reflects that she was in Washington, D.C. on December 17).

[779] Lewinsky 8/6/98 GJ at 122–23.

[780] Lewinsky 8/6/98 GJ at 123.

[781] Lewinsky 2/1/98 Statement at 4.

The President told Ms. Lewinsky to contact Ms. Currie in the event she were subpoenaed.[782] He also reviewed one of their established cover stories. He told Ms. Lewinsky that she "should say she visited the [White House] to see Ms. Currie and, on occasion when working at the [White House], she brought him letters when no one else was around." [783] The President's advice "was * * * instantly familiar to [Ms. Lewinsky]." [784] She testified that the President's use of this "misleading" story amounted to a continuation of their pre-existing pattern.[785]

Later in the conversation, according to Ms. Lewinsky, the President said he would try to get Ms. Currie to come in over the weekend so that Ms. Lewinsky could visit and he could give her several Christmas presents.[786] Ms. Lewinsky replied that, since Ms. Currie's brother had just died, perhaps they should "let Betty be." [787]

In his grand jury appearance, the President was questioned about the December 17 phone call. He testified that, although he could not rule it out, he did not remember such a call.[788] The President was also asked whether in this conversation, or a conversation before Ms. Lewinsky's name came up in the *Jones* case, he instructed her to say that she was coming to bring letters. The President answered: "I might well have said that." [789]

But when asked whether he ever said anything along these lines *after* Ms. Lewinsky had been identified on the witness list, the President answered: "I don't recall whether I might have done something like that." [790] He speculated that he might have suggested this explanation in the context of a call from a reporter.[791] Nonetheless, he testified, in the context of the *Jones* case, "I never asked her to lie." [792]

G. JOB INTERVIEWS

On December 18, Ms. Lewinsky had two job interviews in New York City. At MacAndrews & Forbes, she met with Executive Vice President and Special Counsel to the Chairman Richard Halperin, who viewed the interview as "an accommodation for Vernon Jordan." [793] At Burson-Marstellar, she interviewed with Celia Berk, Managing Director of Human Resources.[794] A few days later, on December 23, Ms. Lewinsky interviewed in Washington, D.C., with Thomas Schick, Executive Vice President, Corporate Affairs and Communications, of American Express.[795]

[782] Lewinsky 8/6/98 GJ at 123.
[783] Lewinsky 2/1/98 Statement at 4.
[784] Lewinsky 8/6/98 GJ at 123–24. Ms. Lewinsky testified that, "on [s]everal occasions," they had resolved to use this cover story to conceal their relationship. *Id.*
[785] Lewinsky 8/6/98 GJ at 232.
[786] Lewinsky 8/6/98 GJ at 126.
[787] Lewinsky 8/6/98 GJ at 126.
[788] Clinton 8/17/98 GJ at 116.
[789] Clinton 8/17/98 GJ at 119. The President himself gave this explanation of Ms. Lewinsky's visits to the Oval Office at his *Jones* deposition. Clinton 1/17/98 Depo. at 50–51.
[790] Clinton 8/17/98 GJ at 119–20.
[791] Clinton 8/17/98 GJ at 119–20.
[792] Clinton 8/17/98 GJ at 120.
[793] Halperin 1/26/98 Int. at 2.
[794] Berk 3/31/98 Int. at 1–2. In her proffer, Ms. Lewinsky stated that, during the week following her December 11 meeting with Mr. Jordan, she "had two interviews in NY in response to her letters." Lewinsky 2/1/98 Statement at 4.
[795] Schick 1/29/98 Int. at 2.

XII. DECEMBER 19, 1997–JANUARY 4, 1998: THE SUBPOENA

Ms. Lewinsky was served with a subpoena in the *Jones* case on Friday, December 19. She immediately called Mr. Jordan, and he invited her to his office. Mr. Jordan spoke with the President that afternoon and again that evening. He told the President that he had met with Ms. Lewinsky, that she had been subpoenaed, and that he planned to obtain an attorney for her. On Sunday, December 28, the President met with Ms. Lewinsky, who expressed concern about the subpoena's demand for the gifts he had given her. Later that day, Ms. Currie drove to Ms. Lewinsky's apartment and collected a box containing some of the subpoenaed gifts. Ms. Currie took the box home and hid it under her bed.

A. DECEMBER 19: MS. LEWINSKY IS SUBPOENAED

On Friday, December 19, 1997, sometime between 3:00 p.m. and 4:00 p.m., Ms. Lewinsky was served with a subpoena at her Pentagon office.[796] The subpoena commanded her to appear for a deposition in Washington, D.C., at 9:30 a.m. on January 23, 1998.[797] The subpoena also required the production of certain documents and gifts. Among the items that Ms. Lewinsky was required to produce were "each and every gift including, but not limited to, any and all dresses, accessories, and jewelry, and/or hat pins given to you by, or on behalf of, Defendant Clinton," as well as "[e]very document constituting or containing communications between you and Defendant Clinton, including letters, cards, notes, memoranda, and all telephone records." [798]

Ms. Lewinsky testified that, after being served with the subpoena, she "burst into tears," and then telephoned Mr. Jordan from a pay phone at the Pentagon.[799] Mr. Jordan confirmed Ms. Lewinsky's account; he said he tried to reassure Ms. Lewinsky: "[C]ome and talk to me and I will see what I can do about finding you counsel." [800]

According to records maintained by Mr. Jordan's law firm, Ms. Lewinsky arrived at his office at 4:47 p.m.[801] White House phone records show that, at 4:57 p.m., the President telephoned Mr. Jordan; the two men spoke from 5:01 p.m. to 5:05 p.m.[802] At 5:06 p.m.,

[796] Lewinsky 8/6/98 GJ at 128; Harte 4/17/98 Int. at 1.
[797] 902–DC–000000135—138 (Lewinsky subpoena).
[798] 902–DC–000000137.
[799] Lewinsky 8/6/98 GJ at 128-29; Lewinsky 7/27/98 Int. at 6; 8/1/98 Int. at 6–7. In the late-night December 17 call, the President told Ms. Lewinsky that, if she were subpoenaed, she should call Ms. Currie. Ms. Lewinsky did not do so on December 19 because Ms. Currie's brother had recently died and Ms. Lewinsky did not want to bother her. Lewinsky 8/6/98 GJ at 126.
[800] Jordan 3/3/98 GJ at 92-93. Mr. Jordan said that he did not contemplate representing Ms. Lewinsky himself because "I represent companies. I don't represent individuals." Jordan 3/3/98 GJ at 101.
[801] V004–DC–00000172 (Akin, Gump visitor logs).
[802] V004–DC–00000151 (Akin, Gump telephone records, indicating the call ended at 5:05 p.m.); 1178–DC–00000014 (Presidential call logs, reflecting the call ended at 5:08 p.m.). Presidential

Mr. Jordan placed a two-minute call to a Washington, D.C., attorney named Francis Carter.[803]

Ms. Lewinsky and Mr. Jordan gave somewhat different accounts of their meeting that day. According to Ms. Lewinsky, shortly after her arrival, Mr. Jordan received a phone call, and she stepped out of his office. A few minutes later, Ms. Lewinsky was invited back in, and Mr. Jordan called Mr. Carter.[804]

Mr. Jordan testified that he spoke to the President before Ms. Lewinsky ever entered his office.[805] He told the President: "Monica Lewinsky called me up. She's upset. She's gotten a subpoena. She is coming to see me about this subpoena. I'm confident that she needs a lawyer, and I will try to get her a lawyer." [806] Mr. Jordan told the President that the lawyer he had in mind was Francis Carter.[807] According to Mr. Jordan, the President asked him: "You think he's a good lawyer?" Mr. Jordan responded that he was.[808] Mr. Jordan testified that informing the President of Ms. Lewinsky's subpoena "was the purpose of [his] call." [809]

According to Mr. Jordan, when Ms. Lewinsky entered his office, "[H]er emotional state was obviously one of dishevelment and she was quite upset. She was crying. She was—she was highly emotional, to say the least." [810] She showed him the subpoena as soon as she entered.[811]

Ms. Lewinsky also testified that she discussed the subpoena with Mr. Jordan.[812] She told him that she found the specific reference to a hat pin alarming—how could the Jones's attorneys have known about it? [813] Mr. Jordan told her it was "a standard subpoena." [814] When he indicated to Ms. Lewinsky that he would be seeing the President that night, Ms. Lewinsky told him "to please make sure that he told the President" about her subpoena.[815]

At some point, according to Mr. Jordan, Ms. Lewinsky asked him about the future of the Clintons' marriage.[816] Because Ms. Lewinsky seemed "mesmerized" by President Clinton,[817] he "asked her directly had there been any sexual relationship between [her]

call logs are recorded by hand, and thus are likely to be less accurate. The President may have been returning a call that Mr. Jordan had placed at 3:51 p.m.

[803] Lewinsky 8/6/98 GJ at 131; V004–DC–00000151 (Akin, Gump telephone records). Mr. Jordan asked whether he could bring a potential client to Mr. Carter's office on Monday morning. Jordan 5/5/98 GJ at 135–136; Carter 6/18/98 GJ at 7–8.

[804] Lewinsky 8/6/98 GJ at 131.

[805] Jordan 5/5/98 GJ at 140, 152–53.

[806] Jordan 5/5/98 GJ at 145.

[807] Jordan 5/5/98 GJ at 145.

[808] Jordan 5/5/98 GJ at 147.

[809] Jordan 5/5/98 GJ at 147.

[810] Jordan 3/3/98 GJ at 102.

[811] Jordan 3/3/98 GJ at 103.

[812] Lewinsky 8/6/98 GJ at 131–32.

[813] Lewinsky 8/6/98 GJ at 132.

[814] Lewinsky 8/6/98 GJ at 132. In her handwritten proffer, Ms. Lewinsky described her meeting with Mr. Jordan that afternoon: "Ms. L expressed anxiety with respect to her subpoena requesting production of any gifts from the Pres., specifically citing hat pins which the Pres. had in fact given her. Mr. Jordan allayed her concerns by telling her it was standard language." Lewinsky 2/1/98 Statement at 5.

[815] Lewinsky 8/6/98 GJ at 133.

[816] Jordan 3/3/98 GJ at 150. Ms. Lewinsky confirmed that she had such a conversation with Mr. Jordan, although she believed it took place after a breakfast meeting on December 31. Lewinsky 8/6/98 GJ at 188; Lewinsky 2/1/98 Statement at 8.

[817] Jordan 3/3/98 GJ at 123.

and the President."[818] Mr. Jordan explained, "You didn't have to be Einstein to know that that was a question that had to be asked by me at that particular time, because heretofore this discussion was about a job. The subpoena changed the circumstances."[819] Ms. Lewinsky said she had not had a sexual relationship with the President.[820]

Ms. Lewinsky testified, however, that at this time she assumed that Mr. Jordan knew "with a wink and a nod that [she] was having a relationship with the President."[821] She therefore interpreted Mr. Jordan's questions as "What are you going to say?" rather than "What are the [actual] answers * * *?"[822] When the meeting ended, she "asked [Mr. Jordan] if he would give the President a hug."[823]

That evening, Mr. Jordan visited the President at the White House. According to Mr. Jordan, the two met alone in the Residence and talked for about ten minutes.[824] He testified:

> I told him that Monica Lewinsky had been subpoenaed, came to me with a subpoena. I told him that I was concerned by her fascination, her being taken with him. I told him how emotional she was about having gotten the subpoena. I told him what she said to me about whether or not he was going to leave the First Lady at the end of the term.[825]

Mr. Jordan asked the President "[t]he one question that I wanted answered."[826] That question was, "Mr. President, have you had sexual relations with Monica Lewinsky?" The President told Mr. Jordan, "No, never."[827]

Mr. Jordan told the President: "I'm trying to help her get a job and I'm going to continue to do that. I'm going to get her counsel and I'm going to try to be helpful to her as much as I possibly can, both with the lawyer, and I've already done what I could about the job, and I think you ought to know that."[828] Mr. Jordan testified: "He thanked me for telling him. Thanked me for my efforts to get her a job and thanked me for getting her a lawyer."[829]

In his grand jury testimony, the President recalled that he met with Mr. Jordan on December 19; however, he testified that his memory of that meeting was somewhat vague:

> I do not remember exactly what the nature of the conversation was. I do remember that I told him that there

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[818] Jordan 3/3/98 GJ at 122. He also said: "I did not get graphic, I did not get specific, I didn't ask her if they kissed, I didn't ask if they caressed, all of which, as I understand it, is a part of the act of sex." *Id.* at 130.
[819] Jordan 3/3/98 GJ at 126.
[820] Jordan 3/3/98 GJ at 122–24. *See also* Lewinsky 8/6/98 GJ at 133–35.
[821] Lewinsky 8/6/98 GJ at 134.
[822] Lewinsky 8/6/98 GJ at 134.
[823] Lewinsky 8/6/98 GJ at 135. According to Ms. Lewinsky, Mr. Jordan responded, "I don't hug men." *Id.*
[824] Jordan 3/3/98 GJ at 167–8.
[825] Jordan 3/3/98 GJ at 169. According to Mr. Jordan, the President listened with "some amazement" when Mr. Jordan recounted the conversation. *Id.* at 170.
[826] Jordan 3/3/98 GJ at 173–74.
[827] Jordan 3/3/98 GJ at 170.
[828] Jordan 3/3/98 GJ at 171.
[829] Jordan 3/3/98 GJ at 172. In the days that followed, Mr. Jordan informed the President that he had succeeded in engaging Francis Carter to represent Ms. Lewinsky. Jordan 3/5/98 GJ at 27.

> was no sexual relationship between me and Monica Lewinsky, which was true. And that—then all I remember for the rest is that he said he had referred her to a lawyer, and I believe it was Mr. Carter.[830]

Asked whether he recalled that Mr. Jordan told him that Ms. Lewinsky appeared fixated on him and hoped that he would leave Mrs. Clinton, the President testified: "I recall him saying he thought that she was upset with—somewhat fixated on me, that she acknowledged that she was not having a sexual relationship with me, and that she did not want to be [brought] into that *Jones* lawsuit." [831]

B. DECEMBER 22: MEETING WITH VERNON JORDAN

Mr. Jordan arranged for Ms. Lewinsky to meet with attorney Francis Carter at 11:00 a.m. on Monday, December 22.[832] On that morning, according to Ms. Lewinsky, she called Mr. Jordan and asked to meet before they went to Mr. Carter's office.[833] She testified: "I was a little concerned. I thought maybe [Mr. Jordan] didn't really understand * * * what it was that was happening here with me being subpoenaed and what this really meant." [834] She also wanted to find out whether he had in fact told the President of her subpoena. Mr. Jordan said that he had.[835] Ms. Lewinsky also told Mr. Jordan that she was worried that someone might have been eavesdropping on her telephone conversations with the President.[836] When Mr. Jordan asked why she thought that would be of concern, Ms. Lewinsky said, "Well, we've had phone sex." [837]

Ms. Lewinsky testified that she brought some of her gifts from the President, showed them to Mr. Jordan, and implied that these items were not all of the gifts that the President had given her.[838] Mr. Jordan, in contrast, testified that Ms. Lewinsky never showed him any gifts from the President.[839]

C. DECEMBER 22: FIRST MEETING WITH FRANCIS CARTER

Mr. Jordan drove Ms. Lewinsky to Mr. Carter's office.[840] There, he introduced Ms. Lewinsky to Mr. Carter, explaining that she needed not only a lawyer but a "counselor." [841] Mr. Carter testified

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[830] Clinton 8/17/98 GJ at 64.
[831] Clinton 8/17/98 GJ at 65–66.
[832] Jordan 3/3/98 GJ at 164–66, 183–84.
[833] Lewinsky 8/6/98 GJ at 138.
[834] Lewinsky 8/6/98 GJ at 138.
[835] Lewinsky 8/6/98 GJ at 138–39.
[836] Lewinsky 8/6/98 GJ at 139.
[837] Lewinsky 8/6/98 GJ at 139. Mr. Jordan asked what "phone sex" was. Lewinsky 8/6/98 GJ at 139. Ms. Lewinsky stated that she may have explained it this way: "He's taking care of business on one end and I'm taking care of business on another." Lewinsky 8/6/98 GJ at 143.
[838] Lewinsky 8/6/98 GJ at 139–140. In her proffer, Ms. Lewinsky wrote that she "showed Mr. Jordan the items she was producing in response to the subpoena. Ms. L believes she made it clear that this was not everything she had that could respond to the subpoena, but she thought it was enough to satisfy." Lewinsky 2/1/98 Statement at 6.
[839] Jordan 3/3/98 GJ at 153.
[840] The diaries of both Mr. Carter and Mr. Jordan reflect an 11:00 a.m. appointment on December 22, 1997. 902–DC–-00000231 (Mr. Carter's diary) and 1034–DC–00000103 (Mr. Jordan's diary).
[841] Carter 6/18/98 GJ at 12, 14. According to Mr. Carter, although Mr. Jordan had previously referred clients to him, Mr. Jordan had never personally driven them to his office. *Id.* at 160–61.

that, after the initial referral, he expected to have no further contact with Mr. Jordan about Ms. Lewinsky or her case.[842]

Mr. Carter and Ms. Lewinsky then met for approximately an hour.[843] She explained that she did not want to be drawn into the *Jones* case and would strongly prefer not to be deposed.[844] He said that he would try to persuade Paula Jones's attorneys not to depose her.[845] Ms. Lewinsky testified that she suggested filing an affidavit to avert a deposition.[846]

According to Ms. Lewinsky, she asked Mr. Carter to get in touch with the President's personal attorney, Robert Bennett, just "to let him know that I had been subpoenaed in this case." [847] She wanted to make clear that she was "align[ing] [her]self with the President's side." [848] Mr. Carter testified that, while Ms. Lewinsky was in his office, he placed a call to Mr. Bennett to arrange a meeting.[849]

On the morning of Tuesday, December 23, Mr. Carter met for an hour with two of the President's personal attorneys, Mr. Bennett and Katherine Sexton.[850] The President's attorneys told Mr. Carter that other witnesses had filed motions to quash their subpoenas, and they offered legal research to support such a motion.[851]

D. DECEMBER 23: CLINTON DENIALS TO PAULA JONES

Throughout the sexual harassment case, Ms. Jones's attorneys attempted to obtain information about President Clinton's sexual relationships with any woman other than his wife. On December 11, 1997, the judge overseeing the *Jones* case, Susan Webber Wright, ruled that the President had to answer a written interrogatory naming every state and federal employee since 1986 with whom he had sexual relations or with whom he had proposed to have sexual relations. On December 23, 1997, the President answered the interrogatory: "None." [852]

E. DECEMBER 28: FINAL MEETING WITH THE PRESIDENT

A day or two after Christmas, Ms. Lewinsky called Ms. Currie and told her that the President had mentioned that he had presents for her.[853] Ms. Currie called back and told her to come to the White House at 8:30 a.m. on Sunday, December 28.[854]

That morning, Ms. Lewinsky met with the President in the Oval Office. WAVES records reflect that the visit was requested by Ms. Currie and that Ms. Lewinsky entered the White House at 8:16 a.m.[855]

[842] Carter 6/18/98 GJ at 158–60, 15, 75.
[843] According to Mr. Carter's bill, he met with Ms. Lewinsky for 1.1 hours. 902–DC–00000037.
[844] Lewinsky 8/6/98 GJ at 146; Carter 6/18/98 GJ at 25.
[845] Lewinsky 8/6/98 GJ at 146–47; Carter 6/18/98 GJ at 25.
[846] Lewinsky 8/6/98 GJ at 146. Somewhat at odds with Ms. Lewinsky, Mr. Carter testified, "I thought I needed to develop an affidavit recounting what she said to me." Carter 6/18/98 GJ at 65.
[847] Lewinsky 8/6/98 GJ at 147.
[848] Lewinsky 8/6/98 GJ at 147.
[849] Carter 6/18/98 GJ at 29–30; 902–DC–00000038.
[850] Carter 6/18/98 GJ at 39.
[851] Carter 6/18/98 GJ at 42–43.
[852] V002–DC–000000052—54 (President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories); 1414–DC–00000512—17 (same).
[853] Lewinsky 8/6/98 GJ at 149.
[854] Lewinsky 8/6/98 GJ at 149.
[855] V0006–DC–00000009 (WAVES records).

After she arrived at the Oval Office, she, the President, and Ms. Currie played with Buddy, the President's dog, and chatted. Then, the President took her to the study and gave her several Christmas presents: a marble bear's head, a Rockettes blanket, a Black Dog stuffed animal, a small box of chocolates, a pair of joke sunglasses, and a pin with a New York skyline on it.[856]

Ms. Lewinsky testified that, during this visit, she and the President had a "passionate" and "physically intimate" kiss.[857]

Ms. Lewinsky and the President also talked about the *Jones* case.[858] In Ms. Lewinsky's account, she asked the President "how he thought [she] got put on the witness list."[859] He speculated that Linda Tripp or one of the uniformed Secret Service officers had told the Jones attorneys about her.[860] When Ms. Lewinsky mentioned her anxiety about the subpoena's reference to a hat pin, he said "that sort of bothered [him], too."[861] He asked whether she had told anyone about the hat pin, and she assured him that she had not.[862]

At some point in the conversation, Ms. Lewinsky told the President, "[M]aybe I should put the gifts away outside my house somewhere or give them to someone, maybe Betty."[863] Ms. Lewinsky recalled that the President responded either "I don't know" or "Let me think about that."[864]

When Ms. Lewinsky was asked whether she thought it odd for the President to give her gifts under the circumstances (with a subpoena requiring the production of all his gifts), she testified that she did not think of it at the time, but she did note some hesitancy on the President's part:

> [H]e had hesitated very briefly right before I left that day in kind of packaging * * * all my stuff back up * * * I don't think he said anything that indicated this to me, but I thought to myself, "I wonder if he's thinking he shouldn't give these to me to take out." But he did.[865]

When asked in the *Jones* deposition about his last meeting with Ms. Lewinsky, the President remembered only that she stopped by "[p]robably sometime before Christmas" and he "stuck [his] head out [of the office], said hello to her."[866] The deposition occurred three weeks after this December 28 meeting with Ms. Lewinsky.

In the grand jury, the President acknowledged "talking with Ms. Lewinsky about her testimony, or about the prospect that she might have to give testimony. And she, she talked to me about

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[856] Lewinsky 8/6/98 GJ at 150–51. In his grand jury testimony, the President recalled giving her many of these gifts and acknowledged that it was "probably true" that these were more gifts than he had ever given her in a single day. Clinton 8/17/98 GJ at 36.

[857] Lewinsky 8/26/98 Depo. at 53.

[858] Lewinsky 8/6/98 GJ at 151.

[859] Lewinsky 8/6/98 GJ at 151–52.

[860] Lewinsky 8/6/98 GJ at 152. In her handwritten statement of February 1, 1998, Ms. Lewinsky wrote: "Ms. L. asked [the President] how he thought the attorneys for Paula Jones found out about her. He thought it was probably 'that woman from the summer * * * with Kathleen Willey' (Linda Tripp) who lead [sic] them to Ms. L or possibly the uniformed agents. He shared Ms. L's concern about the hat pin. He asked Ms. L if she had told anyone that he had given it to her and she replied 'no.'" Lewinsky 2/1/98 Statement at 6.

[861] Lewinsky 8/20/98 GJ at 66.

[862] Lewinsky 8/6/98 GJ at 152. Ms. Lewinsky acknowledged in the grand jury that she had in fact told others about the hat pin. Lewinsky 8/6/98 GJ at 152.

[863] Lewinsky 8/6/98 GJ at 152.

[864] Lewinsky 8/6/98 GJ at 152. *See also* Lewinsky 8/20/98 GJ at 66.

[865] Lewinsky 8/6/98 GJ at 168.

[866] Clinton 1/17/98 Depo. at 68.

that."[867] He maintained, however, that they did not discuss Ms. Lewinsky's subpoena: "[S]he was upset. She—well, she—we—she didn't—we didn't talk about a subpoena. But she was upset."[868] In the President's recollection, Ms. Lewinsky said she knew nothing about sexual harassment; why did she have to testify? According to the President, "I explained to her that it was a political lawsuit. They wanted to get whatever they could under oath that was damaging to me."[869]

Ms. Lewinsky's friend, Catherine Allday Davis, testified about a conversation with Ms. Lewinsky on January 3, 1998. Ms. Lewinsky told Ms. Davis that she had met with the President and discussed the *Jones* case a few days earlier. Ms. Davis testified that Ms. Lewinsky and the President had "noted [that] there was no evidence" of their relationship.[870]

E. DECEMBER 28: CONCEALMENT OF GIFTS

In the afternoon of December 28, a few hours after Ms. Lewinsky's White House visit, Ms. Currie drove to Ms. Lewinsky's Watergate apartment and collected a box containing the President's gifts. Ms. Currie then took the box home and hid it under her bed. Ms. Lewinsky, Ms. Currie, and the President were all questioned as to why Ms. Currie retrieved the box of gifts from Ms. Lewinsky.

According to Ms. Lewinsky, the transfer originated in a phone call from Ms. Currie that afternoon. Ms. Lewinsky testified that Ms. Currie said, "I understand you have something to give me," or, "The President said you have something to give me."[871] Ms. Lewinsky understood that Ms. Currie was alluding to the gifts.[872] Ms. Currie said that she would stop by Ms. Lewinsky's apartment and pick up the items.[873] Ms. Lewinsky testified that she put many, but not all, of her gifts from the President into a box. Ms. Currie drove by her apartment and picked it up.[874]

Ms. Lewinsky was concerned because the gifts were under subpoena; she did not throw them away, however, because "they meant a lot to [her]."[875] The reason she gave the gifts to Ms. Currie, and not to one of her friends or her mother, was "a little bit of an assurance to the President * * * that everything was okay."[876] She felt that, because the gifts were with Ms. Currie, they were within the President's control: "Not that [the gifts] were going to be in his possession, but that he would understand whatever it was I gave to Betty and that that might make him feel a little bit better."[877]

Ms. Lewinsky's account of the events of December 28 in her sworn statement of February 1, 1998, corroborates her later grand jury testimony:

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[867] Clinton 8/17/98 GJ at 33.
[868] Clinton 8/17/98 GJ at 39. He further testified that he did not remember that Ms. Lewinsky's subpoena specifically called for a hat pin. Clinton 8/17/98 GJ at 45.
[869] Clinton 8/17/98 GJ at 39.
[870] Catherine Davis 3/17/98 GJ at 77–79.
[871] Lewinsky 8/6/98 GJ at 154–55.
[872] Lewinsky 8/6/98 GJ at 155.
[873] Lewinsky 8/6/98 GJ at 155–56.
[874] Lewinsky 8/6/98 GJ at 156–58. Ms. Currie could remember only one other occasion in which she had driven to Ms. Lewinsky's Watergate apartment. Currie 5/6/98 GJ at 108.
[875] Lewinsky 8/6/98 GJ at 158–59.
[876] Lewinsky 8/6/98 GJ at 159.
[877] Lewinsky 8/6/98 GJ at 159. *See also* Lewinsky 8/1/98 Int. at 12.

"Ms. L * * * asked if she should put away (outside her home) the gifts he had given her or, maybe, give them to someone else. Ms. Currie called Ms. L later that afternoon as said that the Pres. had told her Ms. L. wanted her to hold onto something for her. Ms. L boxed up most of the gifts she had received and gave them to Ms. Currie. It is unknown if Ms. Currie knew the contents of the box." [878]

Ms. Currie's testimony was somewhat at odds with Ms. Lewinsky's. Though her overall recollection was hazy, Ms. Currie believed that Ms. Lewinsky had called her and raised the idea of the gifts transfer. [879] Ms. Currie was asked about the President's involvement in the transfer:

Q: And did the President know you were holding these things for Monica?

BC: I don't know. I don't know.

Q: Didn't he say to you that Monica had something for you to hold?

BC: I don't remember that. I don't.

Q: Did you ever talk to the President and tell him you had this box from Monica?

BC: I don't remember that either.

Q: Do you think it happened, though?

BC: I don't know. I don't know. [880]

When asked whether a statement by Ms. Lewinsky indicating that Ms. Currie had in fact spoken to the President about the gift transfer would be false, Ms. Currie replied: "Then she may remember better than I. I don't remember." [881]

According to Ms. Currie, Ms. Lewinsky said that she was uncomfortable retaining the gifts herself because "people were asking questions" about them. [882] Ms. Currie said she drove to Ms. Lewinsky's residence after work, collected the box, brought it home, and put it under her bed. [883] Written on the top of the box were the words "Please do not throw away!!!" [884] Ms. Currie testified that she knew that the box contained gifts from the President. [885]

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[878] Lewinsky 2/1/98 Statement at 7 (punctuation corrected).

[879] Ms. Currie stated, at various times, that the transfer occurred sometime in late December 1997 or early January 1998. Currie 1/24/98 Int. at 3; Currie 1/27/98 GJ at 56–57; Currie 5/6/98 GJ at 103–07.

[880] Currie 5/6/98 GJ at 105–06.

[881] Currie 5/6/98 GJ at 126.

[882] Currie 1/27/98 GJ at 58. In her first grand jury appearance in January, Ms. Currie was asked whether she knew who had been asking the questions about the gifts. She testified: "Sir, no, I don't." *Id.* In a May grand jury appearance, Ms. Currie responded to a similar question by saying that she understood that *Newsweek* reporter Michael Isikoff (who had earlier written about Kathleen Willey) was asking about the gifts. Currie 5/6/98 GJ at 107, 114, 120. Ms. Lewinsky testified that she never spoke to Mr. Isikoff. Lewinsky 8/24/98 Int. at 9.

[883] Currie 5/6/98 GJ at 107–08. *See also* Currie 1/27/98 GJ at 57–58.

[884] Currie 5/6/98 GJ at 110. When the OIC later obtained the box from Ms. Currie by subpoena, it contained various items that the President had given to Ms. Lewinsky, including (a) a hat pin; (b) a brooch; (c) an official copy of the 1996 State of the Union Address inscribed "To Monica Lewinsky with best wishes, Bill Clinton"; (d) a photograph of the President in the Oval Office with a handwritten note, "To Monica—Thanks for the tie Bill Clinton"; (e) a photograph of the President and Ms. Lewinsky inscribed "To Monica—Happy Birthday! Bill Clinton 7–23–97"; (f) a sun dress, two t-shirts, and a baseball cap with a Black Dog logo on them; and (g) a facsimile copy of a Valentine's Day message to "Handsome" that Ms. Lewinsky placed in the *Washington Post* in 1996.

[885] Currie 5/6/98 GJ at 106–07.

For his part, the President testified that he never asked Ms. Currie to collect a box of gifts from Ms. Lewinsky.[886] He said that he had no knowledge that Ms. Currie had held those items "until that was made public."[887]

The President testified that he has no distinct recollection of discussing the gifts with Ms. Lewinsky on December 28: "[M]y memory is that on some day in December, and I'm sorry I don't remember when it was, she said, well, what if they ask me about the gifts you have given me. And I said, well, if you get a request to produce those, you have to give them whatever you have."[888]

D. DECEMBER 31: BREAKFAST WITH VERNON JORDAN

Ms. Lewinsky testified that in late December 1997 she realized that she needed to "come up with some sort of strategy as to [what to do] if Linda Tripp" divulged what she knew.[889] On December 30, Ms. Lewinsky telephoned Mr. Jordan's office and conveyed either directly to him or through one of his secretaries that she was concerned about the Jones case.[890]

The following day, Ms. Lewinsky and Mr. Jordan had breakfast together at the Park Hyatt Hotel.[891] According to Ms. Lewinsky, she told Mr. Jordan that a friend of hers, Linda Tripp, was involved in the *Jones* case. She told Mr. Jordan: "I used to trust [Ms. Tripp], but I didn't trust her any more."[892] Ms. Lewinsky said that Ms. Tripp might have seen some notes in her apartment. Mr. Jordan asked: "Notes from the President to you?" Ms. Lewinsky responded: "No, notes from me to the President." According to Ms. Lewinsky, Mr. Jordan said: "Go home and make sure they're not there." Ms. Lewinsky testified that she understood that Mr. Jordan was advising her to "throw * * * away" any copies or drafts of notes that she had sent to the President.[893]

After breakfast, Mr. Jordan gave Ms. Lewinsky a ride back to his office.[894] When Ms. Lewinsky returned home to her apartment that day, she discarded approximately 50 draft notes to the President.[895]

E. JANUARY 4: THE FINAL GIFT

On Sunday, January 4, 1998, Ms. Lewinsky called Ms. Currie at home and told her that she wanted to drop off a gift for the President.[896] Ms. Currie invited Ms. Lewinsky to her home, and Ms. Lewinsky gave her the package.[897] The package contained a book

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[886] Clinton 8/17/98 GJ at 51.
[887] Clinton 8/17/98 GJ at 115.
[888] Clinton 8/17/98 GJ at 46.
[889] Lewinsky 8/6/98 GJ at 186. Ms. Tripp, like Ms. Lewinsky, had been subpoenaed in the *Jones* case.
[890] Lewinsky 8/6/98 GJ at 186–87. Although Mr. Jordan testified that he never had breakfast with Ms. Lewinsky, *see* Jordan 3/5/98 GJ at 60, there is strong circumstantial evidence supporting Ms. Lewinsky's testimony that she had breakfast with Mr. Jordan on December 31. *Compare* Lewinsky 8/6/98 GJ at 187–89 (describing breakfast) *with* 916–DC–00000003 (Park Hyatt receipt reflecting breakfast as described by Ms. Lewinsky).
[891] Lewinsky 8/6/98 GJ at 186–89.
[892] Lewinsky 8/6/98 GJ at 187.
[893] Lewinsky 8/6/98 GJ at 187.
[894] Lewinsky 8/6/98 GJ at 188; 8/26/98 Int. at 2; 8/1/98 Int. at 13.
[895] Lewinsky 8/1/98 Int. at 13.
[896] Lewinsky 8/6/98 GJ at 190.
[897] Lewinsky 8/6/98 GJ at 190–91.

entitled *The Presidents of the United States* and a love note inspired by the movie *Titanic.*[898]

[898] Lewinsky 8/2/98 Int. at 1.

XIII. JANUARY 5–JANUARY 16, 1998: THE AFFIDAVIT

On January 5, 1998, Ms. Lewinsky's attorney, Francis Carter, drafted an affidavit for Ms. Lewinsky in an attempt to avert her deposition. She spoke with the President that evening. On January 6, Ms. Lewinsky talked to Mr. Jordan about the affidavit, which denied any sexual relations between her and the President. On January 7, Ms. Lewinsky signed the affidavit. On January 8, she interviewed for a job in New York City. After the interview went poorly, Mr. Jordan placed a phone call to the company's chairman on her behalf, and Ms. Lewinsky was given a second interview. The following week, after Ms. Lewinsky told Ms. Currie that she would need a reference from the White House, the President asked Chief of Staff Erskine Bowles to arrange one.

A. JANUARY 5: FRANCIS CARTER MEETING

At 3:00 p.m. on Monday, January 5, 1998, Ms. Lewinsky met with Mr. Carter at his office for approximately one hour. [899] Ms. Lewinsky testified that Mr. Carter described what a deposition was like and "threw out a bunch of different questions." [900] The questions that most concerned her related to the circumstances of her departure from the White House. [901]

Mr. Carter told Ms. Lewinsky that he would draft an affidavit for her to sign in hopes of averting her deposition. They arranged for Ms. Lewinsky to pick up a draft of the affidavit the next day. [902]

B. JANUARY 5: CALL FROM THE PRESIDENT

After her meeting with Mr. Carter, Ms. Lewinsky sent word via Ms. Currie that she needed to speak to the President about an important matter. [903] Specifically, Ms. Lewinsky told Ms. Currie she was anxious about something she needed to sign. [904]

A few hours later, according to Ms. Lewinsky, the President returned her call. [905] She mentioned an affidavit she would be signing and asked if he wanted to see it. According to Ms. Lewinsky, the President responded that he did not, as he had already seen about fifteen others. [906] Ms. Lewinsky testified that she told the President that she was troubled by potential questions about her transfer

[899] 902–DC–00000232 (Mr. Carter's day-planner); 902–DC–00000037 (Mr. Carter's bill).

[900] Lewinsky 8/6/98 GJ at 192. Mr. Carter agreed that, during one of his meetings with Ms. Lewinsky, he asked her sample questions. Carter 6/18/98 GJ at 110–12.

[901] Lewinsky 8/6/98 GJ at 192–93.

[902] Carter 6/18/98 GJ at 67–68; Lewinsky 8/6/98 GJ at 194, 199.

[903] Lewinsky 8/6/98 GJ at 195.

[904] Lewinsky 8/6/98 GJ at 195; Lewinsky 8/2/98 Int. at 3; Lewinsky 2/1/98 Statement at 9 ("That evening Ms. L placed a phone call to Ms. Currie asking her to tell the Pres. that she wanted to speak with him before she signed something the next day. He returned Ms. L's call a few hours later.").

[905] Lewinsky 8/6/98 GJ at 196.

[906] Lewinsky 8/2/98 Int. at 3. *See also* Lewinsky 2/1/98 Statement at 9 ("The Pres. told Ms. L. not to worry about the affidavit as he had seen 15 others.").

from the White House to the Pentagon. She was concerned that "people at the White House who didn't like [her]" might contradict her and "get [her] in trouble."[907] The President, according to Ms. Lewinsky, advised her: "[Y]ou could always say that the people in Legislative Affairs got it [the Pentagon job] for you or helped you get it."[908]

The President acknowledged in the grand jury that he was aware that Ms. Lewinsky had signed an affidavit in early January, but had no specific recollection of a conversation with her in that time period.[909] He testified that he did not recall telling Ms. Lewinsky that she could say, if asked, that persons in the Legislative Affairs Office of the White House had helped her obtain the job at the Pentagon.[910]

According to Ms. Lewinsky, she and the President also briefly discussed an antique book that she had dropped off with Ms. Currie the day before. With the book, she enclosed a letter telling the President that she wanted to have sexual intercourse with him at least once.[911] In their phone conversation, Ms. Lewinsky told the President, "I shouldn't have written some of those things in the note."[912] She testified that the President agreed.[913]

Although the President had testified in the *Jones* case that any personal messages from Ms. Lewinsky to him had been "unremarkable," he told the grand jury that he had received "quite affectionate" messages from Ms. Lewinsky, even after their intimate relationship ended.[914] The President testified that he cautioned Ms. Lewinsky about such messages: "I remember telling her she should be careful what she wrote, because a lot of it was clearly inappropriate and would be embarrassing if somebody else read it. I don't remember when I said that. I don't remember whether it was in '96 or when it was."[915] The President did remember the antique book Ms. Lewinsky had given him, but said he did not recall a romantic note enclosed with it.[916]

C. JANUARY 6: THE DRAFT AFFIDAVIT

According to Ms. Lewinsky, in the afternoon of January 6, 1998, she visited Mr. Carter's office and picked up a draft of the affidavit.[917] Later that day, according to Ms. Lewinsky, she and Mr. Jordan discussed the draft by telephone.[918] Ms. Lewinsky testified that having Mr. Jordan review the affidavit was like getting it

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[907] Lewinsky 8/6/98 GJ at 197.
[908] Lewinsky 8/6/98 GJ at 197; Lewinsky 2/1/98 Statement at 9 ("Ms. L told him Mr. Carter had asked some sample questions that might be asked of her in the deposition and she didn't know how to answer them.").
[909] Clinton 8/17/98 GJ at 126.
[910] Clinton 8/17/98 GJ at 129.
[911] Lewinsky 9/3/98 Int. at 2.
[912] Lewinsky 8/6/98 GJ at 198.
[913] Lewinsky 8/6/98 GJ at 198.
[914] Clinton 8/17/98 GJ at 48–49.
[915] Clinton 8/17/98 GJ at 50.
[916] Clinton 8/17/98 GJ at 127, 49–50.
[917] Lewinsky 8/6/98 GJ at 199–200; Carter 6/18/98 GJ at 70–73. A draft copy of the affidavit, with minor revisions, was found in Ms. Lewinsky's apartment in the course of a consensual search on January 22, 1998.
[918] Lewinsky 8/6/98 GJ at 200; Lewinsky 2/1/98 Statement at 6 ("After Ms. L received a draft of the affidavit, she called Mr. Jordan to ask that he look it over before she sign it. He instructed her to drop off a copy at his office. They spoke later by phone about the affidavit agreeing to make some changes.").

"blessed" by the President.[919] Ms. Lewinsky testified that she told Mr. Jordan that she was worried about a sentence that implied that she had been alone with the President and thus might incline Paula Jones's attorneys to question her.[920] She eventually deleted it.[921]

In addition, Paragraph 8 of the draft affidavit provided in part:

> I have never had a sexual relationship with the President. * * * The occasions that I saw the President, *with crowds of other people*, after I left my employment at the White House in April, 1996 related to official receptions, formal functions or events related to the U.S. Department of Defense, where I was working at the time.[922]

Deeming the reference to "crowds" "too far out of the realm of possibility,"[923] Ms. Lewinsky deleted the underscored phrase and wrote the following sentence at the end of this paragraph: "There were other people present on all of these occasions."[924] She discussed this proposed sentence, as well as her general anxiety about Paragraph 8, with Mr. Jordan.[925]

When questioned in the grand jury, Mr. Jordan acknowledged that Ms. Lewinsky called him with concerns about the affidavit,[926] but maintained that he told her to speak with her attorney.[927]

Phone records for January 6 show that Mr. Jordan had a number of contacts with Ms. Lewinsky, the President, and Mr. Carter. Less than thirty minutes after Mr. Jordan spoke by phone to Ms. Lewinsky, he talked with the President for thirteen minutes. Immediately after this call, at 4:33 p.m., Mr. Jordan called Mr. Carter. Less than an hour later, Mr. Jordan placed a four-minute call to the main White House number. Over the course of the day, Mr. Jordan called a White House number twice, Ms. Lewinsky three times, and Mr. Carter four times.[928]

Mr. Carter testified that his phone conversations with Mr. Jordan this day and the next "likely" related to Ms. Lewinsky and his litigation strategy for her.[929] In fact, Mr. Carter billed Ms. Lewinsky for time for "[t]elephone conference with Atty Jordan."[930]

When questioned in the grand jury, Mr. Jordan testified that he could not specifically remember the January 6 calls. He said he "assumed" that he talked with Ms. Lewinsky about her job search, and he believed that he called Mr. Carter to see "how he was deal-

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[919] Lewinsky 8/6/98 GJ at 194–95.

[920] Lewinsky 8/6/98 GJ at 202.

[921] As originally drafted, Paragraph 6 of the affidavit stated: "In the course of my employment at the White House, I met with the President on several occasions. I do not recall ever being alone with the President, although it is possible that while working in the White House Office of Legislative Affairs I may have presented him with a letter for his signature while no one else was present. *This would only have lasted a few minutes and would not have been a private meeting, that is, not behind closed doors.*" 849–DC–00000634 (emphasis added). Ms. Lewinsky deleted the underlined sentence.

[922] 849–DC–00000634–35 (emphasis added).

[923] Lewinsky 8/6/98 GJ at 202.

[924] 849–DC–00000635.

[925] Lewinsky 8/6/98 GJ at 202.

[926] Jordan 3/5/98 GJ at 11.

[927] Jordan 3/5/98 GJ at 11.

[928] *See* Telephone Calls, Table 35. Catalogs of relevant phone calls are included in Appendix G as a Phone Log, Tables 1 through 50.

[929] Carter 6/18/98 GJ at 76–77, 92–93.

[930] 902–DC–00000030 (Mr. Carter's bill to Ms. Lewinsky).

ing with this highly emotional lady."[931] He said that he might have talked with the President about Ms. Lewinsky, but he maintained that "there [was] no connection" between his 13-minute conversation with the President and the call he placed immediately thereafter to Mr. Carter.[932]

D. JANUARY 7: MS. LEWINSKY SIGNS AFFIDAVIT

Ms. Lewinsky set an appointment with Mr. Carter to finalize the affidavit for 10 a.m. on January 7, 1998.[933] She signed the affidavit; however, she acknowledged in the grand jury that statements in it were false.[934] Mr. Carter indicated to her that he "intend[ed] to hold onto this until after I talk to plaintiff's lawyers." He told her to "keep in touch," and said: "Good luck on your job search."[935]

According to Mr. Jordan, Ms. Lewinsky came to his office on January 7 and showed him the signed affidavit.[936] Over the course of the day, Mr. Jordan placed three calls of significant duration to the White House.[937] He testified: "I knew the President was concerned about the affidavit and whether it was signed or not."[938] When asked whether the President understood that the affidavit denied a sexual relationship, Mr. Jordan testified: "I think that's a reasonable assumption."[939] According to Mr. Jordan, when he informed the President that Ms. Lewinsky had signed the affidavit, the President said, "Fine, good."[940] Mr. Jordan said he was continuing to work on her job, and the President responded, "Good."[941]

Ten days after this conversation, in the *Jones* deposition, President Clinton was asked whether he knew that Ms. Lewinsky had met with Vernon Jordan and talked about the *Jones* case. He answered:

> I knew he met with her. I think Betty suggested that he meet with her. Anyway, he met with her. I, I thought that he talked to her about something else. I didn't know that—I thought he had given her some advice about her move to New York. Seems like that's what Betty said.[942]

In his grand jury appearance, however, President Clinton testified that Mr. Jordan informed "us" on January 7 that Ms. Lewinsky had signed an affidavit to be used in connection with the

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[931] Jordan 5/5/98 GJ at 210, 214.
[932] Jordan 5/5/98 GJ at 218–20.
[933] 902-DC-00000232 (Mr. Carter's day-planner).
[934] Lewinsky 8/6/98 GJ at 204-05. As to the sentence, "I have never had a sexual relationship with the President," she testified that this was not true. She was also asked about the statement that other persons were present on the occasions she met with the President. She termed this paragraph "misleading," explaining: "[I]t doesn't say the only occasions, but it's misleading in that one reading it would assume that the only occasions on which I saw the President were those listed."
[935] Carter 6/18/98 GJ at 108.
[936] Jordan 5/5/98 GJ at 222. *See also* Jordan 3/3/98 GJ at 192; Jordan 3/5/98 GJ at 11; Jordan 5/28/98 GJ at 62. Ms. Lewinsky testified that she told Mr. Jordan on January 6, that she would be signing an affidavit the next day. On January 13, she showed him a copy. Lewinsky 8/6/98 GJ at 200, 220.
[937] *See* Telephone Calls, Table 36.
[938] Jordan 3/5/98 GJ at 24-26.
[939] Jordan 5/5/98 GJ at 223-25.
[940] Jordan 5/5/98 GJ at 225.
[941] Jordan 5/5/98 GJ at 226.
[942] Clinton 1/17/98 Depo. at 72.

Jones case.[943] The President defended his deposition testimony by stating:

> [M]y impression was that, at the time, I was focused on the meetings. I believe the meetings he had were meetings about her moving to New York and getting a job.
>
> I knew at some point that she had told him that she needed some help, because she had gotten a subpoena. I'm not sure I know whether she did that in a meeting or a phone call. And I was not, I was not focused on that. I know that, I know Vernon helped her get a lawyer, Mr. Carter. And I, I believe that he did it after she had called him, but I'm not sure. But I knew that the main source of their meetings was about her move to New York and her getting a job.[944]

E. JANUARY 8: THE PERELMAN CALL

The day after she signed the affidavit, January 8, 1998, Ms. Lewinsky interviewed in New York with Jaymie Durnan, Senior Vice President and Special Assistant to the Chairman at MacAndrews & Forbes Holdings, Inc. (MFH).[945] Mr. Durnan testified that, although impressive, Ms. Lewinsky was not suited for any MFH opening.[946] He told her that he would pass on her resume to Revlon, an MFH company.[947] Ms. Lewinsky called Mr. Jordan and reported that she felt that the interview had gone "very poorly."[948] Mr. Jordan indicated in response that "he'd call the chairman."[949]

At 4:54 p.m., Mr. Jordan called Ronald Perelman, chairman and chief executive officer of MFH.[950] Mr. Jordan told the grand jury with respect to Mr. Perelman, one "[c]an't get any higher—or any richer."[951] Asked why he chose to call Mr. Perelman, Mr. Jordan responded: "I have spent a good part of my life learning institutions and people, and, in that process, I have learned how to make things happen. And the call to Ronald Perelman was a call to make things happen, if they could happen."[952]

According to Mr. Perelman, Mr. Jordan spoke of "this bright young girl, who I think is terrific," and said that he wanted "to make sure somebody takes a look at her."[953] Mr. Perelman testified that, in the roughly twelve years that Mr. Jordan had been on Revlon's Board of Directors, he did not recall Mr. Jordan ever calling to recommend someone.[954]

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[943] Clinton 8/17/98 GJ at 74.
[944] Clinton 8/17/98 GJ at 75.
[945] Durnan 3/27/98 Int. at 1.
[946] Durnan 3/27/98 Int. at 2.
[947] Durnan 3/27/98 Int. at 2.
[948] Lewinsky 8/6/98 GJ at 206.
[949] Lewinsky 8/6/98 GJ at 207–08.
[950] *See* Telephone Calls, Table 37, Call 6.
[951] Jordan 5/5/98 GJ at 230.
[952] Jordan 5/5/98 GJ at 231. Asked whether he had ever spoken with Mr. Perelman in the past in the context of a job referral, Mr. Jordan could remember three persons for whom he had made referrals: David Dinkins, the former Mayor of New York City; an attorney at Mr. Jordan's law firm who "was good and they actually stole her away from Akin Gump because she was so good"; and a graduate of the Harvard Business School who was considered for the top position at Marvel Comics. Jordan 3/5/98 GJ at 56-58.
[953] Perelman 4/23/98 Depo. at 10.
[954] Perelman 4/23/98 Depo. at 11. In his testimony before the House Government and Reform Oversight Committee, Mr. Jordan testified that he helped former Associate Attorney General

After he spoke with Mr. Perelman, Mr. Jordan telephoned Ms. Lewinsky and told her, "I'm doing the best I can to help you out." [955] Ms. Lewinsky soon received a call from Revlon, inviting her to another interview.[956]

Over the course of January 8, Mr. Jordan placed three calls to the White House—twice to a number at the White House Counsel's Office, once to the main White House number.[957] As to the Counsel's Office calls, Mr. Jordan speculated that he was trying to reach Cheryl Mills, Deputy White House Counsel, to express his "frustration" about Ms. Lewinsky.[958] According to Mr. Jordan, Ms. Mills knew who Ms. Lewinsky was: "[T]hat was no secret, I don't think, around the White House, that I was helping Monica Lewinsky." [959]

F. JANUARY 9: "MISSION ACCOMPLISHED"

On the morning of Friday, January 9, 1998, Ms. Lewinsky interviewed with Allyn Seidman, Senior Vice President of MFH, and two individuals at Revlon.[960] Ms. Lewinsky testified that the interviews went well and that Ms. Seidman called her back that day and "informally offered [her] a position, and [she] informally accepted." [961]

Ms. Lewinsky then called Mr. Jordan and relayed the good news.[962] When shown records of a seven-minute call at 4:14 p.m., Mr. Jordan testified: "I have to assume that if she got the job and we have a seven-minute conversation and the day before I had talked to the chairman [Ronald Perelman], I have to assume the Jordan magic worked." [963]

According to Mr. Jordan, he believed that he notified Ms. Currie and the President as soon as he learned that Ms. Lewinsky had obtained an offer: "I am certain that at some point in time I told Betty Currie, 'Mission accomplished.' " [964] Mr. Jordan testified that he also told the President directly that, " 'Monica Lewinsky's going to work for Revlon,' and his response was, 'Thank you very much.' " [965]

Webster Hubbell be retained by Revlon by introducing him to Howard Gittes, Vice Chairman and Chief Administrative Officer at MacAndrews & Forbes. Mr. Jordan initially testified that he "certainly" also spoke with Mr. Perelman about retaining Mr. Hubbell. He then testified that "it was entirely possible" that Mr. Perelman was present on April 6, 1994, when Mr. Jordan accompanied Mr. Hubbell to the New York offices of MacAndrews & Forbes to introduce Mr. Hubbell to Mr. Gittes, General Counsel Barry Schwartz, and Richard Halperin, who was in charge of government relations. Jordan 7/24/97 House of Representatives at 35-37. As stated in the text, Mr. Perelman does not remember Mr. Jordan ever contacting him regarding Mr. Hubbell.

[955] Jordan 5/5/98 GJ at 232. Ms. Lewinsky similarly testified that Mr. Jordan called her back that evening and told her "not to worry." Lewinsky 8/6/98 GJ at 209.

[956] Lewinsky 8/6/98 GJ at 209.

[957] *See* Telephone Calls, Table 37. In addition, Mr. Jordan placed a two-minute call to a number at the White House Counsel's office from his limousine at 6:39 p.m.

[958] Jordan 5/28/98 GJ at 19.

[959] Jordan 5/28/98 GJ at 20–21. Ms. Mills does not recall having any discussions with Mr. Jordan about Ms. Lewinsky prior to January 17, 1998. Indeed, she had no recollection of hearing Ms. Lewinsky's name prior to January 17. Mills 8/11/98 GJ at 10–11.

[960] Seidman 4/23/98 Depo. at 37–38.

[961] Lewinsky 8/6/98 GJ at 210.

[962] Lewinsky 8/6/98 GJ at 210.

[963] Jordan 5/28/98 GJ at 30.

[964] Jordan 5/28/98 at 39.

[965] Jordan 5/28/98 GJ at 59. Mr. Jordan added that the President's response was one of "appreciation, gratitude." *Id.*

G. JANUARY 12: PRE-TRIAL HEARING IN JONES CASE

On January 12, 1998, Judge Wright held a hearing in the *Jones* case to discuss pre-trial issues, including the President's upcoming deposition.[966] At that hearing, Judge Wright required Ms. Jones's counsel to list all the witnesses that they planned to call at trial. Ms. Jones's witness list named many women, among them Ms. Lewinsky, to support her theory that the President had a pattern of rewarding women based on their willingness to engage in sexual relations with him. At the hearing, Judge Wright indicated that she would permit Ms. Jones to call as witnesses some of the women she listed in support of her case.

H. JANUARY 13: REFERENCES FROM THE WHITE HOUSE

On Tuesday, January 13, 1998, Jennifer Sheldon, Manager of Corporate Staffing of Revlon, called Ms. Lewinsky and formally extended her a position as a public relations administrator. Asked whether this was a relatively quick hiring process, Ms. Sheldon responded, "In totality of how long open positions normally stay open, yes. This was pretty fast."[967] Ms. Sheldon told Ms. Lewinsky that she needed to send her some references.[968]

According to Ms. Lewinsky, she then called Ms. Currie because she was "concerned that if I put [Mr. Hilley] down as a reference, he might not say flattering things about me."[969] At 11:11 a.m. on January 13, Ms. Currie paged Ms. Lewinsky and left the following message: "Will know something this afternoon. Kay."[970]

That day, January 13, the President talked with Chief of Staff Erskine Bowles about a reference for Ms. Lewinsky.[971] The President told Mr. Bowles that Ms. Lewinsky "had found a job in the * * * private sector, and she had listed John Hilley as a reference, and could we see if he could recommend her, if asked." Mr. Bowles assured the President that Mr. Hilley would give Ms. Lewinsky a recommendation commensurate with her job performance.[972]

Thereafter, Mr. Bowles took the President's request to Mr. Podesta, the Deputy Chief of Staff, who in turn spoke with Mr. Hilley.[973] Mr. Hilley responded that, because he did not know Ms. Lewinsky personally, he would have his office write a recommendation.[974] It would be a generic letter, simply confirming the dates of employment, because of the less than favorable circumstances surrounding Ms. Lewinsky's departure from the White House.[975]

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[966] 921–DC–00000770–72 (Clerk's minutes of *in-camera* hearing).
[967] Sheldon 4/34/98 Depo. at 22.
[968] Lewinsky 8/6/98 GJ at 214.
[969] Lewinsky 8/6/98 GJ at 215.
[970] 831–DC–00000010. At some point, Ms. Currie and Ms. Lewinsky decided that they would use a code name—Kay—when leaving messages for each other. Currie 7/22/98 GJ at 175; Lewinsky 8/6/98 GJ at 215–17.
[971] Bowles 4/2/98 GJ at 78–79. Mr. Bowles placed this conversation with the President at some time between January 4 and January 20. Bowles 4/2/98 GJ at 78. Mr. Podesta recalled that Mr. Bowles passed this request on to him "three or four days before the President's deposition"—that is, January 13 or January 14, though Mr. Podesta did not know who had originated the request. Podesta 6/16/98 GJ at 21–22.
[972] Bowles 4/2/98 GJ at 78.
[973] Bowles 4/2/98 GJ at 78–79; Podesta 6/16/98 GJ at 24–28; Hilley 2/11/98 Int. at 2; Hilley 5/26/98 GJ at 7–11.
[974] Podesta 6/16/98 GJ at 24; Hilley 2/11/98 Int. at 2.
[975] Hilley 2/11/98 Int. at 2; Hilley 5/26/98 GJ at 10–11; Hilley 5/19/98 GJ at 74–76. In the grand jury, Mr. Hilley testified: "At this time, I don't recall that piece of the conversation [deal-

Ms. Lewinsky testified that Ms. Currie called later that day and told her that "Mr. Podesta took care of it and everything would be fine with Mr. Hilley."[976] At 11:17 a.m. the next day, Wednesday, January 14, Ms. Lewinsky faxed her acceptance to Revlon and listed John Hilley and her Defense Department supervisor as references.[977]

The President was asked in the grand jury whether he ever spoke to Mr. Bowles about obtaining a reference from Mr. Hilley for Ms. Lewinsky. He testified that he did, at Ms. Lewinsky's request, although he thought he had done so earlier than January 13 or 14.[978]

I. JANUARY 13: FINAL JORDAN MEETING

According to Ms. Lewinsky, on Tuesday, January 13, she stopped by Mr. Jordan's office to drop off some thank-you gifts for helping her find a job. Ms. Lewinsky offered to show him a copy of her signed affidavit in the *Jones* case, but he indicated that he did not need to see it.[979]

J. JANUARY 13–14: LEWINSKY-TRIPP CONVERSATION AND TALKING POINTS

In a face-to-face conversation on January 13, Ms. Lewinsky told Linda Tripp: "This is what my lawyer taught me. You really don't—you don't very often say 'no' unless you really need to. The best is, 'Well, not that I recall, not that I really remember. Might have, but I don't really remember.'"[980] Ms. Lewinsky said that, if asked in a deposition, "Were you ever alone with the President?" she could say, "Um, it's possible I may have taken a letter on the weekend, but, you know—I might have, but I don't really. . . ."[981]

Ms. Lewinsky and Ms. Tripp then discussed the situation:

> Ms. Lewinsky: I don't think the way that man thinks, I don't think he thinks of lying under oath. . . .
>
> Ms. Tripp: Yes, he is because he's the one who said, "Deny, deny, deny." Of course he knows.
>
> Ms. Lewinsky: Right. But it's—hard to explain this. It's like—(sigh)
>
> Ms. Tripp: You know what I mean. I mean, I don't know—do I think he is consciously—
>
> Ms. Lewinsky: If—if—if I said, if somebody said to him, "Is Monica lying under oath," he would say yes. But when

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ing with Ms. Lewinsky's leaving Legislative Affairs under less than favorable circumstances] with John Podesta." *Id.* at 76.

[976] Lewinsky 8/6/98 GJ at 215. At 2:20 p.m., Ms. Currie paged Ms. Lewinsky again: "Please call me. Kay." 831–DC–00000010. In the grand jury, Ms. Currie stated that she could not remember whether the January 13 page-messages to Ms. Lewinsky involved attempts to notify her of the status of the President's efforts to secure a letter of recommendation for her. Currie 7/22/98 GJ at 147–48.

[977] 830–DC–00000007.

[978] Clinton 8/17/98 GJ at 111–13.

[979] Lewinsky 8/6/98 GJ at 220–21. Mr. Jordan traveled to Florida in the early afternoon. 1034–DC–00000109 (Mr. Jordan's day-planner). Soon after arriving in Florida, he called Ms. Hernreich's line at the White House. *See* Telephone Calls, Table 42. Later that evening, he spoke with the President for nearly four minutes. 1064–DC–00000008 (Mr. Jordan's hotel bill). In the grand jury, Mr. Jordan testified that it is "not inconceivable" that they mentioned Ms. Lewinsky. Jordan 5/28/98 GJ at 69.

[980] T30 at 61.

[981] T30 at 114.

> he on his own thinks about it, he doesn't think about it in those terms. Okay?
>
> Ms. Tripp: Probably.
>
> Ms. Lewinsky: Okay? He thinks of it as, "We're safe. We're being smart." Okay? "We're being smart, we're being safe, it's good for everybody."[982]

On January 14, Ms. Lewinsky gave Ms. Tripp a three-page document regarding "points to make in [Ms. Tripp's] affidavit."[983] Ms. Lewinsky testified that she wrote the document herself, although some of the ideas may have been inspired by conversations with Ms. Tripp.[984]

K. JANUARY 15: THE ISIKOFF CALL

In the grand jury, Betty Currie testified that on Thursday, January 15, 1998, she received a telephone call from Michael Isikoff of *Newsweek*, who inquired about courier receipts reflecting items sent by Ms. Lewinsky to the White House.[985]

Ms. Currie called Mr. Jordan and asked for guidance in responding to Mr. Isikoff's inquiry because, in her words, she had a "comfort level with Vernon."[986] After Ms. Currie arranged to meet with Mr. Jordan at his office,[987] Ms. Lewinsky drove her there.[988]

Mr. Jordan confirmed in the grand jury that Ms. Currie expressed concern about a call from Mr. Isikoff.[989] He invited her to his office but advised her to "talk to Mike McCurry and Bruce Lindsey * * * because I cannot give you that advice."[990]

In a recorded conversation that day, January 15, Ms. Lewinsky encouraged Ms. Tripp not to disclose her (Lewinsky's) relationship with the President. Ms. Lewinsky tried to persuade Ms. Tripp to lie by telling her that others planned to lie: "I'm not concerned all that much anymore because I'm not going to get in trouble because you know what? The story I've signed * * * under oath is what someone else is saying under oath." When Ms. Tripp asked, "Who?" Ms. Lewinsky responded: "He will," referring to the President.[991] Ms. Lewinsky stated that she did not think the President would "slip up" at his deposition because she was not a "big issue" like Gennifer Flowers and Paula Jones. In contrast, she regarded herself as nothing more than "rumor and innuendo."[992]

One of Ms. Lewinsky's friends, Natalie Ungvari, testified that, when Ms. Lewinsky was implicated in the *Jones* case, "it seemed to me that Monica was just confident everybody would say the

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[982] T30 at 169–70.
[983] Lewinsky 8/6/98 GJ at 223–25; GJ Ex. ML–5.
[984] Lewinsky 8/6/98 GJ at 223–37. Ms. Tripp, in contrast, testified that she believed Ms. Lewinsky received assistance in drafting the talking points. Tripp 7/29/98 GJ at 167, 171–172.
[985] Currie 5/6/98 GJ at 120–21.
[986] Currie 5/6/98 GJ at 130.
[987] Akin, Gump records reflect that at some time this day Ms. Currie left a message for Mr. Jordan. The message slip listed the name of the caller as "Betty/Potus." The message was: "Kind of important." V005–DC–00000058.
[988] Lewinsky 8/6/98 GJ at 229. Ms. Currie had immediately informed Ms. Lewinsky of Mr. Isikoff's call. 831–DC–00000008 (Ms. Lewinsky's pager records).
[989] Jordan 3/5/98 GJ at 71.
[990] Jordan 3/5/98 GJ at 71.
[991] T22 at 12.
[992] T22 at 12–13.

right thing, that everything would be orchestrated to come out a secret."[993]

L. JANUARY 15–16: DEVELOPMENTS IN THE *JONES* LAW SUIT

On January 15, 1998, President Clinton's counsel served Ms. Jones's attorneys with the President's responses to Ms. Jones's document requests.[994] One of the requests specifically sought all documents reflecting communications between the President and Monica Lewinsky.[995] President Clinton objected to the scope of this request, but, notwithstanding his objection, he stated that he did not have any responsive documents.

Also on January 15, Mr. Carter drafted a motion to quash the subpoena issued by Paula Jones's attorneys to Ms. Lewinsky. Attached to the motion was Ms. Lewinsky's signed affidavit.[996] At the request of Katherine Sexton, one of the President's personal attorneys, Mr. Carter faxed a copy of the affidavit to her law offices. Mr. Carter testified that he asked Ms. Sexton why she needed the affidavit that day:

> I said, "Well, Katie, you're going to get it tomorrow because I'm filing it, and it's going to be attached as an exhibit to the motion." She said, "Well, but you've already provided it to the other side, so can I get a copy"—words to that effect. I said, "I have no problem." And so I faxed it to her.[997]

On January 16, 1998, Mr. Carter arranged for the overnight delivery of the motion to quash and the accompanying affidavit to Judge Susan Webber Wright's law clerk and Paula Jones's attorneys.[998]

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[993] Ungvari 3/19/98 GJ at 61.

[994] VV0002–DC–00000093–116 (President Clinton's Responses to Plaintiff's Second Set of Requests).

[995] 1441–DC–00001534–46 (Second Set of Requests From Plaintiff to Defendant Clinton for Production of Documents). Ms. Lewinsky's name was misspelled on the document request as Ms. Lewisky.

[996] 921–DC–00000775–778.

[997] Carter 6/18/98 GJ at 123.

[998] 921–DC–00000775. Although the motion (and affidavit) reached the Judge's chambers on January 17, the file stamp date was January 20, 1998.

XIV. JANUARY 17, 1998–PRESENT: THE DEPOSITION AND AFTERWARD

The President was asked a number of questions about Ms. Lewinsky during his January 17, 1998, deposition in the *Jones* case. In sworn testimony, the President denied having a sexual affair or sexual relations with her. That evening, the President called Ms. Currie and asked her to meet him the following day to discuss Ms. Lewinsky. After allegations that the President had an affair with a White House intern became public, the President emphatically denied the reports to aides and to the American public.

A. JANUARY 17: THE DEPOSITION

On Saturday, January 17, 1998, the President testified under oath at a deposition in the *Jones* case.[999] Judge Susan Webber Wright traveled from Little Rock, Arkansas, to preside at the deposition in Washington, D.C.[1000]

Prior to any questions, Judge Wright reminded the parties about her standing Protective Order. She specifically stated: "[I]f anyone reveals anything whatsoever about this deposition * * * it will be in violation of the Protective Order. This includes the questions that were asked * * * You may acknowledge that [the deposition] took place, but that is it." [1001] Judge Wright accepted the following definition of the term "sexual relations:"

> For the purposes of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes * * * contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person * * *. "Contact" means intentional touching, either directly or through clothing.[1002]

After the President had answered a few questions about Ms. Lewinsky, his attorney, Robert Bennett, urged Judge Wright to limit further inquiries. Mr. Bennett stated that Ms. Lewinsky had executed an affidavit "saying that there is absolutely no sex of any kind of any manner, shape or form, with President Clinton." [1003] When Judge Wright cautioned Mr. Bennett not to make remarks that "could be arguably coaching the witness," Mr. Bennett represented to Judge Wright: "In preparation of the witness for this deposition, the witness is fully aware of Ms. Lewinsky's affidavit,

[999] Clinton 1/17/98 Depo. at 1 (849–DC–00000352 *et seq.*).
[1000] Clinton 1/17/98 Depo. at 1–2.
[1001] Clinton 1/17/98 Depo. at 10.
[1002] Clinton 1/17/98 Depo. at 22–23; 849–DC–00000586 (Clinton Depo. Ex. 1).
[1003] Clinton 1/17/98 Depo. at 54.

so I have not told him a single thing he doesn't know * * *."[1004] President Clinton, who was present when Mr. Bennett made his objection, did not contradict his attorney's comment. Rejecting Mr. Bennett's argument, Judge Wright permitted the questioning about Ms. Lewinsky to continue.[1005]

Over the course of extensive questioning, the President testified that he had seen Ms. Lewinsky "on two or three occasions" during the government shutdown in the fall of 1995, including one occasion when she brought pizza to him, and one or two other occasions when she delivered documents to him.[1006] He could not recall whether he had been alone with Ms. Lewinsky on such occasions, although he acknowledged that it was possible.[1007] The President further testified that he could not remember the subject of any conversations with Ms. Lewinsky.[1008]

President Clinton recalled that he received only a couple of unremarkable personal messages from Ms. Lewinsky, and he could not recall ever having received a cassette tape from her.[1009] He received presents from her "[o]nce or twice"—a book or two and a tie.[1010] The President originally testified that he could not recall any gifts he might have given her; later in the deposition, however, he remembered that some merchandise he had purchased from a Martha's Vineyard restaurant might have reached her through Ms. Currie.[1011] The President stated that he might have given Ms. Lewinsky a hat pin, though he could not recall for certain.[1012]

The President testified that his last conversation with Ms. Lewinsky had been before Christmas, when she had visited the White House to see Ms. Currie. The President stated: "I stuck my head out, said hello to her."[1013] He said it was also possible that, during that encounter, he had joked with Ms. Lewinsky that the plaintiff's attorneys were going to subpoena "every woman I ever talked to" and Ms. Lewinsky "would qualify."[1014]

The President testified that he was unaware that Mr. Jordan had talked with Ms. Lewinsky about the *Jones* case, in which she had also been subpoenaed to testify at a deposition.[1015]

The President emphatically denied having had sexual relations with Ms. Lewinsky.[1016]

At the conclusion of the deposition, Judge Wright said: "Before [the President] leaves, I want to remind him, as the witness in this matter, and everyone else in the room, that this case is subject to a Protective Order regarding all discovery * * * and * * * all parties present, including * * * the witness are not to say anything whatsoever about the questions they were asked, the substance of

[1004] Clinton 1/17/98 Depo. at 54. In addition, as previously indicated, Mr. Jordan believes he informed President Clinton on January 7 that Ms. Lewinsky had signed an affidavit denying that there had been a sexual relationship. Jordan 5/5/98 GJ at 223–25.
[1005] Clinton 1/17/98 Depo. at 53–56.
[1006] Clinton 1/17/98 Depo. at 50–51, 58–59.
[1007] Clinton 1/17/98 Depo. at 52–53, 59.
[1008] Clinton 1/17/98 Depo. at 59.
[1009] Clinton 1/17/98 Depo. at 62–64.
[1010] Clinton 1/17/98 Depo. at 75–77.
[1011] Clinton 1/17/98 Depo. at 75–76.
[1012] Clinton 1/17/98 Depo. at 75.
[1013] Clinton 1/17/98 Depo. at 68.
[1014] Clinton 1/17/98 Depo. at 68–71.
[1015] Clinton 1/17/98 Depo. at 72, 79–83.
[1016] Clinton 1/17/98 Depo. at 78.

the deposition * * * any details * * * and this is extremely important to this Court."[1017]

Sometime after the President's deposition, Mr. Podesta saw Bruce Lindsey, Deputy White House Counsel, at the White House and inquired how the deposition went. According to Mr. Podesta, Mr. Lindsey said that the President had been asked about Monica Lewinsky.[1018] Mr. Lindsey testified that, during a break in the President's deposition, the President had told him that Ms. Lewinsky's name had come up.[1019]

That same evening, Mr. Lindsey met with the President in the Oval Office, where they discussed the deposition.[1020] Mr. Lindsey, relying on the attorney-client, presidential communication, deliberative process, and work-product privileges, declined to say what specifically was discussed at this meeting.

B. THE PRESIDENT MEETS WITH MS. CURRIE

Soon after the deposition, the President called Ms. Currie and asked her to come to the White House the next day.[1021] Ms. Currie acknowledged that, "It's rare for [the President] to ask me to come in on Sunday."[1022] The President wanted to discuss Ms. Lewinsky's White House visits.[1023]

At approximately 5:00 p.m. on Sunday, January 18, 1998, Ms. Currie met with the President.[1024] The meeting took place at her desk outside the Oval Office. According to Ms. Currie, the President appeared "concerned."[1025] He told Ms. Currie that, during his deposition the previous day, he had been asked questions about Monica Lewinsky.[1026] Ms. Currie testified: "I think he said, 'There are several things you may want to know.'"[1027] He proceeded to make a series of statements,[1028] one right after the other:[1029]

- "You were always there when she was there, right?"
- "We were never really alone."
- "Monica [Lewinsky] came on to me, and I never touched her, right?"

[1017] Clinton 1/17/98 Depo. at 212–13.

[1018] Podesta 6/16/98 GJ at 62.

[1019] Lindsey 2/19/98 GJ at 12–13. Mr. Lindsey refused to reveal the content of these conversations with the President, citing the presidential communication, deliberative process, and attorney-client privileges, both officially and privately, as well as the attorney work product doctrine. *Id.* at 13.

[1020] Lindsey 2/19/98 GJ at 14–15.

[1021] See Telephone Table 46, Call 4; Currie 1/27/98 GJ at 65–66; Currie 5/7/98 GJ at 79–85; Currie 7/22/98 GJ at 154. *See also* Currie 1/24/98 Int. at 5–6 ("CURRIE advised that sometime late that evening, she received a telephone call from CLINTON. CURRIE advised that CLINTON said he and CURRIE needed to talk. CURRIE advised it was too late to do anything that evening, so she and CLINTON agreed to meet at the White House at 5 p.m. the following day, Sunday, January 18, 1998."). Presidential call logs reflect that the President attempted to call Ms. Currie at 7:02 p.m. on January 17, 1998, and that he spoke to her for two minutes at 7:13 p.m. 1248–DC–00000307.

[1022] Currie 5/7/98 GJ at 91. Also that evening, the President called Mr. Jordan, who testified that they did not discuss the afternoon deposition. *See* Telephone Table 46, Call 2; Jordan 5/28/98 GJ at 94–95.

[1023] Currie 1/27/98 GJ at 70.

[1024] Currie 1/27/98 GJ at 67.

[1025] Currie 1/27/98 GJ at 76.

[1026] Currie 1/27/98 GJ at 70, 76; 7/22/98 GJ at 6, 22. Presidential call logs reflect that the President called Ms. Currie before their meeting and spoke to her from 1:11 p.m. to 1:14 p.m. on January 18. 1248–DC–00000313.

[1027] Currie 1/27/98 GJ at 70.

[1028] Currie 1/27/98 GJ at 73 ("[M]y impression was that he was just making statements.").

[1029] Currie 1/24/98 Int. at 6–7. The President repeated these statements to Ms. Currie a few days later. *See* infra.

- "You can see and hear everything, right?"[1030]

Ms. Currie testified that, based on his demeanor and the way he made the statements, the President wanted her to agree with them.[1031]

Ms. Currie testified that she did, in fact, agree with the President when he said, "You were always there when she was there, right?"[1032] Before the grand jury, however, Ms. Currie acknowledged the possibility that Ms. Lewinsky could have visited the President when she was not at the White House.[1033]

With respect to whether the President was "never really alone" with Ms. Lewinsky, Ms. Currie testified that there were several occasions when the President and Ms. Lewinsky were either in the Oval Office or in the study without anyone else present.[1034] Ms. Currie explained that she did not consider the President and Ms. Lewinsky to be "alone" on such occasions because she was at her desk outside the Oval Office; accordingly, they were all together in the same "general area."[1035] Ms. Currie testified that "the President, for all intents and purposes, is never alone. There's always somebody around him."[1036]

As to whether Ms. Lewinsky "came on" to him, Ms. Currie testified that she "would have no reason to know" whether Ms. Lewinsky ever "came on" to the President because Ms. Currie was not present all the time.[1037] Finally, as to whether she "could see and hear everything," Ms. Currie testified that she should not have agreed with the President.[1038] She testified that when the Presi-

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[1030] Currie 1/27/98 GJ at 71–74; 7/22/98 GJ at 6–7, 10–11, 79. *See also* Clinton 8/17/98 GJ at 55–57. According to Ms. Currie, the way the President phrased the inquiries made them sound like both questions and statements at the same time. Currie 1/24/98 Int. at 6.

[1031] Currie 1/27/98 GJ at 74–75. Ms. Currie's testimony that the President wanted her to agree with his statements shifted somewhat between her first grand jury appearance and her last, which occurred five months later. On January 27, 1998, nine days after her conversation with the President, Ms. Currie testified that she understood from the President's questions that he wanted her to agree with him. Currie 1/27/98 GJ at 72–76. By July 22, 1998, however, Ms. Currie claimed that although the President stated "right?" at the end of the statements, Ms. Currie understood that she could agree or disagree with them. Currie 7/22/98 GJ at 23. Ms. Currie indicated during her first grand jury appearance that her memory about the events was "getting worse by the minute." Currie 1/27/98 GJ at 71. Later, Ms. Currie acknowledged that "closer to the event my recollection would be better." Currie 7/22/98 GJ at 182–183.

[1032] Currie 1/27/98 GJ at 71, 75.

[1033] Currie 7/22/98 GJ at 65–66. Indeed, she testified that, at some point after January 18, she heard that Ms. Lewinsky visited the Oval Office on Saturdays, one of her days off. Currie 7/22/98 GJ at 65–66.

[1034] Currie 1/27/98 GJ at 32–33; 36–38.

[1035] Currie 7/22/98 GJ at 12, 15–6; Currie 1/27/98 GJ at 76.

[1036] Currie 7/22/98 GJ at 14. The President, apparently, had a similar understanding of "alone." Before the grand jury, the President explained that "when I said, we were never alone, right * * * I meant that she [Ms. Currie] was always in the Oval Office complex, in that complex, while Monica was there." Clinton 8/17/98 GJ at 132.

Elsewhere in her testimony, Ms. Currie appeared to have a different understanding of "alone." She testified that, on one occasion, because others observed Ms. Lewinsky in the Oval Office complex, Ms. Currie accompanied Ms. Lewinsky into the Oval Office, where the President was working. Ms. Currie explained that she waited in the dining room while Ms. Lewinsky and the President met in the study so "[t]hey would not be alone." Currie 7/22/98 GJ at 130. *See also* Clinton 8/17/98 GJ at 56 ("I asked her specifically * * * to remain in the dining room, Betty, while I met with Monica in my study."). Ms. Currie testified that she did not want people who had observed Ms. Lewinsky enter the Oval Office to think that she and the President were "alone." Currie 7/22/98 GJ at 132.

[1037] Currie 7/22/98 GJ at 79. Ms. Currie testified: "The way the question was phrased to me at the time, I answered, 'Right.' It seemed to me that was the correct answer for me to give * * * the '[c]ome on to me,' I considered that more of a statement as opposed to a question." *Id.* at 80.

[1038] Currie 1/27/98 GJ at 75.

dent and Ms. Lewinsky were alone together in the study, while Ms. Currie was at her desk, she could "hear nothing." [1039]

The President also made the following statement during their January 18, 1998 meeting, according to Ms. Currie: "[Monica Lewinsky] wanted to have sex with me, but I told her I couldn't do that." [1040]

When the President was questioned about this meeting with Ms. Currie in the grand jury, he testified that he recalled the conversation, but he denied that he was "trying to get Betty Currie to say something that was untruthful." [1041] Rather, the President testified that he asked a "series of questions" in an effort to quickly "refresh [his] memory." [1042] The President explained: "I wanted to establish * * * that Betty was there at all other times in the complex, and I wanted to know what Betty's memory was about what she heard, what she could hear. * * * [a]nd I was trying to figure [it] out * * * in a hurry because I knew something was up." [1043]

In his grand jury testimony, the President acknowledged that, "in fairness," Ms. Currie "may have felt some ambivalence about how to react" to his statements.[1044] The President maintained that he was trying to establish that Ms. Currie was "always there," and could see and hear everything.[1045] At the same time, he acknowledged that he had always tried to prevent Ms. Currie from learning about his relationship with Ms. Lewinsky.[1046] "[I] did what people do when they do the wrong thing. I tried to do it where nobody else was looking at it." [1047]

The President was also asked about his statement that Ms. Currie was always in the Oval Office when Ms. Lewinsky visited. He explained that he may have intended the term "Oval Office" to include the entire Oval Office complex.[1048] The President further explained, "I was talking about 1997. I was never, ever trying to get Betty Currie to claim that on the occasions when Monica Lewinsky was there when she wasn't anywhere around, that she was." [1049] When asked whether he restricted his remarks to the year 1997, the President responded, "Well, I don't recall whether I did or not, but * * * I assumed [Ms. Currie] knew what I was talking about." [1050]

When questioned about his statement to Ms. Currie, "you could see and hear everything," the President responded:

> My memory of that was that, that she had the ability to hear what was going on if she came in the Oval Office from her office. And a lot of times, you know, when I was

[1039] Currie 1/27/98 GJ at 83.
[1040] Currie 1/27/98 GJ at 72–73; 7/22/98 GJ at 7, 10–11. Ms. Currie testified that the President made this statement in a way that did not invite her agreement. Rather, "I would call it a statement, sir." Currie 1/27/98 GJ at 73.
[1041] Clinton 8/17/98 GJ at 57.
[1042] Clinton 8/17/98 GJ at 132.
[1043] Clinton 8/17/98 GJ at 55.
[1044] Clinton 8/17/98 GJ at 141.
[1045] Clinton 8/17/98 GJ at 55.
[1046] Clinton 8/17/98 GJ at 135–36 ("As far as I know, she is unaware of what happened on the, on the occasions when I saw her in 1996 when something improper happened. And she was unaware of the one time that I recall in 1997 when something happened.").
[1047] Clinton 8/17/98 GJ at 38.
[1048] Clinton 8/17/98 GJ at 57–58, 132.
[1049] Clinton 8/17/98 GJ at 133.
[1050] Clinton 8/17/98 GJ at 133.

> in the Oval Office, she just had the door open to her office. Then there was—the door was never completely closed to the hall. So, I think there was—I'm not entirely sure what I meant by that, but I could have meant that she generally would be able to hear conversations, even if she couldn't see them. And I think that's what I meant.[1051]

Finally, when asked about his statement to Ms. Currie that "Monica came on to me and I never touched her," the President refused to answer.[1052]

C. JANUARY 18–19: ATTEMPTS TO REACH MS. LEWINSKY

In the wake of her Sunday afternoon session, Ms. Currie paged Ms. Lewinsky four times.[1053] She testified that the President "may have asked me to call [Ms. Lewinsky] to see what she knew or where she was or what was happening." [1054] Later that evening, at 11:02 p.m., the President called Ms. Currie to ask whether she had spoken to Ms. Lewinsky.[1055]

Over a two-hour span the next morning, Monday, January 19, 1998, Ms. Currie made eight unsuccessful attempts to contact Ms. Lewinsky, by either pager or telephone.[1056] After speaking with the President to let him know that she was unable to reach Ms. Lewinsky, Ms. Currie again paged her.[1057] The purpose of these calls, according to Ms. Currie, was to tell Ms. Lewinsky that her name had been mentioned in the President's deposition.[1058]

Mr. Jordan also tried unsuccessfully to reach Ms. Lewinsky that morning.[1059] That afternoon, Mr. Jordan met with the President in the Oval Office.[1060] Later, Ms. Lewinsky's attorney, Frank Carter, called Mr. Jordan and told him that Ms. Lewinsky had obtained new counsel, William Ginsburg and Nathaniel Speights.[1061] Mr. Jordan passed this information on to the President that evening in a seven-minute phone conversation.[1062]

[1051] Clinton 8/17/98 GJ at 135.

[1052] Clinton 8/17/98 GJ at 139. The President referred to a statement he delivered in the beginning of his grand jury appearance: "[B]ecause of privacy considerations affecting my family, myself, and others, and in an effort to preserve the dignity of the office I hold, this is all I will say about the specifics of these particular matters." Clinton 8/17/98 GJ at 10.

[1053] At 5:12 p.m., Ms. Currie paged Ms. Lewinsky, leaving the message: "Please call Kay at home." At 6:22 p.m., Ms. Currie paged Ms. Lewinsky: "Please call Kay at home." At 7:06 p.m., Ms. Currie paged Ms. Lewinsky: "Please call Kay at home." At 8:28 p.m., Ms. Currie paged Ms. Lewinsky: "Call Kay." 831–DC–00000008 (Ms. Lewinsky's pager records) (Ms. Lewinsky's pager recorded calls in Pacific time). *See also* Currie 5/7/98 GJ at 96–97; 7/22/98 GJ at 156, 158.

[1054] Currie 5/7/98 GJ at 99–100.

[1055] Telephone Calls, Table 47, Call 11. *See also* Currie 7/22/98 GJ at 161–62.

[1056] *See* Telephone Calls, Table 48. At 7:02 a.m. she paged Ms. Lewinsky, leaving the message: "Please call Kay at home at 8:00 this morning." At 8:08 a.m., Ms. Currie paged Ms. Lewinsky again. After calling Ms. Lewinsky's home number at 8:29 a.m., Ms. Currie paged Ms. Lewinsky again at 8:33 a.m. Four minutes later, Ms. Currie paged yet again, leaving the message: "Please call Kay at home. It's a social call. Thank you." (Ms. Currie testified that these calls were, in fact, not of a social nature. Currie 7/22/98 GJ at 161). Receiving no response, Ms. Currie paged Ms. Lewinsky again at 8:41 a.m. She then placed a one-minute call to the President. Currie 5/7/98 GJ at 104–05; 7/22/98 GJ at 160–62.

[1057] Currie 7/22/98 GJ at 162–63. This time, Ms. Currie left a more urgent message: "Please call Kay re: family emergency." 831–DC–00000009 (Ms. Lewinsky's pager records). *See* Telephone Calls, Table 48, Call 7.

[1058] Currie 7/22/98 GJ at 157–59; 164–66.

[1059] Jordan 6/9/98 GJ at 17. *See also* Telephone Calls, Table 48 (831–DC–00000009) (Ms. Lewinsky's pager records).

[1060] Jordan 6/9/98 GJ at 38–39.

[1061] Carter 6/18/98 GJ at 146.

[1062] Jordan 6/9/98 GJ at 54–55.

D. JANUARY 20-22: LEWINSKY STORY BREAKS

After the publication of an article alleging a sexual relationship with Ms. Lewinsky, President Clinton conferred with his attorneys and issued a number of denials to his aides and to the American public.

1. "Clinton Accused"

On Wednesday, January 21, 1998, the *Washington Post* published a story entitled "Clinton Accused of Urging Aide to Lie; Starr Probes Whether President Told Woman to Deny Alleged Affair to Jones's Lawyers."[1063] The White House learned the essentials of the *Post* story on the night of January 20, 1998.[1064]

President Clinton placed a number of phone calls that night and the following morning.[1065] From 12:08 a.m. to 12:39 a.m., he spoke with his personal attorney, Robert Bennett. Mr. Bennett would be quoted in the *Post* article as saying, "The President adamantly denies he ever had a relationship with Ms. Lewinsky and she has confirmed the truth of that."[1066] He added: "This story seems ridiculous and I frankly smell a rat."[1067]

Immediately after his call to Mr. Bennett, President Clinton called Deputy White House Counsel Bruce Lindsey; they spoke for about half an hour, until 1:10 a.m.[1068]

At 1:16 a.m., the President called Ms. Currie at home and spoke to her for 20 minutes. Ms. Currie testified that the President was concerned that her name was mentioned in the *Post* article.[1069] Soon after this call, the President called Mr. Lindsey.[1070]

A few hours later, at approximately 6:30 a.m., the President called Mr. Jordan in New York City to tell him, according to Mr. Jordan, that the *Post* story was untrue.[1071] From 7:14 a.m. to 7:22 a.m., the President spoke again with Mr. Lindsey.[1072]

Responding to the *Post* story that day, the White House issued a statement, personally approved by the President, declaring that he was "outraged by these allegations" and that "he has never had an improper relationship with this woman." White House spokesperson Mike McCurry said that the statement "was prepared by the Counsel's office, and I reviewed it with the President to make sure that it reflected what he wanted me to say * * * He looked at it, and he said fine. * * * It was prepared in consultation be-

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[1063] Schmidt, Baker, and Locy, "Clinton Accused of Urging Aide To Lie," *Wash. Post,* Jan. 21, 1998, at A1.
[1064] Podesta 6/23/98 GJ at 12.
[1065] *See* Telephone Calls, Table 50.
[1066] Mr. Bennett was apparently referring to Ms. Lewinsky's affidavit.
[1067] *Clinton Accused* at A1.
[1068] Mr. Lindsey, on instructions from the President, *see* Lindsey 8/28/98 GJ at 23, has invoked the presidential communication privilege, the deliberative process privilege, the governmental attorney-client privilege, and President Clinton's personal attorney-client privilege with regard to conversations with the President and has thus refused to disclose what the President said to him on January 21. Lindsey 2/19/98 GJ at 42. Mr. Lindsey has testified, however, that based on the President's public statements and statements made to others in Lindsey's presence, the President misled him about the nature of his relationship with Ms. Lewinsky. Lindsey 8/28/98 GJ at 93-96, 101.
[1069] Currie 5/7/98 GJ at 112-14.
[1070] Lindsey 8/28/98 GJ at 90. Mr. Lindsey, citing privileges, refused to testify about the substance of this conversation.
[1071] 1034–DC–00000111 (Mr. Jordan's calendar). *See also* Jordan 3/5/98 GJ at 79 (St. Regis Hotel), 160-61 (New York), 179 (the President's phone call); Jordan 6/9/98 GJ at 76.
[1072] *See* Telephone Calls, Table 50, Call 6. *See also* Lindsey 8/28/98 GJ at 90. Mr. Lindsey asserted privileges over this conversation as well.

tween the lawyers and the President. The Counsel's Office gave it to me. I wanted to, of course, verify that that's exactly what the President wanted me to say." [1073]

2. Denials to Aides

According to Mr. Lindsey, the remainder of the morning was spent in a series of meetings about the Lewinsky matter, including preparing the President for anticipated Lewinsky-related questions in three previously scheduled media interviews. [1074] At these meetings, President Clinton denied the allegations to several of his top aides.

The President met with Chief of Staff Erskine Bowles, along with his two deputies, John Podesta and Sylvia Matthews. According to Mr. Bowles, the President told them, "I want you to know I did not have sexual relationships with this woman, Monica Lewinsky. I did not ask anybody to lie. And when the facts come out, you'll understand." [1075] The President made a similar denial that morning to Harold Ickes, his former Deputy Chief of Staff. [1076]

The President also discussed the matter with Ms. Currie for a second time. [1077] According to Ms. Currie, the President called her into the Oval Office and gave a "sort of a recapitulation of what we had talked about on Sunday—you know, 'I was never alone with her'—that sort of thing." [1078] The President spoke with the same tone and demeanor that he used during his previous session with her. [1079] Ms. Currie testified that the President may have mentioned that she might be asked about Ms. Lewinsky. [1080]

Later that day, the President summoned Sidney Blumenthal to the Oval Office. They spoke for about 30 minutes. [1081] The President said to Mr. Blumenthal, "I haven't done anything wrong." [1082] Mr. Blumenthal testified that the President told him, "Monica Lewinsky came on to me and made a sexual demand on me." The President said that he "rebuffed her." [1083] The President also told Mr. Blumenthal that Ms. Lewinsky had "threatened him. She said that she would tell people they'd had an affair, that she was known as the stalker among her peers, and that she hated it and if she

[1073] White House Press Conference (Mike McCurry), Jan. 21, 1998.
[1074] Lindsey 8/28/98 GJ at 11-12.
[1075] Bowles 4/2/98 GJ at 84. *See also* Podesta 6/16/98 GJ at 85-86.
[1076] Ickes 6/10/98 GJ at 73.
[1077] Ms. Currie could not recall whether the President called her into the Oval Office to discuss Ms. Lewinsky on Tuesday, January 20, or Wednesday, January 21. Currie 1/27/98 GJ at 80-81.
[1078] Currie 1/27/98 GJ at 80-81.
[1079] Currie 1/27/98 GJ at 81.
[1080] Currie 1/24/98 Int. at 8. The President did not specifically recall this second conversation with Ms. Currie, but did not dispute that it took place: "I do not remember how many times I talked to Betty Currie or when. I don't. I can't possibly remember that. I do remember when I first heard about this story breaking, trying to ascertain what the facts were, trying to ascertain what Betty's perception was." Clinton 8/17/98 GJ at 141-42.
[1081] Blumenthal 2/26/98 GJ at 19.
[1082] Blumenthal 6/4/98 GJ at 48-49. When later asked how he interpreted the President's statement, "I haven't done anything wrong," Mr. Blumenthal stated, "My understanding was that the accusations against him which appeared in the press that day were false, that he had not done anything wrong. . . . He had not had a sexual relationship with her, and had not sought to obstruct justice or suborn perjury." Blumenthal 6/25/98 GJ at 26.
[1083] Blumenthal 6/4/98 GJ at 49. The President said, "I've gone down that road before, I've caused pain for a lot of people and I'm not going to do that again." Blumenthal 6/4/98 GJ at 49. Mr. Blumenthal "understood [this statement] to mean that he had had an adulterous relationship in the past, which is something he made very plain to the American people in his "60 Minutes" interview with the First Lady, which is how he introduced himself to the public . . . . And it's been very well known." Blumenthal 6/25/98 GJ at 32.

had an affair or said she had an affair then she wouldn't be the stalker any more." [1084] Mr. Blumenthal then asked the President whether he and Ms. Lewinsky were alone when she threatened him. The President responded, "Well, I was within eyesight or earshot of someone." [1085]

According to Mr. Blumenthal, the President complained: "I feel like a character in a novel. I feel like somebody who is surrounded by an oppressive force that is creating a lie about me and I can't get the truth out. I feel like the character in the novel *Darkness at Noon.*" [1086]

Soon thereafter, in the course of a meeting about the progress of the President's State of the Union address, the President made a second denial of the allegations to Mr. Podesta. [1087] Mr. Podesta testified:

> [H]e said to me that he had never had sex with her, and that—and that he never asked—you know, he repeated the denial, but he was extremely explicit in saying he never had sex with her * * * Well, I think he said—he said that—there was some spate of, you know, what sex acts were counted, and he said that he had never had sex with her in any way whatsoever—that they had not had oral sex. [1088]

The President was asked during his grand jury appearance whether he recalled denying a sexual relationship with Ms. Lewinsky to his senior aides and advisors, including Mr. Bowles, Mr. Podesta, Mr. Blumenthal, Mr. Ickes, and Mr. Jordan. [1089] The President did not recall specific details but did remember the following:

> I met with certain people, and [to] a few of them I said I didn't have sex with Monica Lewinsky, or I didn't have an affair with her or something like that. I had a very careful thing I said, and I tried not to say anything else * * * I remember that I issued a number of denials to people that I thought needed to hear them, but I tried to be careful and to be accurate.
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> * * * * * * *
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> And I believe, sir, that—you'll have to ask them what they thought. But I was using those terms in the normal way people use them. [1090]

[1084] Blumenthal 6/4/98 GJ at 49.
[1085] Blumenthal 6/4/98 GJ at 50.
[1086] Blumenthal 6/4/98 GJ at 49-50; Blumenthal 6/25/98 GJ at 15, 51.
[1087] Podesta 6/16/98 GJ at 92.
[1088] Podesta 6/16/98 GJ at 92. The President made another misleading statement about his relationship with Ms. Lewinsky to Mr. Podesta a few weeks later. According to Mr. Podesta, "[h]e said to me that after she [Ms. Lewinsky] left [the White House], that when she had come by, she came by to see Betty, and that he—when she was there either Betty was with them—either that she was with Betty when he saw her or that he saw her in the Oval Office with the door open and Betty was around—and Betty was out at her desk." Podesta 6/16/98 GJ at 88.
[1089] Clinton 8/17/98 GJ at 101-09.
[1090] Clinton 8/17/98/ GJ at 101, 106. The President was asked specifically whether he denied telling Mr. Podesta that he did not have any kind of sex whatsoever, including oral sex, with Ms. Lewinsky. The President responded: "I'm not saying that anybody who had a contrary memory is wrong. I do not remember." Clinton 8/17/98 GJ at 105.

The President testified that he had said "things that were true about this relationship. That I used—in the language I used, I said, there's nothing going on between us. That was true.[1091] I said I did not have sex with her as I defined it. That was true."[1092] The President qualified this answer, however: "I said things that were true. They may have been misleading, and if they were I have to take responsibility for it, and I'm sorry."[1093]

3. Initial Denials to the American Public

On the afternoon of January 21, the President made his first of a series of previously scheduled media appearances. In an interview on National Public Radio's "All Things Considered," the following colloquy took place:

> Q: Mr. President, * * * [m]any Americans woke up to the news today that the Whitewater independent counsel is investigating an allegation that you * * * encouraged a young woman to lie to lawyers in the Paula Jones civil suit. Is there any truth to that allegation?
>
> WJC: No, sir, there's not. It's just not true.
>
> Q: Is there any truth to the allegation of an affair between you and the young woman?
>
> WJC: No. That's not true either. * * * The charges are not true. And I haven't asked anybody to lie.[1094]

That evening, the President appeared on the PBS program "The News Hour with Jim Lehrer." He was asked again whether the allegation of an affair with a White House intern was true. The President replied, "That is not true. That is not true. I did not ask anyone to tell anything other than the truth. There is no improper relationship. And I intend to cooperate with this inquiry. But that is not true." When asked to define what he meant by the term "improper relationship," the President answered, "Well, I think you know what it means. It means that there is not a sexual relationship, an improper sexual relationship, or any other kind of improper relationship."[1095]

The following morning, on January 22, 1998, the President again denied he had done anything improper. Speaking at a televised White House photo opportunity with Palestinian Authority Chairman Yasser Arafat, the President stated: "[T]he allegations are false, and I would never ask anybody to do anything other than tell the truth. That is false."[1096]

[1091] In claiming that this statement was true, the President was apparently relying on the same tense-based distinction he made during the *Jones* deposition. *See* Clinton 8/17/98 GJ at 59–61 ("It depends on what the meaning of the word 'is' is. If the—if he—if 'is' means is and never has been, that is not—that is one thing. If it means there is none, that was a completely true statement. * * * Now, if someone had asked me on that day, are you having any kind of sexual relations with Ms. Lewinsky, that is, asked me a question in the present tense, I would have said no. And it would have been completely true.")

[1092] Clinton 8/17/98 GJ at 107.

[1093] Clinton 8/17/98 GJ at 107.

[1094] Broadcast on "All Things Considered" on National Public Radio, 5:07 p.m., Wednesday, January 21, 1998.

[1095] "The News Hour with Jim Lehrer," PBS, interview with President Bill Clinton by Jim Lehrer, Wednesday, January 21, 1998. As evidenced by his grand jury testimony, the President is attentive to matters of verb tense. Clinton 8/17/98 GJ at 59.

[1096] Televised Remarks by President Clinton at Photo Opportunity at the White House with Palestinian Authority Chairman Yasser Arafat, January 22, 1998, 10:22 a.m.

The President also gave an interview to *Roll Call* that day. He stated: "[T]he relationship was not improper, and I think that's important enough to say * * *. But let me answer—it is not an improper relationship and I know what the word means * * *. The relationship was not sexual. And I know what you mean, and the answer is no." [1097]

At each of these interviews, the President pledged he would cooperate fully with the investigation. On NPR, the President stated: "I have told people that I would cooperate in the investigation, and I expect to cooperate with it. I don't know any more about it, really, than you do. But I will cooperate * * *. I'm doing my best to cooperate with the investigation." [1098] To Mr. Lehrer, he said: "[W]e are doing the best to cooperate here, but we don't know much yet * * *. I think it's important that we cooperate, I will cooperate, but I want to focus on the work at hand." [1099]

In his photo opportunity with Mr. Arafat, the President stated:

> [T]he American people have a right to get answers. We are working very hard to comply, get all the requests for information up here. And we will give you as many answers as we can, as soon as we can, at the appropriate time, consistent with our obligation to also cooperate with the investigations. And that's not a dodge; that's really what I've—I've talked with our people. I want to do that. I'd like for you to have more rather than less, sooner rather than later. So we will work through it as quickly as we can and get all those questions out there to you." [1100]

Finally, in his *Roll Call* interview, the President vowed: "I'm going to cooperate with this investigation * * *. And I'll cooperate." [1101]

4. "We Just Have To Win"

Amidst the flurry of press activity on January 21, 1998, the President's former political consultant, Dick Morris, read the *Post* story and called the President. [1102] According to Mr. Morris, he told the President, "You poor son of a bitch. I've just read what's going on." [1103] The President responded, Mr. Morris recalled, "Oh, God. This is just awful * * *. I didn't do what they said I did, but I did do something. I mean, with this girl, I didn't do what they said, but

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[1097] *Roll Call, Inc.,* January 22, 1998; transcript of press conference.
[1098] "All Things Considered," January 21, 1998.
[1099] "The News Hour," January 21, 1998.
[1100] Televised Remarks By President Clinton at Photo Opportunity at the White House with Palestinian Authority Chairman Yasser Arafat, January 22, 1998, 10:22 a.m.
[1101] *Roll Call, Inc.,* January 22, 1998. President Clinton was extended invitations to appear before the grand jury and give his testimony on: January 28, 1998; February 4, 1998; February 9, 1998; February 21, 1998; March 2, 1998; and March 13, 1998. He declined all of these invitations. On July 16, 1998, the grand jury issued the President a subpoena. The President promptly moved for a postponement of two weeks in which to respond. At a hearing on the President's motion, Chief Judge Norma Holloway Johnson stated, "What we need to do is to move forward and move forward expeditiously * * *. [A]pparently the grand jury has determined that [they] need to hear from the [President]." *In re Grand Jury Proceedings,* Misc. No. 98–267, July 28, 1998, at pp. 27–28. Before Judge Johnson ruled, the President's attorneys negotiated the terms of the President's appearance.
[1102] Morris 8/18/98 GJ at 6, 10, 12. Mr. Morris was questioned after the President's grand jury appearance on August 17, 1998; accordingly, the OIC never had an opportunity to question the President about this conversation.
[1103] Morris 8/18/98 GJ at 14.

I did . . . do something [1104] * * * And I may have done enough so that I don't know if I can prove my innocence * * *. There may be gifts. I gave her gifts, * * * [a]nd there may be messages on her phone answering machine." [1105]

Mr. Morris assured the President, "[t]here's a great capacity for forgiveness in this country and you should consider tapping into it." [1106] The President said, "But what about the legal thing? You know, the legal thing? You know, Starr and perjury and all * * *. You know, ever since the election, I've tried to shut myself down. I've tried to shut my body down, sexually, I mean * * *. But sometimes I slipped up and with this girl I just slipped up." [1107]

Mr. Morris suggested that he take a poll on the voters' willingness to forgive confessed adultery. The President agreed. [1108]

Mr. Morris telephoned the President later that evening with the poll results, which showed that the voters were "willing to forgive [the President] for adultery, but not for perjury or obstruction of justice[.]" [1109] When Mr. Morris explained that the poll results suggested that the President should not go public with a confession or explanation, he replied, "Well, we just have to win, then." [1110]

The President had a follow-up conversation with Mr. Morris during the evening of January 22, 1998, when Mr. Morris was considering holding a press conference to "blast Monica Lewinsky 'out of the water.'" [1111] The President told Mr. Morris to "be careful." According to Mr. Morris, the President warned him not to "be too hard on [Ms. Lewinsky] because there's some slight chance that she may not be cooperating with Starr and we don't want to alienate her by anything we're going to put out." [1112]

Meanwhile, in California, the President's good friend and Hollywood producer, Harry Thomason, had seen the President's interview with Jim Lehrer on televison. [1113] Mr. Thomason, who had occasionally advised the President on matters relating to the media, traveled to Washington, D.C., and met with him the next day. [1114] Mr. Thomason told the President that "the press seemed to be saying that [the President's comments were] weak" and that he, Mr. Thomason, "thought his response wasn't as strong as it could have been." [1115] Mr. Thomason recommended that the President "should

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[1104] Mr. Morris testified that he interpreted the "something" to be sexual in nature. Morris 8/18/98 GJ at 94.
[1105] Morris 8/18/98 GJ at 14.
[1106] Morris 8/18/98 GJ at 15.
[1107] Morris 8/18/98 GJ at 15-16.
[1108] Morris 8/18/98 GJ at 17.
[1109] Morris 8/18/98 GJ at 28.
[1110] Morris 8/18/98 GJ at 30.
[1111] Morris 8/18/98 GJ at 34. Mr. Morris believed that Ms. Lewinsky's credibility was in question based on a claim by a *USA Today* reporter that there was an occasion when the President and Mr. Morris spoke on the telephone while they each were involved in a sexual encounter. The President was reportedly "having sex" with Ms. Lewinsky while Mr. Morris was allegedly involved with a prostitute at the Jefferson Hotel. Morris 8/18/98 GJ at 32, 34.
[1112] Morris 8/18/98 GJ at 35.
[1113] Thomason 8/11/98 GJ at 6.
[1114] Although Mr. Thomason originally offered to stay with the President for a "couple of days," he stayed at the White House Residence for 34 days. Thomason 8/11/98 GJ at 6, 10. Mr. Thomason testified that while "not particularly an expert in media matters * * * my wife and I seem to have a feel of what the rest of America is thinking * * * ." Thomason 8/11/98 GJ at 24.
[1115] Thomason 8/11/98 GJ at 15–16. Mr. Thomason said he "went on the assumption that [the allegations] were not true," but he never asked the President because he talked to his attorney, Robert Bennett (also the President's personal attorney), who advised him "to make sure you

Continued

explain it so there's no doubt in anybody's mind that nothing happened."[1116] The President agreed: "You know, you're right. I should be more forceful than that."[1117]

In the ensuing days, the President, through his Cabinet, issued a number of firm denials. On January 23, 1998, the President started a Cabinet meeting by saying the allegations were untrue.[1118] Afterward, several Cabinet members appeared outside the White House. Madeline Albright, Secretary of State, said: "I believe that the allegations are completely untrue." The others agreed. "I'll second that, definitely," Commerce Secretary William Daley said. Secretary of Education Richard Riley and Secretary of Health and Human Services Donna Shalala concurred.[1119]

The next day, Ann Lewis, White House Communications Director, publicly announced that "those of us who have wanted to go out and speak on behalf of the president" had been given the green light by the President's legal team.[1120] She reported that the President answered the allegations "directly" by denying any improper relationship. She believed that, in issuing his public denials, the President was not "splitting hairs, defining what is a sexual relationship, talking about 'is' rather than was.[1121] You know, I always thought, perhaps I was naive, since I've come to Washington, when you said a sexual relationship, everybody knew what that meant." Ms. Lewis expressly said that the term includes "oral sex."[1122]

On Monday, January 26, 1998, in remarks in the Roosevelt Room in the White House, President Clinton gave his last public statement for several months on the Lewinsky matter. At an event promoting after-school health care, the President denied the allegations in the strongest terms: "I want to say one thing to the American people. I want you to listen to me. I'm going to say this again: I did not have sexual relations with that woman, Miss Lewinsky. I never told anybody to lie, not a single time. Never. These allegations are false."[1123]

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don't ask questions that will get you subpoenaed." *Id.* at 22, 27. Mr. Thomason also testified he did not ask the President whether the denial was true because "I wanted it to be true and I felt it not to be true." *Id.* at 32–33.

[1116] Thomason 8/11/98 GJ at 15.

[1117] Thomason 8/11/98 GJ at 27.

[1118] Schmidt and Baker, "Ex-Intern Rejected Immunity Offer in Probe," *Wash. Post,* Jan. 24, 1998, at A1.

[1119] Schmidt and Baker, "Ex-Intern Rejected Immunity Offer," at A1.

[1120] Larry King Weekend, Jan. 24, 1998, Transcript No. 98012400V42.

[1121] In fact, the President *did* draw a distinction between "is" and "was." *See* Clinton 8/17/98 GJ at 59.

[1122] Larry King Weekend, Jan. 24, 1998, Transcript No. 98012400V42.

[1123] Televised Remarks by President Clinton at the White House Education News Conference, Monday, January 26, 1998, 10:00 a.m. *See Chi. Tribune*, Jan. 27, 1998, at 1 ("A defiant President Clinton wagged his finger at the cameras and thumped the lectern Monday as he insisted he did not have sex with a young White House intern or ask her to deny it under oath.").

THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT PRESIDENT CLINTON COMMITTED ACTS THAT MAY CONSTITUTE GROUNDS FOR AN IMPEACHMENT

INTRODUCTION

Pursuant to Section 595(c) of Title 28, the Office of Independent Counsel (OIC) hereby submits substantial and credible information that President Clinton obstructed justice during the *Jones* v. *Clinton* sexual harassment lawsuit by lying under oath and concealing evidence of his relationship with a young White House intern and federal employee, Monica Lewinsky. After a federal criminal investigation of the President's actions began in January 1998, the President lied under oath to the grand jury and obstructed justice during the grand jury investigation. There also is substantial and credible information that the President's actions with respect to Monica Lewinsky constitute an abuse of authority inconsistent with the President's constitutional duty to faithfully execute the laws.

There is substantial and credible information supporting the following eleven possible grounds for impeachment:

1. President Clinton lied under oath in his civil case when he denied a sexual affair, a sexual relationship, or sexual relations with Monica Lewinsky.

2. President Clinton lied under oath to the grand jury about his sexual relationship with Ms. Lewinsky.

3. In his civil deposition, to support his false statement about the sexual relationship, President Clinton also lied under oath about being alone with Ms. Lewinsky and about the many gifts exchanged between Ms. Lewinsky and him.

4. President Clinton lied under oath in his civil deposition about his discussions with Ms. Lewinsky concerning her involvement in the *Jones* case.

5. During the *Jones* case, the President obstructed justice and had an understanding with Ms. Lewinsky to jointly conceal the truth about their relationship by concealing gifts subpoenaed by Ms. Jones's attorneys.

6. During the *Jones* case, the President obstructed justice and had an understanding with Ms. Lewinsky to jointly conceal the truth of their relationship from the judicial process by a scheme that included the following means: (i) Both the President and Ms. Lewinsky understood that they would lie under oath in the Jones case about their sexual relationship; (ii) the President suggested to Ms. Lewinsky that she prepare an affidavit that, for the President's purposes, would memorialize her testimony under oath and could be used to prevent questioning of both of them about their relationship; (iii) Ms. Lewinsky signed and filed the false affidavit; (iv) the President used Ms. Lewinsky's false affidavit at his deposition in

an attempt to head off questions about Ms. Lewinsky; and (v) when that failed, the President lied under oath at his civil deposition about the relationship with Ms. Lewinsky.

7. President Clinton endeavored to obstruct justice by helping Ms. Lewinsky obtain a job in New York at a time when she would have been a witness harmful to him were she to tell the truth in the *Jones* case.

8. President Clinton lied under oath in his civil deposition about his discussions with Vernon Jordan concerning Ms. Lewinsky's involvement in the *Jones* case.

9. The President improperly tampered with a potential witness by attempting to corruptly influence the testimony of his personal secretary, Betty Currie, in the days after his civil deposition.

10. President Clinton endeavored to obstruct justice during the grand jury investigation by refusing to testify for seven months *and* lying to senior White House aides with knowledge that they would relay the President's false statements to the grand jury—and did thereby deceive, obstruct, and impede the grand jury.

11. President Clinton abused his constitutional authority by (i) lying to the public and the Congress in January 1998 about his relationship with Ms. Lewinsky; (ii) promising at that time to cooperate fully with the grand jury investigation; (iii) later refusing six invitations to testify voluntarily to the grand jury; (iv) invoking Executive Privilege; (v) lying to the grand jury in August 1998; and (vi) lying again to the public and Congress on August 17, 1998—all as part of an effort to hinder, impede, and deflect possible inquiry by the Congress of the United States.

The first two possible grounds for impeachment concern the President's lying under oath about the nature of his relationship with Ms. Lewinsky. The details associated with those grounds are, by their nature, explicit. The President's testimony unfortunately has rendered the details essential with respect to those two grounds, as will be explained in those grounds.

I. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT PRESIDENT CLINTON LIED UNDER OATH AS A DEFENDANT IN JONES V. CLINTON REGARDING HIS SEXUAL RELATIONSHIP WITH MONICA LEWINSKY.

(1) He denied that he had a "sexual relationship" with Monica Lewinsky.
(2) He denied that he had a "sexual affair" with Monica Lewinsky.
(3) He denied that he had "sexual relations" with Monica Lewinsky.
(4) He denied that he engaged in or caused contact with the genitalia of "any person" with an intent to arouse or gratify (oral sex performed on him by Ms. Lewinsky).
(5) He denied that he made contact with Monica Lewinsky's breasts or genitalia with an intent to arouse or gratify.

On May 6, 1994, former Arkansas state employee Paula Corbin Jones filed a federal civil rights lawsuit against President Clinton claiming that he had sexually harassed her on May 8, 1991, by requesting her to perform oral sex on him in a suite at the Excelsior Hotel in Little Rock. Throughout the pretrial discovery process in *Jones* v. *Clinton,* United States District Judge Susan Webber Wright ruled, over the President's objections, that Ms. Jones's lawyers could seek various categories of information, including information about women who had worked as government employees under Governor or President Clinton and allegedly had sexual activity with him. Judge Wright's rulings followed the prevailing law in sexual harassment cases: The defendant's sexual relationships with others in the workplace, including consensual relationships, are a standard subject of inquiry during the discovery process. Judge Wright recognized the commonplace nature of her discovery rulings and stated that she was following a "meticulous standard of materiality" in allowing such questioning.

At a hearing on January 12, 1998, Judge Wright required Ms. Jones to list potential trial witnesses. Ms. Jones's list included several "Jane Does." [1] Ms. Jones's attorneys said they intended to call a Jane Doe named Monica Lewinsky as a witness to support Ms. Jones's claims. Under Ms. Jones's legal theory, women who had sexual relationships with the President received job benefits because of the sexual relationship, but women who resisted the President's sexual advances were denied such benefits.[2]

On January 17, 1998, Ms. Jones's lawyers deposed President Clinton under oath with Judge Wright present and presiding over the deposition. Federal law requires a witness testifying under oath to provide truthful answers. The intentional failure to provide

[1] The pseudonym Jane Doe was used during discovery to refer to certain women whose identities were protected from the public.
[2] For a discussion of the procedural background to the *Jones* case, see Appendix, Tab C.

truthful answers is a crime punishable by imprisonment and fine.[3] At the outset of his deposition, the President took an oath administered by Judge Wright: "Do you swear or affirm * * * that the testimony you are about to give in the matter before the court is the truth, the whole truth, and nothing but the truth, so help you God?" The President replied: "I do."[4] At the beginning of their questioning, Ms. Jones's attorneys asked the President: "And your testimony is subject to the penalty of perjury; do you understand that, sir?" The President responded, "I do."[5]

Based on the witness list received in December 1997 (which included Ms. Lewinsky) and the January 12, 1998, hearing, the President and his attorneys were aware that Ms. Jones's attorneys likely would question the President at his deposition about Ms. Lewinsky and the other "Jane Does." In fact, the attorneys for Ms. Jones did ask numerous questions about "Jane Does," including Ms. Lewinsky.

There is substantial and credible information that President Clinton lied under oath in answering those questions.

A. EVIDENCE THAT PRESIDENT CLINTON LIED UNDER OATH DURING THE CIVIL CASE

1. President Clinton's Statements Under Oath About Monica Lewinsky

During pretrial discovery, Paula Jones's attorneys served the President with written interrogatories.[6] One stated in relevant part:

> Please state the name, address, and telephone number of each and every [federal employee] with whom you had sexual relations when you [were] * * * President of the United States.[7]

The interrogatory did not define the term "sexual relations." Judge Wright ordered the President to answer the interrogatory, and on December 23, 1997, under penalty of perjury, President Clinton answered "None."[8]

At the January 17, 1998, deposition of the President, Ms. Jones's attorneys asked the President specific questions about possible sex-

[3] Sections 1621 and 1623 of Title 18 (perjury) carry a penalty of imprisonment of not more than five years for knowingly making a false, material statement under oath, including in any ancillary court proceeding. An "ancillary proceeding" includes a deposition in a civil case. *United States* v. *McAfee,* 8 F.3d 1010, 1013 (5th Cir. 1993); *United States* v. *Scott,* 682 F.2d 695, 698 (8th Cir. 1982). The perjury statutes apply to statements made during civil proceedings. As one United States Court of Appeals recently stated, "we categorically reject any suggestion, implicit or otherwise, that perjury is somehow less serious when made in a civil proceeding. Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals." *United States* v. *Holland,* 22 F.3d 1040, 1047 (11th Cir. 1994); *see also United States* v. *Wilkinson,* 137 F.3d 214, 225 (4th Cir. 1998).

[4] Clinton 1/17/98 Depo.; *see also* Clinton 1/17/98 Depo. at 18.

[5] Clinton 1/17/98 Depo. at 19.

[6] Written interrogatories are a common discovery device in federal civil cases by which a party serves written questions on the opposing party. The rules require that they be answered under oath and therefore under penalty of perjury. *See* Fed. R. Civ. P. 33.

[7] V002–DC–00000016–32 (Plaintiff's Second Set of Interrogatories, *see* Interrogatory no. 10). The interrogatory in the text reflects Judge Wright's order, dated December 11, 1997, limiting the scope of the question to cover only women who were state or federal employees at the relevant times.

[8] V002–DC–00000052–55 (President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories, *see* Response to Interrogatory no. 10).

ual activity with Monica Lewinsky. The attorneys used various terms in their questions, including "sexual affair," "sexual relationship," and "sexual relations." The terms "sexual affair" and "sexual relationship" were not specially defined by Ms. Jones's attorneys. The term "sexual relations" was defined:

> For the purposes of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes * * * contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person. * * * "Contact" means intentional touching, either directly or through clothing.[9]

President Clinton answered a series of questions about Ms. Lewinsky, including:

> Q: Did you have an extramarital sexual affair with Monica Lewinsky?
>
> WJC: *No.*
>
> Q: If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?
>
> WJC: *It's certainly not the truth. It would not be the truth.*
>
> Q: I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?

Mr. Bennett:[10]

> I object because I don't know that he can remember—

Judge Wright:

> Well, it's real short. He can—I will permit the question and you may show the witness definition number one.
>
> WJC: *I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.*[11]

President Clinton reiterated his denial under questioning by his own attorney:

> Q: In paragraph eight of [Ms. Lewinsky's] affidavit, she says this, "I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship." Is that a true and accurate statement as far as you know it?
>
> WJC: *That is absolutely true.*[12]

2. Monica Lewinsky's Testimony

Monica Lewinsky testified under oath before the grand jury that, beginning in November 1995, when she was a 22-year-old White House intern, she had a lengthy relationship with the President that included substantial sexual activity. She testified in detail about the times, dates, and nature of ten sexual encounters that involved some form of genital contact. As explained in the Narrative section of this Referral, White House records corroborate Ms.

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[9] Clinton 1/17/98 Depo., Exh. 1.

[10] Robert S. Bennett, counsel for President Clinton.

[11] Clinton 1/17/98 Depo. at 78 (emphasis added).

[12] *Id.* at 204 (emphasis added). The full text of Ms. Lewinsky's affidavit is set forth in the Doc. Supp. B, Tab 7.

Lewinsky's testimony in that the President was in the Oval Office area during the encounters. The records of White House entry and exit are incomplete for employees, but they do show her presence in the White House on eight of those occasions.[13]

The ten incidents are recounted here because they are necessary to assess whether the President lied under oath, both in his civil deposition, where he denied any sexual relationship at all, and in his grand jury testimony, where he acknowledged an "inappropriate intimate contact" but denied *any* sexual contact with Ms. Lewinsky's breasts or genitalia. When reading the following descriptions, the President's denials under oath should be kept in mind.

Unfortunately, the nature of the President's denials requires that the contrary evidence be set forth in detail. If the President, in his grand jury appearance, had admitted the sexual activity recounted by Ms. Lewinsky and conceded that he had lied under oath in his civil deposition, these particular descriptions would be superfluous. Indeed, we refrained from questioning Ms. Lewinsky under oath about particular details until after the President's August 17 testimony made that questioning necessary. But in view of (i) the President's denials, (ii) his continued contention that his civil deposition testimony was legally accurate under the terms and definitions employed, and (iii) his refusal to answer related questions, the detail is critical. The detail provides credibility and corroboration to Ms. Lewinsky's testimony. It also demonstrates with clarity that the President lied under oath *both* in his civil deposition *and* to the federal grand jury.[14] There is substantial and credible information that the President's lies about his relationship with Ms. Lewinsky were abundant and calculating.

(i) Wednesday, November 15, 1995

Ms. Lewinsky testified that she had her first sexual contact with the President on the evening of Wednesday, November 15, 1995, while she was an intern at the White House. Two times that evening, the President invited Ms. Lewinsky to meet him near the Oval Office.[15] On the first occasion, the President took Ms. Lewinsky back into the Oval Office study, and they kissed.[16] On the second, she performed oral sex on the President in the hallway outside the Oval Office study.[17] During this encounter, the President directly touched and kissed Ms. Lewinsky's bare breasts.[18] In addition, the President put his hand down Ms. Lewinsky's pants and directly stimulated her genitalia (acts clearly within the definition of "sexual relations" used at the *Jones* deposition).[19]

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[13] White House records reflecting entry and exit are incomplete. For Ms. Lewinsky, there are no records for January 7, 1996, and January 21, 1996.

[14] The President's false statements to the grand jury are discussed in Ground II.

[15] Lewinsky 8/26/98 Depo. at 6–7.

[16] *Id.* at 7.

[17] *Id.* at 8. Ms. Lewinsky stated that the hallway outside the Oval Office study was more suitable for their encounters than the Oval Office because the hallway had no windows. Lewinsky 8/6/98 GJ at 34–35.

[18] Lewinsky 8/26/98 Depo. at 8.

[19] *Id.* at 8, 21. Ms. Lewinsky testified that she had an orgasm. *Id.* at 8.

(ii) Friday, November 17, 1995

Ms. Lewinsky testified that she met with the President again two days later, on Friday, November 17, 1995.[20] During that encounter, Ms. Lewinsky stated, she performed oral sex on the President in the private bathroom outside the Oval Office study.[21] The President initiated the oral sex by unzipping his pants and exposing his genitals. Ms. Lewinsky understood the President's actions to be a sign that he wanted her to perform oral sex on him.[22] During this encounter, the President also fondled Ms. Lewinsky's bare breasts with his hands and kissed her breasts.[23]

(iii) Sunday, December 31, 1995

Ms. Lewinsky testified that she met with the President on New Year's Eve, Sunday, December 31, 1995, after the President invited her to the Oval Office.[24] Once there, the President lifted Ms. Lewinsky's sweater, fondled her bare breasts with his hands, and kissed her breasts. She stated that she performed oral sex on the President in the hallway outside the Oval Office study.[25]

(iv) Sunday, January 7, 1996

Monica Lewinsky testified that she performed oral sex on the President in the bathroom outside the Oval Office study during the late afternoon on Sunday, January 7, 1996.[26] The President arranged this encounter by calling Ms. Lewinsky at home and inviting her to visit.[27] On that occasion, the President and Ms. Lewinsky went into the bathroom, where he fondled her bare breasts with his hands and mouth. During this encounter, the President stated that he wanted to perform oral sex on Ms. Lewinsky, but she stopped him for a physical reason.[28]

(v) Sunday, January 21, 1996

Ms. Lewinsky testified that she and the President had a sexual encounter on the afternoon of Sunday, January 21, 1996, after he invited her to the Oval Office.[29] The President lifted Ms. Lewinsky's top and fondled her bare breasts.[30] The President unzipped his pants and exposed his genitals, and she performed oral sex on him in the hallway outside the Oval Office study.[31]

(vi) Sunday, February 4, 1996

Ms. Lewinsky testified that she and the President had sexual contact in the Oval Office study and in the adjacent hallway on the

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[20] *Id.* at 11–12.
[21] *Id.* at 12–13.
[22] *Id.* at 14.
[23] *Id.* at 12–13.
[24] *Id.* at 15–16.
[25] *Id.* at 17. After the sexual encounter, she saw the President masturbate in the bathroom near the sink. *Id.* at 18.
[26] *Id.* at 18.
[27] *Id.* at 18.
[28] *Id.* at 19. They engaged in oral-anal contact as well. *See* Lewinsky 8/26/98 Depo. at 18–20.
[29] *Id.* at 21–22. This was shortly after their first phone sex encounter, which occurred on January 16, 1996. *Id.* at 22; Lewinsky 7/30/98 Int. at 9. Phone sex occurs when one or both parties masturbate while one or both parties talk in a sexually explicit manner on the telephone.
[30] Lewinsky 8/26/98 Depo. at 25.
[31] *Id.* at 26. As Ms. Lewinsky departed, she observed the President "manually stimulating" himself in Ms. Hernreich's office. *Id.* at 27.

afternoon of Sunday, February 4, 1996.[32] That day, the President had called Ms. Lewinsky.[33] During their encounter, the President partially removed Ms. Lewinsky's dress and bra and touched her bare breasts with his mouth and hands. He also directly touched her genitalia.[34] Ms. Lewinsky performed oral sex on the President.[35]

(vii) Sunday, March 31, 1996

Ms. Lewinsky testified that she and the President had sexual contact in the hallway outside the Oval Office study during the late afternoon of Sunday, March 31, 1996.[36] The President arranged this encounter by calling Ms. Lewinsky and inviting her to the Oval Office. During this encounter, Ms. Lewinsky did not perform oral sex on the President. The President fondled Ms. Lewinsky's bare breasts with his hands and mouth and fondled her genitalia directly by pulling her underwear out of the way. In addition, the President inserted a cigar into Ms. Lewinsky's vagina.[37]

(viii) Sunday, April 7, 1996

Ms. Lewinsky testified that she and the President had sexual contact on Easter Sunday, April 7, 1996, in the hallway outside the Oval Office study and in the study itself.[38] On that occasion, the President touched Ms. Lewinsky's breasts, both through her clothing and directly. After the President unzipped his pants, Ms. Lewinsky also performed oral sex on him.[39]

This was their last in-person sexual encounter for over nine months.

(ix) Friday, February 28, 1997

Ms. Lewinsky testified that her next sexual encounter with the President occurred on Friday, February 28, 1997, in the early evening.[40] The President initiated this encounter by having his secretary Betty Currie call Ms. Lewinsky to invite her to the White House for a radio address. After the address, Ms. Lewinsky and the President kissed by the bathroom. The President unbuttoned her dress and fondled her breasts, first with her bra on and then directly. He touched her genitalia through her clothes, but not directly, on this occasion. Ms. Lewinsky performed oral sex on him.[41] On this day, Ms. Lewinsky was wearing a blue dress that forensic tests have conclusively shown was stained with the President's semen.[42]

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[32] *Id.* at 28–32.
[33] *Id.* at 28.
[34] *Id.* at 30–31. Ms. Lewinsky testified that she had an orgasm. *Id.*
[35] *Id.* at 30–32. They engaged in oral-anal contact as well. *See* Lewinsky 8/26/98 Depo. at 29–33.
[36] *Id.* at 34–38.
[37] *Id.* at 37–38. The President then put the cigar in his mouth and said to Ms. Lewinsky: "it tastes good." Lewinsky 7/30/98 Int. at 12–13; *see also* Lewinsky Depo. at 38.
[38] Lewinsky 8/6/98 GJ at 91, 94–97; Lewinsky 8/26/98 Depo. at 40–42.
[39] Lewinsky 8/26/98 Depo. at 40–43.
[40] *Id.* at 45–49. They had engaged in phone sex a number of times in the interim, according to Ms. Lewinsky. Lewinsky 7/30/98 Int. at 14–15.
[41] Lewinsky 8/26/98 Depo. at 47. On this occasion, the President ejaculated. *Id.*
[42] FBI Lab Report, Lab Nos. 980730002SBO and 980803100SBO, 8/17/98.

(x) Saturday, March 29, 1997

Ms. Lewinsky testified that she and the President had sexual contact on the afternoon of March 29, 1997, in the Oval Office study.[43] On that occasion, the President unbuttoned Ms. Lewinsky's blouse and touched her breasts through her bra, but not directly. He also put his hands inside Ms. Lewinsky's pants and stimulated her genitalia.[44] Ms. Lewinsky performed oral sex on him, and they also had brief, direct genital-to-genital contact.[45]

(xi) Two Subsequent Meetings

Ms. Lewinsky testified that she met with President Clinton in the Oval Office study on the morning of Saturday, August 16, 1997. They kissed, and Ms. Lewinsky touched the President's genitals through his clothing, but he rebuffed her efforts to perform oral sex. No other sexual acts occurred during this encounter.[46]

On Sunday, December 28, 1997, three weeks before the President's civil deposition in the *Jones* case, the President and Ms. Lewinsky met in the Oval Office. In addition to discussing a number of issues that are analyzed below, they engaged in "passionate" kissing—she said, "I don't call it a brief kiss." No other sexual contact occurred.[47]

3. Phone Sex

Ms. Lewinsky testified that she and the President engaged in "phone sex" approximately fifteen times. The President initiated each phone sex encounter by telephoning Ms. Lewinsky.[48]

4. Physical Evidence

Ms. Lewinsky produced to OIC investigators a dress she wore during the encounter on February 28, 1997, which she believed might be stained with the President's semen. At the request of the OIC, the FBI Laboratory examined the dress and found semen stains.[49] At that point, the OIC requested a DNA sample from the President. On August 3, 1998, two weeks before the President's grand jury testimony, a White House physician drew blood from the President in the presence of a senior OIC attorney and a FBI special agent.[50] Through the most sensitive DNA testing, RFLP testing, the FBI Laboratory determined conclusively that the

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[43] Lewinsky 8/26/98 Depo. at 49–51.

[44] Ms. Lewinsky testified that she had multiple orgasms. *Id.* at 50.

[45] *Id.* at 50–51; Lewinsky 8/6/98 GJ at 21. On this occasion, the President ejaculated. Lewinsky 8/26/98 Depo. at 50–51.

[46] Lewinsky 8/26/98 Depo. at 51–53.

[47] *Id.* at 53. *See also* Lewinsky 8/6/98 GJ at 35–36.

[48] Lewinsky 7/30/98 Int. at 11–16; Lewinsky 8/6/98 GJ at 24. The summary chart of contacts between the President and Ms. Lewinsky, GJ Exhibit ML–7, which is based on information provided by Ms. Lewinsky, lists 17 separate phone sex calls. *Id.* at 27–28. Ms. Lewinsky also gave the President Vox, a novel about phone sex. *Id.*

While phone sex may not itself constitute a "sexual relationship," it adds detail to Ms. Lewinsky's testimony and underscores the sexual and intimate nature of the relationship between the President and Ms. Lewinsky.

Ms. Lewinsky also said that the President left a few messages on her home answering machine (although he told her he did not like to leave messages). Ms. Lewinsky provided four microcassettes of four messages to the OIC on July 29, 1998. FBI Receipt for Property Received, dated 7/29/98.

[49] FBI Lab Report, Lab No. 9800730002SB0, 8/3/98.

[50] FBI Observation Report (White House), 8/3/98.

semen on Ms. Lewinsky's dress was, in fact, the President's.[51] The chance that the semen is not the President's is one in 7.87 trillion.[52]

5. Testimony of Ms. Lewinsky's Friends, Family Members, and Counselors

During her relationship with the President, Monica Lewinsky spoke contemporaneously to several friends, family members, and counselors about the relationship. Their testimony corroborates many of the details of the sexual activity provided by Ms. Lewinsky to the OIC.

(i) Catherine Allday Davis

Catherine Allday Davis, a college friend of Monica Lewinsky's,[53] testified that Ms. Lewinsky told her in late 1995 or early 1996 about Ms. Lewinsky's sexual relationship with the President.[54] According to Ms. Davis, Ms. Lewinsky told her that the relationship included mutual kissing and hugging, as well as oral sex performed by Ms. Lewinsky on the President. She also stated that the President touched Monica "on her breasts and on her vagina."[55] Ms. Davis also described the cigar incident discussed above.[56] Ms. Davis added that Monica said that she had "phone sex" with the President five to ten times in 1996 or 1997.[57]

(ii) Neysa Erbland

Neysa Erbland, a high school friend of Ms. Lewinsky's,[58] testified that Ms. Lewinsky told her in 1995 that she was having an affair with President Clinton.[59] According to Ms. Erbland, Ms. Lewinsky said that the sexual relationship began when Ms. Lewinsky was an intern.[60] Ms. Lewinsky told Ms. Erbland that the sexual contact included oral sex, kissing, and fondling.[61] On occasion, as Ms. Erbland described it, the President put his face in Ms. Lewinsky's bare chest.[62] Ms. Erbland also said that Ms. Lewinsky described the cigar incident discussed above.[63] Ms. Erbland also understood from Ms. Lewinsky that she and the President engaged in phone sex, normally after midnight.[64]

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[51] FBI Lab Report, Lab No. 980730002SBO and 980803100SBO, 8/17/98.
[52] *Id.*
[53] Catherine Davis 3/17/98 GJ at 9–10. Ms. Catherine Davis talked to Ms. Lewinsky by telephone an average of once a week until April 1997 when Ms. Davis moved to Tokyo; thereafter she and Ms. Lewinsky remained in touch through e-mail. *Id.* at 14, 27.
[54] *Id.* at 19–20.
[55] *Id.* at 20.
[56] *Id.* at 169.
[57] *Id.* at 37.
[58] Erbland 2/12/98 GJ at 9-10. Ms. Erbland testified that she spoke on the phone with Ms. Lewinsky at least once a month. *Id.* at 18-19.
[59] *Id.* at 24, 30, 31.
[60] *Id.* at 27.
[61] *Id.* at 26 ("She told me that she had given him [oral sex] and that she had had all of her clothes off, but that he only had his shirt off and that she had given him oral sex and they kissed and fondled each other and that they didn't have sex. That was kind of a little bit of a letdown for her."); *id.* at 29 ("He put his face in her chest. And, you know, just oral sex on her part, you know, to him.").
[62] *Id.* at 29.
[63] *Id.* at 45.
[64] *Id.* at 39 ("They were like phone sex conversations. They would, you know, talk about what they wanted to do to each other sexually.").

(iii) Natalie Rose Ungvari

Ms. Lewinsky told another high school friend, Natalie Rose Ungvari,[65] of her sexual relationship with the President. Ms. Lewinsky first informed Ms. Ungvari of the sexual relationship on November 23, 1995. Ms. Ungvari specifically remembers the date because it was her birthday.[66] Ms. Ungvari recalled that Ms. Lewinsky said that she performed oral sex on the President and that he fondled her breasts.[67] Ms. Lewinsky told Ms. Ungvari that the President sometimes telephoned Ms. Lewinsky late at night and would ask her to engage in phone sex.[68]

(iv) Ashley Raines

Ashley Raines, a friend of Ms. Lewinsky who worked in the White House Office of Policy Development Operations,[69] testified that Ms. Lewinsky described the sexual relationship with the President. Ms. Raines testified that Ms. Lewinsky told her that the relationship began around the time of the government furlough in late 1995.[70] Ms. Raines understood that the President and Ms. Lewinsky engaged in kissing and oral sex, usually in the President's study.[71] Ms. Lewinsky also told Ms. Raines that she and the President had engaged in phone sex on several occasions.[72]

(v) Andrew Bleiler

In late 1995, Monica Lewinsky told Andrew Bleiler, a former boyfriend, that she was having an affair with a high official at the White House.[73] According to Mr. Bleiler, Ms. Lewinsky said that the relationship did not include sexual intercourse, but did include oral sex. She also told Mr. Bleiler about the cigar incident discussed above, and sexual activity in which the man touched Ms. Lewinsky's genitals and caused her to have an orgasm.[74]

(vi) Dr. Irene Kassorla

Dr. Irene Kassorla counseled Ms. Lewinsky from 1992 through 1997.[75] Ms. Lewinsky told her of the sexual relationship with the President. Ms. Lewinsky said she performed oral sex on the President in a room adjacent to the Oval Office, that the President touched Ms. Lewinsky causing her to have orgasms, and that they engaged in fondling and touching of one another.[76] The President

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[65] Ms. Ungvari spoke with Monica Lewinsky on the telephone an average of once a week, and visited her in Washington in October 1995 and March 1996. Ungvari 3/19/98 GJ at 9-11, 14-15.
[66] *Id.* at 18.
[67] *Id.* at 23-24.
[68] *Id.* at 81.
[69] Raines 1/29/98 GJ at 11. Ms. Raines and Monica Lewinsky have become "close friend[s]" since Ms. Lewinsky left the White House. *Id.* at 19.
[70] *Id.* at 35-36, 38.
[71] *Id.* at 30, 43, 48.
[72] *Id.* at 51.
[73] Andrew Bleiler 1/28/98 Int. at 3.
[74] *Id.* at 3.
[75] Ms. Lewinsky gave this Office permission to interview Dr. Kassorla.
[76] Kassorla 8/28/98 Int. at 2.

was in charge of scheduling their sexual encounters and "became Lewinsky's life." [77]

(vii) Linda Tripp

When she worked at the Pentagon, Ms. Lewinsky told a co-worker, Linda Tripp, that she had a sexual relationship with President Clinton.[78] Ms. Tripp stated that Ms. Lewinsky first told her about the relationship in September or October 1996. Ms. Lewinsky told Ms. Tripp that the first sexual encounter with the President had occurred on November 15, 1995, when Ms. Lewinsky performed oral sex on him. Ms. Lewinsky told Ms. Tripp that, during the course of this sexual relationship, she performed oral sex on the President, the President fondled Ms. Lewinsky's breasts, the President touched Ms. Lewinsky's genitalia, and they engaged in phone sex.[79]

(viii) Debra Finerman

Ms. Lewinsky's aunt, Debra Finerman, testified that Monica told her about her sexual relationship with President Clinton.[80] Ms. Finerman testified that Ms. Lewinsky described a particular sexual encounter with the President.[81] Ms. Finerman otherwise did not ask and was not told the specifics of the sexual activity between the President and Ms. Lewinsky.[82]

(ix) Dale Young

Dale Young, a family friend, testified that Ms. Lewinsky told her that she had engaged in oral sex with President Clinton.[83]

(x) Kathleen Estep

Kathleen Estep, a counselor for Ms. Lewinsky,[84] met with Ms. Lewinsky on three occasions in November 1996.[85] Based on her limited interaction with Ms. Lewinsky, Ms. Estep stated that she considered Ms. Lewinsky to be credible.[86] During their second session, Ms. Lewinsky told Ms. Estep about her sexual relationship with President Clinton.[87] Ms. Lewinsky told Ms. Estep that the physical part of the relationship involved kissing, Ms. Lewinsky performing oral sex on the President, and the President fondling her breasts.[88]

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[77] *Id.* at 2-3. Dr. Kassorla advised Ms. Lewinsky against the relationship, stating that she was an employee having an office romance with a superior and that the relationship would cost Ms. Lewinsky her job. *Id.* at 2.

[78] Tripp 7/2/98 GJ at 104.

[79] *Id.* at 97-105.

[80] Finerman 3/18/98 Depo. at 29-33.

[81] She testified that the encounter concluded with the President masturbating into a bathroom sink. *Id.* at 30-31. Ms. Finerman indicated that "it was something I didn't want to talk about," and Ms. Lewinsky "sort of clammed up" thereafter. *Id.* at 35. *See also* Lewinsky 8/26/98 Depo. at 18.

[82] Finerman 3/18/98 Depo. at 33-35.

[83] Young 6/23/98 GJ at 37-38.

[84] Estep 8/23/98 Int. at 1. Ms. Estep is a licensed certified social worker; Ms. Lewinsky gave this Office permission to interview her.

[85] *Id.* at 1, 4.

[86] *Id.* at 3. Ms. Estep also thought that Ms. Lewinsky had her "feet in reality." *Id.*

[87] *Id.* at 2.

[88] *Id.*

6. Summary

The detailed testimony of Ms. Lewinsky, her corroborating prior consistent statements to her friends, family members, and counselors, and the evidence of the President's semen on Ms. Lewinsky's dress establish that Ms. Lewinsky and the President engaged in substantial sexual activity between November 15, 1995, and December 28, 1997.[89]

The President, however, testified under oath in the civil case—both in his deposition and in a written answer to an interrogatory—that he did *not* have a "sexual relationship" or a "sexual affair" or "sexual relations" with Ms. Lewinsky. In addition, he denied engaging in activity covered by a more specific definition of "sexual relations" used at the deposition.[90]

In his civil case, the President made five different false statements related to the sexual relationship. For four of the five statements, the President asserts a semantic defense: The President argues that the terms used in the *Jones* deposition to cover sexual activity did not cover the sexual activity in which he engaged with Ms. Lewinsky. For his other false statements, the President's response is factual—namely, he disputes Ms. Lewinsky's account that he ever touched her breasts or genitalia during sexual activity.[91]

The President's denials—semantic and factual—do not withstand scrutiny.

First, in his civil deposition, the President denied a "sexual affair" with Ms. Lewinsky (the term was not defined). The President's response to lying under oath on this point rests on his definition of "sexual affair"—namely, that it requires sexual intercourse, no matter how extensive the sexual activities might otherwise be. According to the President, a man could regularly engage in oral sex and fondling of breasts and genitals with a woman and yet not have a "sexual affair" with her.

Second, in his civil deposition, the President also denied a "sexual relationship" with Ms. Lewinsky (the term was not defined). The President's response to lying under oath on this point similarly rests on his definition of "sexual relationship"—namely, that it requires sexual intercourse. Once again, under the President's theory, a man could regularly engage in oral sex and fondling of breasts and genitals with a woman, yet not have a "sexual relationship" with her.

The President's claim as to his interpretation of "sexual relationship" is belied by the fact that the President's own lawyer—earlier at that same deposition—equated the term "sexual relationship" with "sex of any kind in any manner, shape or form." The President's lawyer offered that interpretation when requesting Judge Wright to limit the questioning to prevent further inquiries with respect to Monica Lewinsky. As the videotape of the deposition re-

[89] The President and Ms. Lewinsky had ten sexual encounters that included direct contact with the genitalia of at least one party, and two other encounters that included kissing. On nine of the ten occasions, Ms. Lewinsky performed oral sex on the President. On nine occasions, the President touched and kissed Ms. Lewinsky's bare breasts. On four occasions, the President also touched her genitalia. On one occasion, the President inserted a cigar into her vagina to stimulate her. The President and Ms. Lewinsky also had phone sex on at least fifteen occasions.

[90] This denial encompassed touching of Ms. Lewinsky's breasts or genitalia.

[91] He provided his responses during his August 17, 1998 grand jury appearance; those responses are separately analyzed in Ground II.

veals, the President was present and apparently looking in the direction of his attorney when his attorney offered that statement.[92] The President gave no indication that he disagreed with his attorney's straightforward interpretation that the term "sexual relationship" means "sex of any kind in any manner, shape, or form." Nor did the President thereafter take any steps to correct the attorney's statement.

Third, in an answer to an interrogatory submitted before his deposition, the President denied having "sexual relations" with Ms. Lewinsky (the term was not defined). Yet again, the President's apparent rejoinder to lying under oath on this point rests on his definition of "sexual relations"—that it, too, requires sexual intercourse. According to President Clinton, oral sex does not constitute sexual relations.

Fourth, in his civil deposition, the President denied committing any acts that fell within the specific definition of "sexual relations" that was in effect for purposes of that deposition. Under that specific definition, sexual relations occurs "when the person knowingly engages in or causes contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person."[93] Thus, the President denied engaging in or causing contact with the genitalia, breasts, or anus of "any person" with an intent to arouse or gratify the sexual desire of "any person."

Concerning oral sex, the President's sole answer to the charge that he lied under oath at the deposition focused on his interpretation of "any person" in the definition. Ms. Lewinsky testified that she performed oral sex on the President on nine occasions. The President said that by *receiving* oral sex, he would not "engage in" or "cause"[94] contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of "any person" because "any person" really means "any *other* person." The President further testified before the grand jury: "[I]f the deponent is the person who has oral sex performed on him, then the contact is with—*not with anything on that list, but with the lips of another person*."[95]

The President's linguistic parsing is unreasonable. Under the President's interpretation (which he says he followed at his deposition), in an oral sex encounter, one person *is* engaged in sexual relations, but the other person *is not* engaged in sexual relations.[96]

Even assuming that the definitional language can be manipulated to exclude the deponent's receipt of oral sex, the President is still left with the difficulty that reasonable persons would not have

[92] Chief Judge Norma Holloway Johnson, United States District Court for the District of Columbia, and Judge Susan Webber Wright, United States District Court for the Eastern District of Arkansas, each has one copy of the videotape, and the Congress may see fit to seek the videotape from either court. The videotape is valuable in facilitating a proper assessment of the facts and evidence presented in this Referral.

[93] Clinton 1/17/98 Depo., Exh. 1.

[94] Clinton 8/17/98 GJ at 151.

[95] Clinton 8/17/98 GJ at 151 (emphasis added).

[96] The definition used at the President's deposition also covers acts in which the deponent "cause[d] contact" with the genitalia or anus of "any person." When he testified to the grand jury, the President said that this aspect of the definition still does not cover his receiving oral sex. The President said that the word "cause" implies "forcing to me" and "forcible abusive behavior." Clinton 8/17/98 GJ at 17. And thus the President said that he did not lie under oath in denying that he "caused" contact with the genitalia of any person because his activity with Ms. Lewinsky did not include any nonconsensual behavior. *Id.* at 18.

understood it that way. And in context, the President's semantics become even weaker: The *Jones* suit rested on the allegation that the President sought to have Ms. Jones perform oral sex on him. Yet the President now claims that the expansive definition devised for deposition questioning should be interpreted to exclude that very act.

Fifth, by denying at his civil deposition that he had engaged in any acts falling within the specific definition of "sexual relations," the President denied engaging in or causing contact with the breasts or genitalia of Ms. Lewinsky with an intent to arouse or gratify one's sexual desire. In contrast to his explanations of the four preceding false statements under oath, the President's defense to lying under oath in this instance is purely *factual*.

As discussed above, Ms. Lewinsky testified credibly that the President touched and kissed her bare breasts on nine occasions, and that he stimulated her genitals on four occasions.[97] She also testified about a cigar incident, which is discussed above. In addition, a deleted computer file from Ms. Lewinsky's home computer contained an apparent draft letter to the President that explicitly referred to an incident in which the President's "mouth [was] on [her] breast" and implicitly referred to direct contact with her genitalia.[98] This draft letter further corroborates Ms. Lewinsky's testimony.

Ms. Lewinsky's prior consistent statements to various friends, family members, and counselors—made when the relationship was ongoing—likewise corroborate her testimony on the nature of the President's touching of her body. Ms. Lewinsky had no apparent motive to lie to her friends, family members, and counselors. Ms. Lewinsky especially had no reason to lie to Dr. Kassorla and Ms. Estep, to whom she related the facts in the course of a professional relationship. And Ms. Lewinsky's statements to some that she did not have intercourse with the President, even though she wanted to do so, enhances the credibility of her statements. Moreover, the precise nature of the sexual activity only became relevant after the President interposed his semantic defense regarding oral sex on August 17, 1998.

By contrast, the President's testimony strains credulity. His apparent "hands-off" scenario—in which he would have received oral sex on *nine* occasions from Ms. Lewinsky but never made direct contact with Ms. Lewinsky's breasts or genitalia—is not credible. The President's claim seems to be that he maintained a hands-off policy in ongoing sexual encounters with Ms. Lewinsky, which coincidentally happened to permit him to truthfully deny "sexual relations" with her at a deposition occurring a few years in the future. As Ms. Lewinsky noted, it suggests some kind of "service contract—that all I did was perform oral sex on him and that that's all this relationship was."[99]

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[97] She testified that she had orgasms on three of the four occasions. We note that fact because (i) the definition referred to direct contact with the genitalia with the "intent to arouse or gratify" and (ii) the President has denied such contact. Ms. Lewinsky also testified that on one occasion, the President put his hand over her mouth during a sexual encounter to keep her quiet. Lewinsky 7/31/98 Int. at 3.

[98] MSL–55–DC–0094; MSL–55–DC–0124.

[99] Lewinsky 8/20/98 GJ at 54.

The President also had strong personal, political, and legal motives to lie in the *Jones* deposition: He did not want to admit that he had committed extramarital sex acts with a young intern in the Oval Office area of the White House. Such an admission could support Ms. Jones's theory of liability and would embarrass him. Indeed, the President admitted that during the relationship he did what he could to keep the relationship secret, including "misleading" members of his family and Cabinet.[100] The President testified, moreover, that he "hoped that this relationship would never become public." [101]

At the time of his civil deposition, the President also could have presumed that he could lie under oath without risk because—as he knew—Ms. Lewinsky had already filed a false affidavit denying a sexual relationship with the President. Indeed, they had an understanding that each would lie under oath (explained more fully in Ground VI below). So the President might have expected that he could lie without consequence on the belief that no one could ever successfully challenge his denial of a sexual relationship with her.

In sum, based on all of the evidence and considering the President's various responses, there is substantial and credible information that the President lied under oath in his civil deposition and his interrogatory answer in denying a sexual relationship, a sexual affair, or sexual relations with Ms. Lewinsky.[102]

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[100] Text of President's Address to Nation, reprinted in *Washington Post*, August 18, 1998, at A5 (emphasis added).

[101] Clinton 8/17/98 GJ at 107.

[102] Following the President's public admission of an inappropriate relationship, Judge Wright stated *sua sponte* in an order issued on September 1, 1998: "Although the Court has concerns about the nature of the President's January 17, 1998 deposition testimony given his recent public statements, the Court makes no findings at this time regarding whether the President may be in contempt." *Jones* v. *Clinton*, No. LR–C–94–290 (September 1, 1998), Unpublished Order at 7 n.5.

II. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT PRESIDENT CLINTON LIED UNDER OATH TO THE GRAND JURY ABOUT HIS SEXUAL RELATIONSHIP WITH MONICA LEWINSKY.

A. BACKGROUND

In January 1998, upon application of the Attorney General, the Special Division of the United States Court of Appeals for the District of Columbia Circuit expanded the OIC's jurisdiction to investigate, among other matters, whether Monica Lewinsky and the President obstructed justice in the *Jones* case. The criminal investigation was triggered by specific and credible evidence that Monica Lewinsky denied her relationship with President Clinton in a false affidavit in the *Jones* case, that she had spoken to the President and Vernon Jordan about her testimony, and that she may have been influenced to lie by the President through the assistance of Vernon Jordan and others in finding her a job. After the President, in his January 17 deposition, denied any sexual relationship with Monica Lewinsky and otherwise minimized his overall relationship with her, the President's testimony became an additional subject of the OIC investigation.

The threshold factual question was whether the President and Monica Lewinsky in fact had a sexual relationship. If they did, the President would have committed perjury in his civil deposition and interrogatory answer: The President, as noted in Ground I above, had denied a sexual affair, sexual relationship, or sexual relations with Monica Lewinsky, including any direct contact with her breasts or genitalia. The answer to the preliminary factual question also could alter the interpretation of several possibly obstructionist acts by the President—the employment assistance for Ms. Lewinsky, the concealment of gifts he had given to Ms. Lewinsky, the discussion between the President and Ms. Lewinsky of her testimony or affidavit, the President's post-deposition communications with Betty Currie, and the President's emphatic denials of a relationship to his aides who later testified before the grand jury.

During the investigation, the OIC gathered a substantial body of information that established that the President and Monica Lewinsky did, in fact, have a sexual relationship. That information is outlined in Ground I above. In particular, the information includes: (i) the detailed and credible testimony of Ms. Lewinsky regarding the 10 sexual encounters; (ii) the President's semen stain on Ms. Lewinsky's dress; and (iii) the testimony of friends, family members, and counselors to whom she made near-contemporaneous statements about the relationship. All of this evidence pointed to a single conclusion—that she and the President did have a sexual relationship.

B. THE PRESIDENT'S GRAND JURY TESTIMONY

The President was largely aware of that extensive body of evidence before he testified to the grand jury on August 17, 1998. Not only did the President know that Ms. Lewinsky had reached an immunity agreement with this Office in exchange for her truthful testimony, but the President knew from public reports and his own knowledge that his semen might be on one of Ms. Lewinsky's dresses. The OIC had asked him for a blood sample on August 3, 1998 (two weeks before his grand jury testimony) and assured his counsel that there was a substantial predicate for the request, which reasonably implied that there was semen on the dress.

As a result, the President had three apparent choices in his testimony to the grand jury. *First*, the President could adhere to his previous testimony in his civil case, as well as in his public statements, and deny any sexual relationship. But he knew (or at least, had reason to know) that the contrary evidence was overwhelming, particularly if his semen were in fact on Ms. Lewinsky's dress. *Second*, the President could admit a sexual relationship, which would cause him also to simultaneously admit that he lied under oath in the *Jones* case. *Third*, the President could invoke his Fifth Amendment privilege against compelled self-incrimination.

Confronting those three options, the President attempted to avoid them altogether. The President admitted to an "inappropriate intimate" relationship, but he maintained that he had not committed perjury in the *Jones* case when he denied having a sexual relationship, sexual affair, or sexual relations with her. [103] The President contended that he had believed his various statements in the *Jones* case to be legally accurate. [104] He also testified that the inappropriate relationship began not in November 1995 when Ms. Lewinsky was an intern, as Ms. Lewinsky and other witnesses have testified, but in 1996.

During his grand jury testimony, the President was asked whether Monica Lewinsky performed oral sex on him and, if so, whether he had committed perjury in his civil deposition by denying a sexual relationship, sexual affair, or sexual relations with her. The President refused to say whether he had oral sex. Instead, the President said (i) that the undefined terms "sexual affair," "sexual relationship," and "sexual relations" necessarily require sexual intercourse, (ii) that he had not engaged in intercourse with Ms. Lewinsky, and (iii) that he therefore had not committed perjury in denying a sexual relationship, sexual affair, or sexual relations. [105]

A more specific definition of "sexual relations" had also been used at the civil deposition. As to that definition, the President said to the grand jury that he does not and did not believe oral sex was covered.

> Q: [I]s oral sex performed on you within that definition as you understood it, the definition in the Jones——

[103] Clinton 8/17/98 GJ at 9–10.

[104] *Id.* at 9–10. *See also* Excerpt from President Clinton's Televised Address to the American People, 8/17/98, *reprinted in* The Washington Post, at A5 (8/18/98) ("In a deposition in January, I was asked questions about my relationship with Monica Lewinsky. While my answers were legally accurate, I did not volunteer information.").

[105] Clinton 8/17/98 GJ at 23–24.

A: As I understood it, it was not; no.[106]

The President thus contended that he had not committed perjury on that question in the *Jones* deposition—even assuming that Monica Lewinsky performed oral sex on him.

There still was the question of his contact with Ms. Lewinsky's breasts and genitalia, which the President conceded would fall within the *Jones* definition of sexual relations. The President denied that he had engaged in such activity and said, in effect, that Monica Lewinsky was lying:

> Q: The question is, if Monica Lewinsky says that while you were in the Oval Office area you touched her breasts would she by lying?
>
> A: *That is not my recollection.* My recollection is that I did not have sexual relations with Ms. Lewinsky and I'm staying on my former statement about that. * * * My, my statement is that I did not have sexual relations as defined by that.
>
> Q: If she says that you kissed her breasts, would she be lying?
>
> A: I'm going to revert to my former statement [that is, the prepared statement denying "sexual relations"].
>
> Q: Okay. If Monica Lewinsky says that while you were in the Oval Office area you touched her genitalia, would she be lying? And that calls for a yes, no, or reverting to your former statement.
>
> A: I will revert to my former statement on that.[107]

The President elaborated that he considered kissing or touching breasts or genitalia during sexual activity to be covered by the *Jones* definition, but he denied that he had ever engaged in such conduct with Ms. Lewinsky:

> Q: So touching, in your view then and now—the person being deposed touching or kissing the breast of another person would fall within the definition?
>
> A: That's correct, sir.
>
> Q: And you testified that you didn't have sexual relations with Monica Lewinsky in the *Jones* deposition, under that definition, correct?
>
> A: That's correct, sir.
>
> Q: If the person being deposed touched the genitalia of another person, would that be—and with the intent to arouse the sexual desire, arouse or gratify, as defined in definition (1), would that be, under your understanding then and now——
>
> A: Yes, sir.
>
> Q: ——sexual relations.
>
> A: Yes, sir.
>
> Q: Yes it would?
>
> A: Yes it would. If you had a direct contact with any of these places in the body, if you had direct contact with intent to arouse or gratify, that would fall within the definition.
>
> Q: So you didn't do any of those three things——
>
> A: You——
>
> Q: ——with Monica Lewinsky.

[106] *Id.* at 93.

[107] *Id.* at 110 (emphasis added).

A: *You are free to infer that my testimony is that I did not have sexual relations, as I understood this term to be defined.*
Q: *Including touching her breast, kissing her breast, touching her genitalia?*
A: *That's correct.*[108]

C. SUMMARY

In the foregoing testimony to the grand jury, the President lied under oath three times.

1. The President testified that he believed oral sex was not covered by *any* of the terms and definitions for sexual activity used at the *Jones* deposition. That testimony is not credible: At the *Jones* deposition, the President could not have believed that he was telling "the truth, the whole truth, and nothing but the truth" in denying a sexual relationship, sexual relations, or a sexual affair with Monica Lewinsky.

2. In all events, even putting aside his *definitional* defense, the President made a second false statement to the grand jury. The President's grand jury testimony contradicts Ms. Lewinsky's grand jury testimony on the question whether the President touched Ms. Lewinsky's breasts or genitalia during their sexual activity. There can be no contention that one of them has a lack of memory or is mistaken. On this issue, either Monica Lewinsky lied to the grand jury, or President Clinton lied to the grand jury. Under any rational view of the evidence, the President lied to the grand jury.

First, Ms. Lewinsky's testimony about these encounters is detailed and specific. She described with precision nine incidents of sexual activity in which the President touched and kissed her breasts and four incidents involving contacts with her genitalia.

Second, Ms. Lewinsky has stated repeatedly that she does not want to hurt the President by her testimony.[109] Thus, if she had exaggerated in her many prior statements, she presumably would have said as much, rather than adhering to those statements. She has confirmed those details, however, even though it clearly has been painful for her to testify to the details of her relationship with the President.

Third, the testimony of many of her friends, family members, and counselors corroborate her testimony in important detail. Many testified that Ms. Lewinsky had told them that the President had touched her breasts and genitalia during sexual activity. These statements were made well before the President's grand jury testimony rendered these precise details important. Ms. Lewinsky had no motive to lie to these individuals (and obviously not to counselors). Indeed, she pointed out to many of them that she was upset that sexual intercourse had not occurred, an unlikely admission if she were exaggerating the sexual aspects of their relationship.

Fourth, a computer file obtained from Ms. Lewinsky's home computer contained a draft letter that referred in one place to their sexual relationship. The draft explicitly refers to "watching your mouth on my breast" and implicitly refers to direct contact with Ms. Lewinsky's genitalia.[110] This draft letter further corroborates

[108] *Id.* at 95–96 (emphasis added).
[109] Lewinsky 8/26/98 Depo. at 69.
[110] MSL–55–DC–0094; MSL–55–DC–0124.

Ms. Lewinsky's testimony and indicates that the President's grand jury testimony is false.

Fifth, as noted above, the President's "hands-off" scenario—in which he would have received oral sex on nine occasions from Ms. Lewinsky but never made direct contact with Ms. Lewinsky's breasts or genitalia—is implausible. As Ms. Lewinsky herself testified, it suggests that she and the President had some kind of "service contract—that all I did was perform oral sex on him and that that's all this relationship was." [111] But as the above descriptions and the Narrative explain, the nature of the relationship, including the sexual relationship, was far more than that.

Sixth, in the grand jury, the President had a motive to lie by denying he had fondled Ms. Lewinsky in intimate ways. The President clearly sought to deny any acts that would show that he committed perjury in his civil case (implying that the President understood how seriously the public and the courts would view perjury in a civil case). To do that, the President had to deny touching Ms. Lewinsky's breasts or genitalia—no matter how implausible his testimony to that effect might be.

Seventh, the President refused to answer specific questions before the grand jury about what activity he did engage in (as opposed to what activity he did *not* engage in)—even though at the *Jones* deposition only seven months before, his attorney stated that he was willing to answer specific questions when there was a sufficient factual predicate.[112] The President's failure in the grand jury to answer specific follow-up questions suggests that he could not supply responses in a consistent or credible manner.

3. Finally, the President made a third false statement to the grand jury about his sexual relationship with Monica Lewinsky. He contended that the intimate contact did not begin until 1996. Ms. Lewinsky has testified that it began November 15, 1995, during the government shutdown—testimony corroborated by statements she made to friends at the time.[113] A White House photograph of the evening shows the President and Ms. Lewinsky eating pizza.[114] White House records show that Ms. Lewinsky did not depart the White House until 12:18 a.m. and show that the President was in the Oval Office area until 12:35 a.m.[115]

Ms. Lewinsky was still an *intern* when she says the President began receiving oral sex from her, whereas she was a full-time employee by the time that the President admits they began an "inappropriate intimate" relationship. The motive for the President to make a false statement about the date on which the sexual relationship started appears to have been that the President was unwilling to admit sexual activity with a young 22-year-old White House *intern* in the Oval Office area. Indeed, Ms. Lewinsky testified that, at that first encounter, the President tugged at her intern pass. He said that "this" may be a problem; Ms. Lewinsky inter-

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[111] Lewinsky 8/20/98 GJ at 54.
[112] Clinton 1/17/98 Depo. at 26 ("If the predicates are met, we have no objection to detail").
[113] *See, e.g.,* Ungvari 3/19/98 GJ at 18, 22–24; Erbland 2/12/98 GJ at 23–25.
[114] V006–DC–00003737–3744.
[115] 827–DC–00000008; 1222–DC–00000156, 1222–DC–0000083–85.

preted that statement to reflect his awareness that there would be a problem with her obtaining access to the West Wing.[116]

For all these reasons, there is substantial and credible information that the President lied to the grand jury about his sexual relationship with Monica Lewinsky.[117]

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[116] Lewinsky 7/30/98 Int. at 6; Lewinsky 8/24/98 Int. at 5.

[117] The President contended that he had only one encounter in 1997 with Ms. Lewinsky, whereas she says that there were two. The motive for making a false statement on that issue is less clear, except that perhaps the President wanted to portray the 1997 relationship as an isolated incident.

III. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT PRESIDENT CLINTON LIED UNDER OATH DURING HIS CIVIL DEPOSITION WHEN HE STATED THAT HE COULD NOT RECALL BEING ALONE WITH MONICA LEWINSKY AND WHEN HE MINIMIZED THE NUMBER OF GIFTS THEY HAD EXCHANGED.

The President testified to the grand jury and stated to the Nation on August 17 that his testimony in his civil deposition had been "legally accurate." Even apart from his answers about the sexual relationship, the President's deposition testimony was inaccurate on several other points.

During President Clinton's deposition in the *Jones* case, Ms. Jones's attorneys asked the President many detailed questions about the nature of his relationship with Ms. Lewinsky, apart from whether the relationship was sexual. The questions included: (i) whether the President had been alone with Ms. Lewinsky in the White House and, if so, how many times; and (ii) whether he and Ms. Lewinsky exchanged gifts.[118] Both issues were important in determining the nature of the relationship.[119]

There is substantial and credible information that the President lied under oath about those subjects.

A. There is substantial and credible information that President Clinton lied under oath when he testified that he could not specifically recall instances in which he was alone with Monica Lewinsky.

1. The President's Civil Deposition Testimony

President Clinton was asked at his deposition whether he had ever been alone with Ms. Lewinsky. He testified as follows:

> Q: * * * At any time were you and Monica Lewinsky together alone in the Oval Office?
>
> [videotape shows approximately five-second pause before answer]
>
> WJC: *I don't recall,* but as I said, when she worked at the legislative affairs office, they always had somebody there on the weekends. I typically worked some on the weekends. Sometimes they'd bring me things on the weekends. She—it seems to me she brought things to me once or twice on the weekends. In that case, whatever time she would be in there, drop it off, exchange a few words and

[118] Ms. Jones's attorneys had earlier served President Clinton with a document request that sought documents reflecting "any communications, meetings or visits involving" President Clinton and Ms. Lewinsky. 1414–DC–00001534–46.

[119] Throughout the *Jones* case, Judge Susan Webber Wright ruled that Ms. Jones was entitled to discover information regarding the nature of President Clinton's relationship with government employees, including Monica Lewinsky, a federal employee at the time. *See, e.g.,* 921–DC–00000459–66; 920–DC–00000517–25; 1414–DC–00001006–14; 921–DC–00000736–44; 921–DC–00000751–52; 1414–DC–00001188–92.

go, she was there. I don't have any specific recollections of what the issues were, what was going on, but when the Congress is there, we're working all the time, and typically I would do some work on one of the days of the weekends in the afternoon.

Q: So I understand, your testimony is that it was possible, then, that you were alone with her, but you have no specific recollection of that ever happening?

WJC: *Yes, that's correct.* It's possible that she, in, while she was working there, brought something to me and that at the time she brought it to me, she was the only person there. That's possible. [120]

The President also was asked whether he had ever been alone with Ms. Lewinsky in the hallway that runs from the Oval Office, past the study, to the dining room and kitchen area.[121]

Q: At any time were you and Monica Lewinsky alone in the hallway between the Oval Office and this kitchen area?

WJC: *I don't believe so,* unless we were walking back to the back dining room with the pizza. [122] I just, I don't remember. *I don't believe we were alone in the hallway, no.*[123]

The President was then asked about any times he may have been alone in any room with Ms. Lewinsky:

Q: At any time have you and Monica Lewinsky ever been alone together in any room of the White House?

WJC: I think I testified to that earlier. I think that there is a, it is—*I have no specific recollection,* but it seems to me that she was on duty on a couple of occasions working for the legislative affairs office *and brought me some things to sign, something on the weekend. That's—I have a general memory of that.*[124]

2. Evidence That Contradicts the President's Testimony

In the seven months preceding the President's grand jury testimony on August 17, the OIC gathered substantial and credible information that the President lied under oath in his deposition statements about being alone with Monica Lewinsky.

First, Monica Lewinsky testified before the grand jury that she was alone with the President on numerous occasions [125] and in numerous areas, including the Oval Office, [126] Nancy Hernreich's office,[127] the President's private study,[128] the private bathroom across from the study,[129] and the hallway that leads from the Oval Office

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[120] Clinton 1/17/98 Depo. at 52–53 (emphasis added).

[121] Ms. Lewinsky testified that many of her sexual encounters with the President occurred in this windowless hallway. Lewinsky 8/6/96 GJ at 34–36.

[122] The President had earlier testified that during the government shutdown in November 1995, Ms. Lewinsky was working as an intern in the Chief of Staff's Office, and had brought the President and others some pizza. Clinton 1/17/98 Depo. at 58.

[123] *Id.* at 58–59 (emphasis added).

[124] *Id.* at 59 (emphasis added).

[125] Lewinsky 8/6/98 GJ at 20, 52.

[126] Lewinsky 8/26/98 Depo. at 22; Lewinsky 8/6/98 GJ at 52–53.

[127] Lewinsky 8/6/98 GJ at 76.

[128] *Id.* at 52–53.

[129] *Id.* at 35.

to the private dining room.[130] Ms. Lewinsky confirmed that she and the President were alone during sexual activity.[131]

Second, Betty Currie testified that President Clinton and Ms. Lewinsky were alone together in the Oval Office area a number of times.[132] She specifically remembered three occasions when the President and Ms. Lewinsky were alone together: February 28, 1997,[133] early December 1997,[134] and December 28, 1997.[135]

Third, six current or former members of the Secret Service testified that the President and Ms. Lewinsky were alone in the Oval Office area—Robert Ferguson,[136] Lewis Fox,[137] William Bordley,[138] Nelson Garabito,[139] Gary Byrne,[140] and John Muskett.[141]

Fourth, White House steward Glen Maes testified that on some weekend day after Christmas 1997,[142] the President came out of the Oval Office, saw Ms. Lewinsky with a gift, and escorted her into the Oval Office. Mr. Maes testified that the President and Ms. Lewinsky were alone together for approximately eight minutes, and then Ms. Lewinsky left.[143]

3. The President's Grand Jury Testimony

On August 17, 1998, the President testified to the grand jury and began his testimony by reading a statement admitting that he had been alone with Ms. Lewinsky:

> *When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997,* I engaged in conduct that was wrong.[144]

The President acknowledged being alone with Ms. Lewinsky on multiple occasions, although he could not pinpoint the precise number.[145] Perhaps most important, the President admitted that he was alone with Ms. Lewinsky on December 28, 1997,[146] *less than three weeks before his deposition in the Jones case.* Indeed, he acknowledged that he would have to have been an "exhibitionist" for

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[130] *Id.* at 34–36.

[131] *Id.* at 20.

[132] Currie 1/27/98 GJ at 32–33. *See also* Currie 5/6/98 GJ at 98. The Oval Office area includes the study, dining room, kitchen, bathroom, and hallway connecting the area. *See* Appendix, Exhibit D (diagram of Oval Office area).

[133] Currie 1/27/98 GJ at 34–35 (recalling that after the President's radio address, the President told Ms. Lewinsky he wanted to show her his collection of political buttons and took her into the Oval Office study for 15 to 20 minutes while Ms. Currie waited nearby, in the pantry or the dining room).

[134] Currie 1/27/98 GJ at 36–38 (testifying that Ms. Lewinsky came to the White House and met with the President alone for 15 or 20 minutes). *See also* Currie 5/14/98 GJ at 116.

[135] Currie 1/27/98 GJ at 35–36 (testifying that Ms. Lewinsky and the President were in the Oval Office for "[p]erhaps 30 minutes."). Again, Ms. Currie testified that she believes no one else was present. *See also* Currie 5/6/98 GJ at 103–105.

[136] Ferguson 7/17/98 GJ at 23–35 (alone for approximately 45 minutes); Ferguson 7/23/98 GJ at 18–24.

[137] Fox 2/17/98 GJ at 30–38 (alone for approximately 40 minutes).

[138] Bordley 8/13/98 GJ at 19–30 (alone for approximately 30 to 35 minutes).

[139] Garabito 7/30/98 GJ at 25–32.

[140] Byrne 7/30/98 GJ at 7–12, 29–32 (alone for 15 to 25 minutes).

[141] Muskett 7/21/98 GJ at 9–13, 22–32 (alone on Easter Sunday 1996).

[142] The last date that White House records reflect a visit by Ms. Lewinsky is Sunday, December 28, 1997. 827–DC–00000018; V006–DC–00000009.

[143] Maes 4/8/98 GJ at 84–89.

[144] Clinton 8/17/98 GJ at 9–10 (emphasis added).

[145] *Id.* at 30–33.

[146] *Id.* at 34.

him not to have been alone with Ms. Lewinsky when they were having sexual encounters.[147]

4. Summary

Substantial and credible information demonstrates that the President made three false statements under oath in his civil deposition regarding whether he had been alone with Ms. Lewinsky.

First, the President lied when he said "I don't recall" in response to the question whether he had ever been alone with Ms. Lewinsky. The President admitted to the grand jury that he had been alone with Ms. Lewinsky. It is not credible that he actually had no memory of this fact six months earlier, particularly given that they were obviously alone when engaging in sexual activity.

Second, when asked whether he had been alone with Ms. Lewinsky in the hallway in the Oval Office, the President answered, "I don't believe so, unless we were walking back to the back dining room with the pizza."[148] That statement, too, was false: Most of the sexual encounters between the President and Ms. Lewinsky occurred in that hallway (and on other occasions, they walked through the hallway to the dining room or study), and it is not credible that the President would have forgotten this fact.

Third, the President suggested at his civil deposition that he had no specific recollection of being alone with Ms. Lewinsky in the Oval Office, but had a general recollection that Ms. Lewinsky may have brought him "papers to sign" on certain occasions when she worked at the Legislative Affairs Office.[149] This statement was false. Ms. Lewinsky did not bring him papers for official purposes. To the contrary, "bringing papers" was one of the sham "cover stories" that the President and Ms. Lewinsky had originally crafted to conceal their sexual relationship.[150] The fact that the President resorted to a previously designed cover story when testifying *under oath* at the *Jones* deposition confirms that he made these false denials in a calculated manner with the intent and knowledge that they were false.

The President had an obvious motive to lie in this respect. He knew that it would appear odd for a President to have been alone with a female intern or low-level staffer on so many occasions. Such an admission might persuade Judge Wright to deny any motion by Ms. Lewinsky to quash her deposition subpoena. It also might prompt Ms. Jones's attorneys to oppose efforts by Ms. Lewinsky not to be deposed and to ask specific questions of Ms. Lewinsky about the times she was alone with the President. It also might raise questions publicly if and when the President's deposition became public; at least parts of the deposition were likely to become public at trial, if not at the summary judgment stage.

Because lying about their sexual relationship was insufficient to avoid raising further questions, the President also lied about being

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[147] *Id.* at 54.
[148] Clinton 1/17/98 Depo. at 58–59.
[149] *See id.* at 52–53, 59.
[150] Clinton 8/17/98 GJ at 118; Lewinsky 8/6/98 GJ at 53–55.

alone with Ms. Lewinsky—or at least feigned lack of memory as to specific occurrences.[151]

B. There is substantial and credible information that the President lied under oath in his civil deposition about gifts he exchanged with Monica Lewinsky.

During his civil deposition, the President also was asked several questions about gifts he and Monica Lewinsky had exchanged. The evidence demonstrates that he answered the questions falsely. As with the questions about being alone, truthful answers to these questions would have raised questions about the nature of the relationship. Such answers also would have been inconsistent with the understanding of the President and Ms. Lewinsky that, in response to her subpoena, Ms. Lewinsky would not produce all of the gifts she had received from the President (an issue discussed more fully in Ground V).

1. The President's Civil Deposition Testimony About His Gifts to Monica Lewinsky

During the President's deposition in the *Jones* case, Ms. Jones's attorneys asked several questions about whether he had given gifts to Monica Lewinsky.

> Q: Well, have you ever given any gifts to Monica Lewinsky?
> WJC: *I don't recall. Do you know what they were?*
> Q: A hat pin?
> WJC: *I don't, I don't remember. But I certainly, I could have.*
> Q: A book about Walt Whitman?
> WJC: I give—let me just say, I give people a lot of gifts, and when people are around I give a lot of things I have at the White House away, so *I could have given her a gift, but I don't remember a specific gift.*
> Q: Do you remember giving her a gold broach?
> WJC: No.[152]

2. Evidence that Contradicts the President's Civil Deposition Testimony

(i) Just three weeks before the President's deposition, on December 28, 1997, President Clinton gave Ms. Lewinsky a number of gifts, the largest number he had ever given her.[153] They included a large Rockettes blanket, a pin of the New York skyline, a marble-like bear's head from Vancouver, a pair of sunglasses, a small box of cherry chocolates, a canvas bag from the Black Dog, and a stuffed animal wearing a T-shirt from the Black Dog.[154] Ms. Lewinsky produced the Rockettes blanket, the bear's head, the Black Dog canvas bag, the Black Dog stuffed animal, and the sunglasses to the OIC on July 29, 1998.[155]

[151] In criminal law, a feigned lack of memory is sufficient for a perjury conviction. *See, e.g., United States* v. *Chapin,* 515 F.2d 1274 (D.C. Cir. 1975); *Behrle* v. *United States,* 100 F.2d 174 (D.C. Cir. 1938).
[152] Clinton 1/17/98 Depo. at 75 (emphasis added).
[153] Clinton 8/17/98 GJ at 36.
[154] Lewinsky 8/6/98 GJ at 27–28, 150–51; GJ Exhibit ML–7.
[155] FBI Receipt for Property received, 7/29/98.

(ii) The evidence also demonstrates that the President gave Ms. Lewinsky a hat pin as a belated Christmas gift on February 28, 1997.[156] The President and Ms. Lewinsky discussed the hatpin on December 28, 1997, after Ms. Lewinsky received a subpoena calling for her to produce all gifts from the President, including any hat pins.[157] In her meeting with the President on December 28, 1997, according to Ms. Lewinsky, "I mentioned that I had been concerned about the hat pin being on the subpoena and he said that that had sort of concerned him also and asked me if I had told anyone that he had given me this hat pin and I said no." [158] The President's secretary Betty Currie also testified that she had previously discussed the hat pin with the President.[159]

(iii) Ms. Lewinsky testified that the President gave her additional gifts over the course of their relationship, such as a brooch,[160] the book *Leaves of Grass* by Walt Whitman,[161] an Annie Lennox compact disk,[162] and a cigar.[163]

3. President's Civil Deposition Testimony About Gifts from Monica Lewinsky to the President

When asked at his civil deposition in the *Jones* case whether Monica Lewinsky had ever given him gifts, President Clinton testified as follows:

> Q: Has Monica Lewinsky ever given you any gifts?
> WJC: *Once or twice.* I think she's given me a book or two.
> Q: Did she give you a silver cigar box?
> WJC: No.
> Q: Did she give you a tie?
> WJC: Yes, she has given me a tie before. I believe that's right. Now, as I said, let me remind you, normally when I get these ties, I get ties, you know, together, and then they're given to me later, but I believe that she has given me a tie.[164]

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[156] Lewinsky 8/6/98 GJ at 26–28; GJ Exhibit ML–7.

[157] Lewinsky 8/6/98 GJ at 151. Ms. Lewinsky's subpoena directed in part: "Please produce each and every gift including, but not limited to, any and all dresses, accessories, and jewelry, and/or hat pins given to you by, or on behalf of, Defendant Clinton." 902–DC–00000135–38.

[158] Lewinsky 8/6/98 GJ at 33, 152. *See also* Lewinsky 2/1/98 Statement at 7. In fact, Ms. Lewinsky had told Ms. Tripp about it. Ms. Lewinsky had also discussed the hat pin and the subpoena's request for the hat pin with Mr. Jordan. Lewinsky 8/6/98 GJ at 132, 140.

[159] Currie 5/6/98 GJ at 142 (relating incident where the President asks Ms. Currie about the hat pin he gave to Ms. Lewinsky). After this criminal investigation started, Ms. Currie turned over a box of items—including a hat pin—that had been given to her by Ms. Lewinsky. Ms. Currie understood from Ms. Lewinsky that the box did contain gifts from the President. *See* Currie 5/6/98 GJ at 107. Ms. Lewinsky testified that the box contained gifts from the President, including the hat pin. Lewinsky 8/6/98 GJ at 154–162.

[160] Ms. Lewinsky testified that the President had given her a gold brooch, and she made near-contemporaneous statements to Ms. Erbland, Ms. Raines, Ms. Ungvari, and Ms. Tripp regarding the gift. Lewinsky 8/6/98 GJ at 26–28; GJ Exhibit ML–7; Erbland 2/12/98 GJ at 41; Raines 1/29/98 GJ at 53–55; Ungvari 3/19/98 GJ at 44; Tripp 7/29/98 GJ at 105.

[161] Ms. Lewinsky testified that *Leaves of Grass* was "the most sentimental gift he had given me." Lewinsky 8/6/98 GJ at 156. Ms. Lewinsky made near-contemporaneous statements to her mother, her aunt, and her friends Ms. Davis, Ms. Erbland, and Ms. Raines that the President had given her *Leaves of Grass.* Davis 3/17/98 GJ at 30–31; Erbland 2/12/98 GJ at 40–41; Finerman 3/18/98 Depo. at 15–16; Marcia Lewis 2/10/98 GJ at 51–52; Marcia Lewis 2/11/98 GJ at 10 ("[S]he liked the book of poetry very much."); Raines 1/29/98 GJ 53–55.

[162] Lewinsky 8/6/98 GJ at 27; GJ Exhibit ML–7.

[163] Lewinsky 8/26/98 Depo. at 15–16; Lewinsky 8/6/98 GJ at 27; GJ Exhibit ML–7; Finerman Depo. 3/18/98 at 13–17; Ungvari 3/19/98 GJ at 43–44.

[164] Clinton 1/17/98 Depo. at 76–77 (emphasis added).

4. Evidence that Contradicts the President's Testimony

(i) Monica Lewinsky's Testimony

The evidence reveals that Ms. Lewinsky gave the President approximately 38 gifts; she says she almost always brought a gift or two when she visited.[165]

a. Ms. Lewinsky testified before the grand jury that she gave the President six neckties.[166]

b. Ms. Lewinsky testified that she gave the President a pair of sunglasses on approximately October 22, 1997.[167] The President's attorney, David E. Kendall, stated in a letter on March 16, 1998: "We believe that Ms. Lewinsky might have given the President a few additional items, such as ties and a pair of sunglasses, but we have not been able to locate these items."[168]

c. On November 13, 1997, Ms. Lewinsky gave the President an antique paperweight that depicted the White House.[169] Ms. Lewinsky testified that on December 6, 1997, and possibly again on December 28, 1997, she saw this paperweight in the dining room, where the President keeps many items of political memorabilia.[170] The President turned over the paperweight to the OIC in response to a second subpoena calling for it.[171]

d. Ms. Lewinsky gave the President at least seven books:

- *The Presidents of the United States,* on January 4, 1998;[172]
- *Our Patriotic President: His Life in Pictures, Anecdotes, Sayings, Principles and Biography,*[173] on December 6, 1997;[174]
- an antique book on Peter the Great, on August 16, 1997;[175]
- *The Notebook,* on August 16, 1997;[176]
- *Oy Vey,* in early 1997;[177]
- a small golf book, in early 1997;[178] and
- her personal copy of *Vox*, a novel about phone sex, on March 29, 1997.[179]

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[165] Lewinsky 8/6/98 GJ at 27-28, GJ Exhibit ML–7; Lewinsky 7/27/98 Int. at 12–14.

[166] Lewinsky 8/6/98 GJ at 235–36.

[167] *Id.* at 27, 150; GJ Exhibit ML–7.

[168] V002–DC–00000475 (Letter to OIC, 3/16/98).

[169] Lewinsky 8/6/98 GJ at 27; GJ Exhibit ML–7. *See also* Lewinsky 7/27/98 Int. at 14.

[170] Lewinsky 8/6/98 GJ at 185.

[171] Letter from David Kendall to OIC, August 3, 1998.

[172] V002–DC–00000471. Ms. Lewinsky testified that she bought and gave the President that book in early January 1998, and that when she talked to him on January 5, 1998, he acknowledged that he had received the book. Lewinsky 8/6/98 GJ at 189–192. When testifying before the grand jury, the President acknowledged receiving "a particularly nice book for Christmas, an antique book on Presidents. She knew that I collected old books and it was a very nice thing." Clinton 8/17/98 GJ at 36.

[173] V002–DC–0000003.

[174] Lewinsky 8/6/98 GJ at 27–28, 109; GJ Exhibit ML–7.

[175] *Id.*; Lewinsky 8/6/98 GJ at 26–28; Lewinsky 7/27/98 Int. at 13. The President did not turn over this antique book in response to a subpoena.

[176] Lewinsky 8/6/98 GJ at 27–28; GJ Exhibit ML–7. The President did not produce *The Notebook* in response to a subpoena.

[177] Lewinsky 8/6/98 GJ at 27–28, 182–183; GJ Exhibit ML–7. Ms. Lewinsky saw a copy of the book in the President's study in November 1997. Lewinsky 8/6/98 GJ at 183. White House records list *Oy Vey* and *Vox* on an October 10, 1997, catalog of books in the West Wing. 1361–DC–000000029 (Catalog of Books in the West Wing Presidential Study as of 10 October 1997). The President did not produce *Oy Vey* in response to a subpoena.

[178] Lewinsky 8/6/98 GJ at 27–28, 183–84; Lewinsky 7/27/98 Int. at 13; GJ Exhibit ML–7. Ms. Lewinsky testified that she had seen the book in the President's study in November 1997. Lewinsky 8/6/98 GJ at 183–84. The President did not produce this book in response to a subpoena.

[179] *Id.* at 27–28, 183–84; Lewinsky 7/27/98 Int. at 12–13; GJ Exhibit ML–7.

e. Ms. Lewinsky gave the President an antique cigar holder on December 6, 1997.[180]

f. Ms. Lewinsky testified that she gave the President a number of additional gifts.[181]

5. Grand Jury Testimony of the President and Ms. Currie

When he testified to the grand jury, President Clinton acknowledged giving Monica Lewinsky several gifts, stating that "it was a right thing to do to give her gifts back." [182] He acknowledged giving her gifts on December 28, 1997,[183] just three weeks before the civil deposition.

During the criminal investigation, the President has produced seven gifts that Ms. Lewinsky gave him. He testified to the grand jury that Ms. Lewinsky had given him "a tie, a coffee cup, a *number of other things I had*." [184] In addition, the President acknowledged that "there were some things that had been in my possession that I no longer had, I believe." [185]

Betty Currie testified that Ms. Lewinsky sent a number of packages for the President—six or eight, she estimated.[186] Ms. Lewinsky also sometimes dropped parcels off or had family members do so.[187] When the packages came to the White House, Ms. Currie would leave the packages from Ms. Lewinsky in the President's box outside the Oval Office, and "[h]e would pick [them] up." [188] To the best of her knowledge, such parcels always reached the President: "The President got everything anyone sent him." [189] Ms. Currie testified that to her knowledge, no one delivered packages or something as many times as Ms. Lewinsky did.[190]

6. Summary

The President stated in his civil deposition that he could not recall whether he had ever given any gifts to Ms. Lewinsky; [191] that he could not remember whether he had given her a hat pin although "certainly, I could have"; and that he had received a gift

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[180] Lewinsky 8/6/98 GJ at 26–28; GJ Exhibit ML–7.

[181] These included a Sherlock Holmes game sometime after Christmas 1996; a golf ball and tees on February 28, 1997; after the President injured his leg in March 1997, a care package filled with whimsical gifts, such as a magnet with the Presidential seal for his metal crutches, a license plate with "Bill" for his wheelchair, and knee pads with the Presidential seal; a Banana Republic casual shirt and a puzzle on golf mysteries on May 24, 1997; the card game "Royalty" in mid-August 1997; shortly before Halloween of 1997, a package filled with Halloween-related items, such as a pumpkin lapel pin, a wooden letter opener with a frog on the handle, and a plastic pumpkin filled with candy; and on December 6, 1997, a Starbucks Santa Monica mug and a Hugs and Kisses box. Lewinsky 8/6/98 GJ at 27–28; GJ Exhibit ML–7; Lewinsky 7/27/97 Int. at 12–15.

[182] Clinton 8/17/98 GJ at 47.

[183] *Id.* at 34–36.

[184] *Id.* at 173 (emphasis added). The President testified that "to his knowledge" he has turned over all the gifts that Ms. Lewinsky gave him. *Id.* at 154–155.

[185] *Id.* at 172–173.

[186] Currie 5/6/98 GJ at 88–89; *see also id.* at 184; Currie 5/14/98 GJ at 78. Courier receipts show that Ms. Lewinsky sent nine packages to Ms. Currie. *See* 0837–DC–00000001 to 0837–DC–00000027.

[187] T1 at 63–64.

[188] Currie GJ 5/6/98 at 88–89; *see also* Currie GJ 5/14/98 at 78.

[189] Currie 5/6/98 GJ at 129.

[190] Currie 5/14/98 GJ at 145.

[191] In his grand jury testimony, the President said that this question at his civil deposition confused him and that he thought that the questioner was asking whether he could list specific gifts he had given her rather than *whether* he had ever given Ms. Lewinsky a gift. Clinton 8/17/98 GJ at 51–52. Even if that explanation were credited, the President's answer to the hat pin question is inaccurate, particularly because he had discussed it with Ms. Lewinsky on December 28, according to her testimony.

from Ms. Lewinsky only "once or twice." [192] In fact, the evidence demonstrates that they exchanged numerous gifts of various kinds at many points over a lengthy period of time. Indeed, on December 28, only three weeks before the deposition, they had discussed the hat pin. Also on December 28, the President had given Ms. Lewinsky a number of gifts, more than he had ever given her before.

A truthful answer to the questions about gifts at the *Jones* deposition would have raised further questions about the President's relationship with Monica Lewinsky. The number itself would raise questions about the relationship and prompt further questions about specific gifts; some of the specific gifts (such as *Vox* and *Leaves of Grass*) would raise questions whether the relationship was sexual and whether the President had lied in denying that their relationship was sexual. Ms. Lewinsky explained the point: Had they admitted the gifts, it would "at least prompt [the *Jones* attorneys] to want to question me about what kind of friendship I had with the President and they would want to speculate and they'd leak it and my name would be trashed and he [the President] would be in trouble." [193]

A truthful answer about the gifts to Ms. Lewinsky also would have raised the question of where they were. Ms. Lewinsky had been subpoenaed for gifts, as the President knew. The President knew also from his conversation with Ms. Lewinsky on December 28, 1997 (an issue discussed more fully in Ground V) that Ms. Lewinsky would not produce all of the gifts she had received from the President.

For those reasons, the President had a clear motive when testifying under oath to lie about the gifts.

[192] Clinton 1/17/98 Depo. at 75.
[193] Lewinsky 8/6/98 GJ at 167.

IV. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT THE PRESIDENT LIED UNDER OATH DURING HIS CIVIL DEPOSITION CONCERNING CONVERSATIONS HE HAD WITH MONICA LEWINSKY ABOUT HER INVOLVEMENT IN THE JONES CASE.

President Clinton was asked during his civil deposition whether he had discussed with Ms. Lewinsky the possibility of her testifying in the *Jones* case. He also was asked whether he knew that she had been subpoenaed at the time he last had spoken to her.

There is substantial and credible information that the President lied under oath in answering these questions. A false statement about these conversations was necessary in order to avoid raising questions whether the President had tampered with a prospective witness in the civil lawsuit against him.

A. CONVERSATIONS WITH MS. LEWINSKY REGARDING THE POSSIBILITY OF HER TESTIFYING IN THE JONES CASE

1. President Clinton's Testimony in His Deposition

In the President's civil deposition, he was asked about any discussions he might have had with Monica Lewinsky about the *Jones* case:

> Q: Have you ever talked to Monica Lewinsky about the possibility that she might be asked to testify in this lawsuit?
>
> [videotape indicates an approximately 14-second pause before answer]
>
> WJC: *I'm not sure, and let me tell you why I'm not sure.* It seems to me the, the, the—I want to be as accurate as I can here. Seems to me the last time she was there to see Betty before Christmas we were joking about how you-all [Ms. Jones's attorneys], with the help of the Rutherford Institute, were going to call every woman I'd ever talked to * * * and ask them that, and so I said you [Ms. Lewinsky] would qualify, or something like that. *I don't, I don't think we ever had more of a conversation than that about it,* but I might have mentioned something to her about it, because when I saw how long the witness list was, or I heard about it, before I saw, but actually by the time I saw it her name was on it, but I think that was after all this had happened. *I might have said something like that, so I don't want to say for sure I didn't, because I might have said something like that.*
>
> * * * * * * *
>
> Q: What, if anything, did Monica Lewinsky say in response?
>
> WJC: Nothing that I remember. Whatever she said, I don't remember. Probably just some predictable thing.[194]

[194] Clinton 1/17/98 Depo. at 70–71 (emphasis added).

2. Evidence that Contradicts the President's Civil Deposition Testimony

(i) Ms. Lewinsky's Testimony

Ms. Lewinsky testified that she spoke *three times* to President Clinton about the prospect of testifying in the *Jones* lawsuit—once (December 17, 1997) after she was on the witness list and twice more (December 28, 1997, and January 5, 1998) after she had been subpoenaed.

a. *December 17, 1997, Call.* Ms. Lewinsky testified that President Clinton called her at about 2:00 a.m. on December 17, 1997. First, he told her that Ms. Currie's brother had died; then he told Ms. Lewinsky that she was on the witness list in the *Jones* case. According to Ms. Lewinsky, "[h]e told me that it didn't necessarily mean that I would be subpoenaed, but that that was a possibility, and if I were to be subpoenaed, that I should contact Betty and let Betty know that I had received the subpoena." [195] Ms. Lewinsky said that the President told her that she might be able to sign an affidavit to avoid being deposed.[196] According to Ms. Lewinsky, the President also told her, "*You know, you can always say you were coming to see Betty or that you were bringing me letters.*" [197] Ms. Lewinsky took that statement to be a reminder of the false "cover stories" that they had used earlier in the relationship.[198]

b. *December 28, 1997, Visit.* Ms. Lewinsky was subpoenaed on December 19. At her request, Vernon Jordan told the President that Ms. Lewinsky had been subpoenaed.[199] She then met with President Clinton nine days later on December 28, less than three weeks before the President was deposed.

According to Ms. Lewinsky, she and the President discussed the *Jones* lawsuit and how the *Jones* lawyers might have learned about her. Ms. Lewinsky said they also discussed the subpoena's requirement that she produce gifts she had received from the President, including specifically a "hat pin." [200]

Because of their mutual concern about the subpoena, Ms. Lewinsky testified that she asked the President if she should put the gifts away somewhere.[201] The President responded "I don't know" or "Hmm" or "Let me think about it." [202] Later that day, according to Ms. Lewinsky, Ms. Currie called to pick up the gifts, which she then stored under her bed in her home in Virginia.[203] (This issue will be discussed more fully in Ground V below.)

c. *January 5, 1998, Call.* Ms. Lewinsky also testified that she spoke to the President by telephone on January 5, 1998, and they

[195] Lewinsky 8/6/98 GJ at 123; Lewinsky 8/26/98 Depo. at 57–58; Lewinsky 2/1/98 Statement at 4.

[196] Lewinsky 8/6/98 GJ at 123–24; Lewinsky 2/1/98 Statement at 4 ("When asked what to do if she was subpoenaed, the Pres. suggested she could sign an affidavit to try to satisfy their inquiry and not be deposed.").

[197] Lewinsky 8/6/98 GJ at 123 (emphasis added); Lewinsky 2/1/98 Statement at 4 ("In general, Ms. L. should say she visited the WH to see Ms. Currie and, on occasion when working at the WH, she brought him letters when no one else was around.").

[198] Lewinsky 8/6/98 GJ at 123–24.

[199] Jordan 5/5/98 GJ at 136, 142, 144–45; Lewinsky 8/6/98 GJ at 133, 135.

[200] Lewinsky 8/6/98 GJ at 151–52; Lewinsky 8/20/98 GJ at 65–66; Lewinsky 2/1/98 Statement at 6.

[201] Lewinsky 8/6/98 GJ at 152; Lewinsky 8/20/98 GJ at 66.

[202] Lewinsky 8/6/98 GJ at 152; Lewinsky 8/20/98 GJ at 66. *See also* Lewinsky 8/1/98 Int. at 11 (noting that the President said something like "I don't know" or "I'll think about it").

[203] Lewinsky 8/6/98 GJ at 154–59. *See also* Lewinsky 8/1/98 Int. at 11–12.

continued to discuss her role in the *Jones* case. Ms. Lewinsky expressed concern that, if she were deposed, she might have a difficult time explaining the circumstances of her transfer from the White House to the Pentagon. According to Ms. Lewinsky, the President suggested that she answer by explaining that people in the White House Legislative Affairs office had helped her get the Pentagon job—which Ms. Lewinsky understood to be a misleading answer because she in fact had been transferred as a result of her being around the Oval Office too much.[204]

(ii) The President's Grand Jury Testimony

When the President testified to the grand jury, the President admitted that Ms. Lewinsky visited him on December 28, 1997,[205] and that during that visit, they discussed her involvement in the *Jones* case:

> WJC: * * * *I remember a conversation about the possibility of her testifying.* I believe it must have occurred on the 28th.
>
> She mentioned to me that she did not want to testify. So, that's how it came up. Not in the context of, I heard you have a subpoena, let's talk about it.
>
> *She raised the issue with me in the context of her desire to avoid testifying,* which I certainly understood; not only because there were some embarrassing facts about our relationship that were inappropriate, but also because a whole lot of innocent people were being traumatized and dragged through the mud by these Jones lawyers with their dragnet strategy * * *.[206]
>
> * * * * * * *
>
> Q: * * * Do you agree that she was upset about being subpoenaed?
>
> WJC: Oh, yes, sir, she was upset. She—well, she—we—she didn't—we didn't talk about a subpoena. But she was upset. *She said, I don't want to testify;* I know nothing about this; I certainly know nothing about sexual harassment; *why do they want me to testify.* And I explained to her why they were doing this, and why all these women were on these lists, people that they knew good and well had nothing to do with any sexual harassment.[207]

3. Summary

There is substantial and credible information that President Clinton lied under oath in his civil deposition in answering "I'm not sure" when asked whether he had talked to Ms. Lewinsky about the prospect of her testifying. In fact, he had talked to Ms. Lewinsky about it on three occasions in the month preceding his civil deposition, as Ms. Lewinsky's testimony makes clear.

The President's motive to lie in his civil deposition on this point is evident. Had he admitted talking to Ms. Lewinsky about the possibility that she might be asked to testify, that would have raised

[204] Lewinsky 8/6/98 GJ at 197.
[205] Clinton 8/17/98 GJ at 33.
[206] *Id.* at 36–37 (emphasis added).
[207] *Id.* at 39–40 (emphasis added).

the specter of witness tampering. Such an admission likely would have led Ms. Jones's attorneys to inquire further into that subject with both the President and Ms. Lewinsky. Furthermore, had the President admitted talking to Ms. Lewinsky about her testifying, that conversation would have attracted public inquiry into the conversation and the general relationship between the President and Ms. Lewinsky.

B. There is substantial and credible information that President Clinton lied under oath in his civil deposition when he denied knowing that Ms. Lewinsky had received her subpoena at the time he had last talked to her.

1. Evidence

In his civil deposition, President Clinton testified that the last time he had spoken to Ms. Lewinsky was in December 1997 (the month before the deposition), "[p]robably sometime before Christmas." [208] The President was asked:

> Q: Did [Ms. Lewinsky] tell you she had been served with a subpoena in this case?
> WJC: No. *I don't know if she had been.* [209]

Vernon Jordan testified that he had told the President about the subpoena on December 19, 1997, after he had talked to Ms. Lewinsky. Ms. Lewinsky confirmed that Mr. Jordan had told her on December 22, 1997, that he (Mr. Jordan) had told the President of her subpoena. [210]

When he testified to the grand jury, the President stated that in his conversation with Ms. Lewinsky on December 28, 1997, "my recollection is *I knew by then, of course, that she had gotten a subpoena*. And I knew that she was, therefore * * * slated to testify." [211]

Ms. Lewinsky testified that she and the President had two conversations after she was subpoenaed: the December 28, 1997, meeting and a January 5, 1998, phone conversation. [212]

2. Summary

There is substantial and credible information that the President lied under oath in his civil deposition by answering "I don't know if she had been" subpoenaed when describing his last conversation with Ms. Lewinsky. In fact, he knew that she had been subpoenaed. Given that the conversation with Ms. Lewinsky occurred in the few weeks immediately before the President's civil deposition, he could not have forgotten the conversation. As a result, there is no plausible conclusion except that the President intentionally lied in this answer.

During the civil deposition, the President also falsely dated his last conversation with Ms. Lewinsky as "probably sometime before Christmas," which implied that it might have been before the December 19 subpoena. Because Ms. Lewinsky had been subpoenaed

[208] Clinton 1/17/98 Depo. at 68.
[209] *Id.* (emphasis added).
[210] Jordan 5/5/98 GJ at 144; Lewinsky 8/6/98 GJ at 138–39.
[211] Clinton 8/17/98 GJ at 36 (emphasis added).
[212] Lewinsky 8/6/98 GJ at 149–153, 191–192, 195–198; Lewinsky 8/20/98 GJ at 35–36, 47, 49, 65–66.

on December 19, that false statement about the date of the conversation was a corollary to his other false statement (that he did not know she had been subpoenaed at the time of their last conversation).

The President's motive to lie in his civil deposition on the subpoena issue is evident. Had he admitted talking to Ms. Lewinsky *after* her subpoena, that would have raised the specter of witness tampering, which could have triggered legal and public scrutiny of the President.

V. There is substantial and credible information that President Clinton endeavored to obstruct justice by engaging in a pattern of activity to conceal evidence regarding his relationship with Monica Lewinsky from the judicial process in the Jones case. The pattern included:

(i) concealment of gifts that the President had given Ms. Lewinsky and that were subpoenaed from Ms. Lewinsky in the *Jones* case; and

(ii) concealment of a note sent by Ms. Lewinsky to the President on January 5, 1998.

From the beginning, President Clinton and Monica Lewinsky hoped and expected that their relationship would remain secret. They took active steps, when necessary, to conceal the relationship. The President testified that "I hoped that this relationship would never become public." [213]

Once the discovery process in the *Jones* case became an issue (particularly after the Supreme Court's unanimous decision on May 27, 1997, that ordered the case to go forward), their continuing efforts to conceal the relationship took on added legal significance. The risks to the President of disclosure of the relationship dramatically increased.

An effort to obstruct justice by withholding the truth from the legal process—whether by lying under oath, concealing documents, or improperly influencing a witness's testimony—is a federal crime.[214] There is substantial and credible information that President Clinton engaged in such efforts to prevent the truth of his relationship with Monica Lewinsky from being revealed in the *Jones* case.

A. Concealment of Gifts

1. Evidence Regarding Gifts

Ms. Lewinsky testified that in the early morning of December 17, at roughly 2:00 or 2:30 a.m., she received a call from the President.[215] Among other subjects, the President mentioned that he had Christmas presents for her.[216]

On December 19, 1997, Monica Lewinsky was served with a subpoena in connection with the *Jones* v. *Clinton* litigation. The subpoena required her to testify at a deposition on January 23, 1998.[217] The subpoena also required Ms. Lewinsky to produce "each and every gift including, but not limited to, any and all dresses, accessories, and jewelry, and/or hat pins given to you by, or on behalf

[213] Clinton 8/17/98 GJ at 106.
[214] *See* 18 U.S.C. §§ 1503, 1512, 1621.
[215] Lewinsky 8/6/98 GJ at 121–26.
[216] *Id.* at 126; Lewinsky 8/20/98 GJ at 70.
[217] 920–DC–00000013–18.

of, Defendant Clinton."[218] After being served with the subpoena, Ms. Lewinsky became concerned because the list of gifts included the hat pin, which "screamed out at me because that was the first gift that the President had given me."[219]

Later that same day, December 19, 1997, Ms. Lewinsky met with Vernon Jordan and told him of her concern about the gifts, including the hat pin.[220] During that meeting, Ms. Lewinsky asked Mr. Jordan to inform the President that she had been subpoenaed.[221] Mr. Jordan acknowledged that Ms. Lewinsky "was concerned about the subpoena and I think for her the subpoena ipso facto meant trouble."[222]

Shortly after Christmas, Ms. Lewinsky called Ms. Currie and said that the President had mentioned that he had presents for her.[223] Ms. Currie called back and told her to come to the White House at 8:30 a.m. on Sunday, December 28, 1997.[224] On December 28, Ms. Lewinsky and the President met in the Oval Office. According to her testimony, Ms. Lewinsky "mentioned that [she] had been concerned about the hat pin being on the subpoena and he said that that had sort of concerned him also and asked [her] if [she] had told anyone that he had given [her] this hat pin and [she] said no."[225] According to Ms. Lewinsky, she and the President discussed the possibility of moving some of the gifts out of her possession:

> [A]t some point I said to him, "Well, you know, should I—maybe I should put the gifts away outside my house somewhere or give them to someone, maybe Betty." And he sort of said—I think he responded, "I don't know" or "Let me think about that." And [we] left that topic.[226]

Ms. Lewinsky testified that she was never under the impression from anything the President said that she should turn over to Ms. Jones's attorneys all the gifts that he had given her.[227]

On the 28th, the President also gave Ms. Lewinsky several Christmas gifts. When asked why the President gave her more gifts on December 28 when he understood she was under an obligation to produce gifts in response to the subpoena, Ms. Lewinsky stated:

> You know, I can't answer what [the President] was thinking, but to me, it was—there was never a question in my mind and I—*from everything he said to me,* I never questioned him, that we were never going to do anything but keep this private, so that meant deny it and that meant do—take whatever appropriate steps needed to be taken, you know, for that to happen * * * . So by turning over all these gifts, it would at least prompt [the *Jones* at-

[218] 920–DC–00000018.
[219] Lewinsky 8/6/98 GJ at 132.
[220] *Id.* at 132.
[221] *Id.* at 133.
[222] Jordan 3/3/98 GJ at 159. Mr. Jordan stated that Ms. Lewinsky was crying both on the telephone earlier that day and then again in his office. *Id.* at 149–150.
[223] Lewinsky 8/6/98 GJ at 149.
[224] *Id.* at 149.
[225] *Id.* at 152. This statement was false. Ms. Lewinsky had "in fact * * * told people about the hat pin." *Id.*
[226] *Id.* at 152. In a later grand jury appearance, Ms. Lewinsky again described the conversation, and said "I don't remember his response. I think it was something like, 'I don't know,' or 'Hmm' or—there really was no response." Lewinsky 8/20/98 GJ at 66.
[227] Lewinsky 8/26/98 Depo. at 58.

> torneys] to want to question me about what kind of friendship I had with the President and they would want to speculate and they'd leak it and my name would be trashed and he [the President] would be in trouble.[228]

Ms. Lewinsky testified that a few hours after their meeting on December 28, 1997, Ms. Currie called her.[229] According to Ms. Lewinsky, Ms. Currie said: "'I understand you have something to give me.' Or, 'The President said you have something to give me'—[Something] [a]long those lines."[230] In her February 1 handwritten statement to the OIC, which Ms. Lewinsky has testified was truthful, she stated: "Ms. Currie called Ms. L later that afternoon a[nd] said that *the Pres. had told her* [that] Ms. L wanted her to hold onto something for her. Ms. L boxed up most of the gifts she had received and gave them to Ms. Currie."[231]

Ms. Lewinsky testified that she understood that Ms. Currie was referring to gifts from the President when she mentioned "something for me."[232] Ms. Lewinsky testified that she was not surprised to receive the call, given her earlier discussion with the President.[233]

Ms. Currie testified that Ms. Lewinsky, not Ms. Currie, placed the call and raised the subject of transferring the gifts. In Ms. Currie's account, Ms. Lewinsky said that she (Ms. Lewinsky) was uncomfortable retaining the gifts herself because "people were asking questions about the stuff she had gotten."[234] Ms. Currie also testified that she did not remember the President telling her that Ms. Lewinsky wanted her to hold some items, and she did not remember later telling the President that she was holding the gifts for Ms. Lewinsky.[235] When asked if a contrary statement by Ms. Lewinsky—indicating that Ms. Currie had in fact spoken to the President about the gift transfer—would be false, Ms. Currie replied: "*Then she may remember better than I. I don't remember.*"[236]

According to both Ms. Currie and Ms. Lewinsky, Ms. Currie drove to Ms. Lewinsky's home later on December 28 for only the second time in her life.[237] Ms. Lewinsky gave her a sealed box that contained several gifts Ms. Lewinsky had received from the President, including the hat pin and one of the gifts he had given her that very morning.[238] Ms. Lewinsky wrote "Please do not throw away" on the box.[239] Ms. Currie then took the box and placed it in her home under her bed. Ms. Currie understood that the box contained gifts from the President, although she did not know the specific contents.[240] Ms. Lewinsky said that Ms. Currie did not seem

[228] Lewinsky 8/6/98 GJ at 166–67 (emphasis added).
[229] *Id.* at 154; Lewinsky 8/20/98 GJ at 71.
[230] Lewinsky 8/6/98 GJ at 154–55.
[231] Lewinsky 2/1/98 Statement at 7 (emphasis added); *see also* Lewinsky 8/6/98 GJ at 179; Lewinsky 8/20/98 GJ at 62 ("I was truthful in my [February 1] proffer").
[232] Lewinsky 8/6/98 GJ at 155.
[233] *Id.* at 154.
[234] Currie 1/27/98 GJ at 57–58.
[235] Currie 5/6/98 GJ at 105–06.
[236] *Id.* at 126 (emphasis added).
[237] *Id.* at 108.
[238] Lewinsky 8/6/98 GJ at 156–58.
[239] *Id.* at 158.
[240] Currie 5/6/98 GJ at 105, 107–08.

at all confused when Ms. Lewinsky handed over the box of gifts[241] and never asked about the contents.[242]

When Ms. Currie later produced the box to the OIC in response to a subpoena, the box contained a hat pin, two brooches, an inscribed official copy of the 1996 State of the Union Address, a photograph of the President in the Oval Office, an inscribed photograph of the President and Ms. Lewinsky, a sun dress, two t-shirts, and a baseball cap with a Black Dog logo.[243]

2. The President's Grand Jury Testimony

President Clinton testified that he had spoken to Ms. Lewinsky about gifts he had given her, but said the conversation may have occurred *before* she received the subpoena on December 19. He testified:

> *I did have a conversation with Ms. Lewinsky at some time about gifts, the gifts I'd given her.* I do not know whether it occurred on the 28th, or whether it occurred earlier. I do not know whether it occurred in person or whether it occurred on the telephone. I have searched my memory for this, because I know it's an important issue. * * * The reason I'm not sure it happened on the 28th is that my recollection is that Ms. Lewinsky said something to me like, what if they ask me about the gifts you've given me. That's the memory I have. That's why I question whether it happened on the 28th, because she had a subpoena with her, request for production. *And I told her that if they asked her for gifts, she'd have to give them whatever she had, that that's what the law was.*[244]

The President denied that he had asked Betty Currie to pick up a box of gifts from Ms. Lewinsky:

> Q: After you gave her the gifts on December 28th [1997], did you speak with your secretary, Ms. Currie, and ask her to pick up a box of gifts that were some compilation of gifts that Ms. Lewinsky would have——
>
> WJC: No, sir, I didn't do that.
>
> Q: ——to give to Ms. Currie?
>
> WJC: I did not do that.[245]
>
> * * * * * * *
>
> Q: [D]id you ever have a conversation with Betty Currie about gifts, or picking something up from Monica Lewinsky?
>
> WJC: I don't believe I did, sir. No.
>
> Q: You never told her anything to this effect, that Monica has something to give you?
>
> WJC: No, sir.[246]

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[241] Lewinsky 8/20/98 GJ at 72–73.
[242] Lewinsky 8/6/98 GJ at 158.
[243] FBI Receipt for Property Received, 1/23/98; 824–DC–00000001–2 (letter from Karl Metzner, attorney for Betty Currie, dated 1/23/98, to the OIC, listing items in the box).
[244] Clinton 8/17/98 GJ at 43–44 (emphasis added). In his grand jury testimony, the President repeated this "whatever you have" language several times. *Id.* at 45, 46–47, 115.
[245] *Id.* at 51.
[246] *Id.* at 114–15.

3. Summary of Gifts

The uncontroverted evidence demonstrates that the President had given gifts to Ms. Lewinsky before December 28, 1997; that the President told Ms. Lewinsky on the phone on December 17, 1997, that he had more gifts for her; that Ms. Lewinsky met with the President at the White House on December 28; that on the 28th, Ms. Lewinsky was concerned about retaining possession of the gifts the President had previously given her because they were under subpoena; that on the 28th, the President gave several Christmas gifts to Ms. Lewinsky; and that after that meeting, Ms. Lewinsky transferred some gifts (including one of the new gifts) to the President's personal secretary, Ms. Currie, who stored them under her bed in her home.

Ms. Lewinsky testified that she spoke to the President on December 28 about the gifts called for by the subpoena—in particular, the hat pin. The President agreed that they talked about gifts, but suggested that the conversation might have taken place before Ms. Lewinsky was subpoenaed on December 19. The President said, however, that his memory is unclear on the timing.[247]

The testimony conflicts as to what happened when Ms. Lewinsky raised the subject of gifts with the President and what happened later that day. The President testified that he told Ms. Lewinsky that "you have to give them whatever you have."[248] According to Ms. Lewinsky, she raised the possibility of hiding the gifts, and the President offered a somewhat neutral response.

Ms. Lewinsky testified that Betty Currie called her to retrieve the gifts soon after Ms. Lewinsky's conversation with the President. Ms. Currie says that she believes that Ms. Lewinsky called her about the gifts, but she says she has a dim memory of the events.[249]

The central factual question is whether the President orchestrated or approved the concealment of the gifts. The reasonable inference from the evidence is that he did.

1. The witnesses disagree about whether Ms. Currie called Ms. Lewinsky or Ms. Lewinsky called Ms. Currie. That issue is relevant because Ms. Currie would not have called Ms. Lewinsky about the gifts unless the President directed her to do so. Indeed, because she did not know of the gifts issue, there is no other way that Ms. Currie could have known to make such a call unless the President told her to do so.

Ms. Lewinsky's testimony on the issue is consistent and unequivocal. In her February 1, 1998, handwritten statement, she wrote: "Ms. Currie called Ms. L later that afternoon a[nd] said that *the Pres. had told her* Ms. L wanted her to hold onto something for her."[250] In her grand jury testimony, Ms. Lewinsky said that several hours after she left the White House, Ms. Currie called and said something along the lines of "The President said you have something to give me."[251]

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[247] *Id.* at 46–47.
[248] *Id.* at 46.
[249] Ms. Currie testified that she was taking St. John's Wort to try to remember, but it was not helping. Currie 7/22/98 GJ at 172.
[250] Lewinsky 2/1/98 Statement at 7 (emphasis added).
[251] Lewinsky 8/6/98 GJ at 154–55; *see also* Lewinsky 8/20/98 GJ at 70–72.

Ms. Currie's testimony is contrary but less clear. Ms. Currie has stated that Ms. Lewinsky called her, but her memory of the conversation, in contrast to Ms. Lewinsky's, generally has been hazy and uncertain. As to whether she had talked to the President about the gifts, for example, Ms. Currie initially said she had not, but then said that Ms. Lewinsky (who said that Ms. Currie *had* talked to the President) "may remember better than I. I don't remember." [252]

Ms. Lewinsky's testimony makes more sense than Ms. Currie's testimony. First, Ms. Lewinsky stated that if Ms. Currie had not called, Ms. Lewinsky simply would have kept the gifts (and perhaps thrown them away). [253] She would not have produced the gifts to Ms. Jones's attorneys. And she would *not* have given them to a friend or mother because she did not want to get anyone else involved. [254] She was not looking for someone else to take them. [255]

Also, Ms. Currie drove to Ms. Lewinsky's house to pick up the gifts. That was only the second time that Ms. Currie had ever gone there. [256] More generally, the person making the extra effort (in this case, Ms. Currie) is ordinarily the person requesting the favor.

2. Even if Ms. Lewinsky is mistaken and she did call Ms. Currie first, the evidence still leads clearly to the conclusion that the President orchestrated this transfer.

First, it is unlikely that Ms. Lewinsky would have involved Ms. Currie in this matter unless the President had indicated his assent when Ms. Lewinsky raised the issue with him earlier in the day. Indeed, there is a logical flaw in the President's story: If the President had truly suggested that Ms. Lewinsky produce the gifts to Ms. Jones's attorneys, Ms. Lewinsky obviously would not have turned around and called the President's personal secretary to give the gifts to her, in direct contravention of the President's instruction.

Second, it also is unlikely that Ms. Currie would have driven to Ms. Lewinsky's home, retrieved the gifts from Ms. Lewinsky, and stored them under her bed at home without being asked to do so by the President—at least, without checking with him. It would have been out of character for Ms. Currie to have taken such an action without the President's approval. For example, when helping Ms. Lewinsky in her job search, Ms. Currie said that she told the President of her plans and agreed that she "would not have tried to get Ms. Lewinsky a job if * * * [I] thought the President didn't want [me] to." [257]

3. Even if the President did not orchestrate the transfer to Ms. Currie, there is still substantial evidence that he encouraged the *concealment* and *non-production* of the gifts by Ms. Lewinsky. The President "hoped that this relationship would never become pub-

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[252] Currie 5/6/98 GJ at 126.

[253] Lewinsky 9/3/98 Int. at 2.

[254] *Id.*

[255] *Id.* In addition, under her immunity agreement, Ms. Lewinsky has no apparent motive to shift blame on this issue. In fact, just the opposite. If the truth were that she had called Ms. Currie, she could have said as much, and it would not have affected Ms. Lewinsky's legal rights or obligations at all. Moreover, she stated that does not want to harm the President with her truthful testimony. Lewinsky 8/26/98 Depo. at 69.

[256] Currie 5/6/98 GJ at 108.

[257] Currie 5/6/98 GJ at 32; *see also id.* at 44, 45.

lic."[258] The President gave Ms. Lewinsky new gifts on December 28, 1997. Given his desire to conceal the relationship, it makes no sense that the President would have given Ms. Lewinsky more gifts on the 28th unless he and Ms. Lewinsky understood that she would *not* produce all of her gifts in response to her subpoena.

4. The President had a motive to orchestrate the concealment of gifts, whether accomplished through Ms. Currie indirectly or through Ms. Lewinsky directly. The President knew that Ms. Lewinsky was concerned about the subpoena. Both of them were concerned that the gifts might raise questions about the relationship. By confirming that the gifts would not be produced, the President ensured that these questions would not arise.

The concealment of the gifts also ensured that the President could provide false and misleading statements about the gifts under oath at his deposition (as he did) without being concerned that Ms. Lewinsky might have produced gifts that the President was denying (or minimizing the number of). If Ms. Lewinsky had produced to Ms. Jones's attorneys all of the gifts that she had given to Ms. Currie, then the President could not plausibly have said "I don't recall" in response to the question, "[H]ave you ever given any gifts to Monica Lewinsky?" He could not have said, "I don't remember a specific gift."[259] Indeed, unless the President knew that Ms. Lewinsky had not complied with the subpoena, it is unlikely he would have risked lying about the number and nature of the gifts he had given her.

In analyzing the evidence on this issue, it also bears mention that President Clinton likely operated no differently with respect to the gifts than he did with respect to testimony. It is clear that he lied under oath and that Ms. Lewinsky filed a false affidavit after the President suggested she file an affidavit. So there is little reason that he would not have attempted to ensure (whether directly or subtly) that Ms. Lewinsky conceal the gifts as a corollary to their mutual lies under oath. (Also, it was the President's pattern to use Ms. Currie as an intermediary in dealing with Ms. Lewinsky.[260])

The President's apparent response to all of this is that Ms. Lewinsky *on her own* contacted Ms. Currie and involved her in this endeavor to hide subpoenaed evidence, and that Ms. Currie complied without checking with the President. Based on the testimony and behavior of both Ms. Currie and Ms. Lewinsky, those inferences fall outside the range of reasonable possibility.

There is substantial and credible information, therefore, that the President endeavored to obstruct justice by participating in the concealment of subpoenaed evidence.

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[258] Clinton 8/17/98 GJ at 106.

[259] Clinton 1/17/98 Depo. at 75.

[260] Lewinsky 8/20/98 GJ at 5 (Ms. Lewinsky could not visit the President unless Ms. Currie cleared her in); *see also* Lewinsky 7/31/98 Int. at 4–5 (Currie was "in the loop" when it came to keeping Lewinsky's relationship with the President discreet); Currie GJ 5/6/98 at 14–15, 57–58, 97–98.

B. JANUARY 5, 1998, NOTE TO THE PRESIDENT

1. Evidence Regarding the January 5, 1998 Note

On December 16, 1997, the President was served by Ms. Jones's attorneys with a request for production of documents, including documents relating to "Monica Lewisky" [sic]. The request placed upon the President a continuing obligation to preserve and produce responsive documents. Notes and letters from Ms. Lewinsky were responsive and relevant.

On January 4, 1998, Ms. Lewinsky left a book for the President with Ms. Currie.[261] Ms. Lewinsky had enclosed in the book a romantic note that she had written, inspired by a recent viewing of the movie *Titanic*.[262] In the note, Ms. Lewinsky told the President that she wanted to have sexual intercourse with him, at least once.[263]

On January 5, in the course of discussing her affidavit and possible testimony in a phone conversation with the President, Ms. Lewinsky says she told the President, "I shouldn't have written some of those things in the note."[264] According to Ms. Lewinsky, the President said that he agreed and that she should not write those kinds of things on paper.[265]

On January 15, President Clinton served responses to Ms. Jones's second set of document requests, which again asked for documents that related to "Monica Lewisky." The President stated that he had "no documents" responsive to this request.[266]

2. President Clinton's Testimony

The President remembered the book Ms. Lewinsky had given him about the Presidents and testified that he "did like it a lot."[267] President Clinton testified that he did not recall a romantic note enclosed in the book or when he had received it.[268]

3. Summary on January 5, 1998, Note

The request for production of documents that the President received from Ms. Jones's attorneys called for all documents reflecting communications between him and Ms. Lewinsky. The note given to him by Ms. Lewinsky on January 5, 1998, fell within that category and would have been revealing about the relationship. Indeed, had the note been produced, the President might have been foreclosed from denying a sexual relationship at his deposition. Based on Ms. Lewinsky's testimony, there is substantial and credible information that the President concealed or destroyed this note at a time when such documents were called for by the request for production of documents.[269]

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[261] Lewinsky 8/6/98 GJ at 189–91, 197–98.
[262] *Id.* at 189, 198.
[263] Lewinsky 9/3/98 Int. at 2.
[264] Lewinsky 8/6/98 GJ at 198.
[265] *Id.*
[266] V0002–DC–0000093–116.
[267] Clinton 8/17/98 GJ at 127.
[268] *Id.* at 49–50.
[269] President Clinton also committed perjury before the grand jury if he was involved in the concealment of the gifts.

VI. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT

(i) President Clinton and Ms. Lewinsky had an understanding that they would lie under oath in the *Jones* case about their relationship; and

(ii) President Clinton endeavored to obstruct justice by suggesting that Ms. Lewinsky file an affidavit so that she would not be deposed, she would not contradict his testimony, and he could attempt to avoid questions about Ms. Lewinsky at his deposition.

Based on their conversations and their past practice, both the President and Ms. Lewinsky understood that they would lie under oath in the *Jones* case about their sexual relationship, as part of a scheme to obstruct justice in the *Jones* case. In pursuing this effort:

- the President suggested that Monica Lewinsky file an affidavit, which he knew would be false;
- the President had an interest in Ms. Lewinsky's false affidavit because it would "lock in" her testimony, allowing the President to deny the sexual relationship under oath without fear of contradiction;
- Ms. Lewinsky signed and, on January 16, sent to the Court the false affidavit denying a sexual relationship with the President as part of a motion to quash her deposition subpoena;
- the President's attorney used the affidavit to object to questions about Ms. Lewinsky at his January 17 deposition; and
- when that failed, the President also lied under oath about the relationship with Ms. Lewinsky at his civil deposition, including by the use of "cover stories" that he and Ms. Lewinsky had devised.

A. EVIDENCE REGARDING AFFIDAVIT AND USE OF AFFIDAVIT

Monica Lewinsky testified that President Clinton called her at around 2:00 or 2:30 a.m. on December 17, 1997,[270] and told her that her name was on the *Jones* case witness list.[271] As noted in her February 1 handwritten statement: "When asked what to do if she was subpoenaed, the Pres. suggested she could sign an affidavit.* * *"[272] Ms. Lewinsky said she is "100% sure" that the President suggested that she might want to sign an affidavit.[273]

Ms. Lewinsky understood the President's advice to mean that she might be able to execute an affidavit that would not disclose the true nature of their relationship. In order "to prevent me from

[270] Lewinsky 8/6/98 GJ at 121–22.
[271] *Id.* at 122–23.
[272] Lewinsky 2/1/98 Statement at 4.
[273] Lewinsky 8/19/98 Int. at 4–5; *see also* Lewinsky 8/6/98 GJ at 123.

being deposed," she said she would need an affidavit that "could range from anywhere between maybe just somehow mentioning, you know, innocuous things or going as far as maybe having to deny any kind of relationship."[274]

Ms. Lewinsky has stated that the President never *explicitly* told her to lie. Instead, as she explained, they both understood from their conversations that they would continue their pattern of covering up and lying about the relationship. In that regard, the President never said they must now tell the truth under oath; to the contrary, as Ms. Lewinsky stated:

> [I]t wasn't as if the President called me and said, "You know, Monica, you're on the witness list, this is going to be really hard for us, we're going to have to tell the truth and be humiliated in front of the entire world about what we've done," which I would have fought him on probably. *That was different. And by him not calling me and saying that, you know, I knew what that meant.*[275]

Ms. Jones's lawyers served Ms. Lewinsky with a subpoena on December 19, 1997. Ms. Lewinsky contacted Vernon Jordan, who in turn put her in contact with attorney Frank Carter.[276] Based on the information that Ms. Lewinsky provided, Mr. Carter prepared an affidavit which stated: "I have never had a sexual relationship with the President."[277]

After Mr. Carter drafted the affidavit, Ms. Lewinsky spoke to the President by phone on January 5th.[278] She asked the President if he wanted to see the draft affidavit. According to Ms. Lewinsky, the President replied that he did not need to see it because he had already "seen 15 others."[279]

Mr. Jordan confirmed that President Clinton knew that Ms. Lewinsky planned to execute an affidavit denying a sexual relationship.[280] Mr. Jordan further testified that he informed President Clinton when Ms. Lewinsky signed the affidavit.[281] Ms. Lewinsky's affidavit was sent to the federal court in Arkansas on January 16, 1998—the day before the President's deposition—as part of her motion to quash the deposition subpoena.

Two days before the President's deposition, his lawyer, Robert Bennett, obtained a copy of Ms. Lewinsky's affidavit from Mr. Carter.[282] At the President's deposition, Ms. Jones's counsel asked questions about the President's relationship with Ms. Lewinsky. Mr. Bennett objected to the "innuendo" of the questions, noting that Ms. Lewinsky had signed an affidavit denying a sexual relationship, which according to Mr. Bennett, indicated that "*there is absolutely no sex of any kind in any manner, shape or form.*"[283] Mr.

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[274] *Id.* at 124.
[275] *Id.* at 234 (emphasis added).
[276] *Id.* at 145–48.
[277] Lewinsky Affidavit, Jan. 7, 1998, ¶ 8 (849–DC–00000634).
[278] Ms. Lewinsky spoke to one of her friends, Catherine Allday Davis in early January. Ms. Lewinsky informed her of her situation. Ms. Davis said that "I was very scared for her" and "I didn't want to see her being like Susan McDougal." Catherine Davis 3/17/98 GJ at 80. Ms. Davis said that she did not want Monica "to lie to protect the President." *Id.* at 173.
[279] Lewinsky 2/1/98 Statement at 9; *see also* Lewinsky 8/19/98 Int. at 4.
[280] Jordan 5/5/98 GJ at 223–25.
[281] *Id.* at 223–25.
[282] Carter 6/18/98 GJ at 113.
[283] Clinton 1/17/98 Depo. at 54.

Bennett said that the President was "fully aware of Ms. Lewinsky's affidavit."[284] Mr. Bennett affirmatively used the affidavit in an effort to cut off questioning. The President said nothing—even though, as he knew, the affidavit was false. Judge Wright overruled the objection and allowed the questioning to continue.

Later, Mr. Bennett read Ms. Lewinsky's affidavit denying a "sexual relationship" to the President and asked him: "Is that a true and accurate statement as far as you know it?" The President answered: "*That is absolutely true*."[285]

B. SUMMARY OF PRESIDENT'S GRAND JURY TESTIMONY

The President told the grand jury: "[D]id I hope [Ms. Lewinsky would] be able to get out of testifying on an affidavit? Absolutely. Did I want her to execute a false affidavit? No, I did not."[286] The President did not explain how a full and truthful affidavit—for example, an affidavit admitting that they engaged in oral sex and that Vernon Jordan had been involved, at the President's request, in late 1997 and early 1998 in obtaining Ms. Lewinsky a job—would have helped her avoid a deposition.

When questioned about his phone conversation with Ms. Lewinsky on December 17, 1997—during which the President suggested filing an affidavit—the President testified that he did not remember exactly what he had said.[287] The President also maintained that Ms. Lewinsky's affidavit, as it ultimately was filed denying a "sexual relationship," was not necessarily inaccurate. He testified that, depending on Ms. Lewinsky's state of mind, her statement denying a sexual relationship could have been true.

> I believe at the time that she filled out this affidavit, *if she believed that the definition of sexual relationship was two people having intercourse, then this is accurate. And I believe that is the definition that most ordinary Americans would give it.*[288]

At his grand jury appearance, the President also was asked about his counsel's statement to Judge Wright that Ms. Lewinsky's affidavit denying a "sexual relationship" was equivalent to saying "there is absolutely no sex of any kind in any manner, shape or form" with President Clinton. Given the President's interpretation of the term "sexual relationship" to require sexual intercourse, the President was asked how he lawfully could have sat silent while his attorney—in the President's presence and on his behalf—made a false statement to a United States District Judge in an effort to forestall further questioning. The President offered several responses.

First, the President maintained that he was not paying "much attention" when Mr. Bennett said that there is "absolutely no sex of any kind" between the President and Ms. Lewinsky."[289] The President further stated: "That moment, that whole argument just

[284] *Id.* at 54.
[285] *Id.* at 204 (emphasis added).
[286] Clinton 8/17/98 GJ at 120. *See also id.* at 82 ("I was glad she saw a lawyer. I was glad she was doing an affidavit.").
[287] Clinton 8/17/98 GJ at 117.
[288] *Id.* at 22 (emphasis added).
[289] *Id.* at 25.

passed me by. I was a witness."[290] The President's explanation is difficult to reconcile with the videotape of the deposition, which shows that the President was looking in Mr. Bennett's direction when his counsel made this statement.

Alternatively, the President contended that when Mr. Bennett said that "there *is* absolutely no sex of any kind," Mr. Bennett was speaking only in the present tense and thus was making a completely true statement. The President further stated: "*It depends on what the meaning of the word 'is' is,"*[291] and that "actually, in the present tense that is an accurate statement."[292] Before the grand jury, counsel for the OIC then asked the President: "Do you mean today that because you were not engaging in sexual activity with Ms. Lewinsky during the deposition that the statement of Mr. Bennett might be literally true?"[293] The President responded: "No, sir. I mean that at the time of the deposition, it had been—that was well beyond any point of improper contact between me and Ms. Lewinsky."[294] The President's suggestion that he might have engaged in such a detailed parsing of the words at his deposition is at odds with his assertion that the "whole argument passed me by."

Finally, the President took issue with the notion that he had any duty to prevent his attorney from making a false statement to Judge Wright: "Mr. Bennett was representing me. I wasn't representing him."[295] That is a truism. Yet when a witness is knowingly responsible for a misstatement of fact to a federal judge that misleads the Court and attempts to prevent questioning on a relevant subject, that conduct rises to the level of an obstruction of justice.

C. EVIDENCE REGARDING COVER STORIES

The affidavit was not the only part of the scheme in which both the President and Ms. Lewinsky would lie under oath. Ms. Lewinsky testified that, as part of their mutual concealment efforts, she and President Clinton formulated "cover stories" to explain Ms. Lewinsky's presence in the West Wing and Oval Office. When Ms. Lewinsky worked at the White House, she and the President agreed that Ms. Lewinsky would tell people that she was coming to the Oval Office to deliver papers or to have papers signed, when in truth she was going to the Oval Office to have a sexual encounter with the President.[296]

While employed at the White House, Ms. Lewinsky used this cover story on several occasions.[297] It worked: Several Secret Service officers testified that they understood that Ms. Lewinsky was at the Oval Office to deliver or to pick up papers.[298] In fact, however, Ms. Lewinsky stated that her White House job never required

[290] *Id.* at 30.
[291] *Id.* at 59 (emphasis added).
[292] *Id.* at 20.
[293] *Id.* at 61.
[294] *Id.* at 61-62.
[295] *Id.* at 26.
[296] Lewinsky 8/6/98 GJ at 53–54 (Q: "When you say that you planned to bring papers, did you ever discuss with the President the fact that you would try to use that as a cover?" ML: "Yes.").
[297] Muskett 7/21/98 GJ at 25–26, 83, 89–90; Fox 2/17/98 GJ at 34–35.
[298] Householder 8/13/98 GJ at 11; Byrne 7/30/98 GJ at 9, 16, 30, 37; Garabito 7/30/98 GJ at 17. Other Secret Service officers testified that they saw Ms. Lewinsky in the West Wing carrying paperwork. Moore 7/30/98 GJ at 25–26; Overstreet 8/11/98 GJ at 7; Wilson 7/23/98 GJ at 32.

her to deliver papers or obtain the President's signature, although she carried papers as a prop.[299]

After she was transferred to the Pentagon, Ms. Lewinsky testified that she and the President formulated a second "cover story": that Ms. Lewinsky was going to the White House to visit Betty Currie rather than the President. Ms. Lewinsky testified that she and the President discussed how "Betty always needed to be the one to clear me in so that, you know, I could always say I was coming to see Betty."[300] Ms. Lewinsky testified that she met with the President privately on ten occasions after she left her job at the White House.[301] Ms. Currie signed her in for each of those private visits.[302]

Ms. Lewinsky has stated that her true purpose in visiting the White House on these occasions was to see President Clinton, not Ms. Currie.[303] President Clinton agreed that "just about every time" that Ms. Lewinsky came to see Ms. Currie when he was there, Ms. Lewinsky saw him as well.[304]

Ms. Lewinsky testified that President Clinton encouraged her to continue to use the cover stories to conceal their relationship *after* her name appeared on the witness list in the *Jones* case. In her early-morning phone conversation with President Clinton on December 17, 1997—the same conversation in which the President told her that her name was on the witness list and suggested that she file an affidavit if subpoenaed[305]—Ms. Lewinsky discussed cover stories with the President:

> ML: At some point in the conversation, and I don't know if it was before or after the subject of the affidavit came up, he sort of said, "*You know, you can always say you were coming to see Betty or that you were bringing me letters." Which I understood was really a reminder of things that we had discussed before.*
>
> Q: So when you say things you had discussed, sort of ruses that you had developed.
>
> ML: Right. I mean, this was—this was something that—that was instantly familiar to me.
>
> Q: Right.
>
> ML: *And I knew exactly what he meant.*
>
> Q: Had you talked with him earlier about these false explanations about what you were doing visiting him on several occasions?
>
> ML: Several occasions throughout the entire relationship. Yes. *It was the pattern of the relationship, to sort of conceal it.*[306]

President Clinton used those same deceptive cover stories during his deposition in the *Jones* case. In the civil deposition, when asked

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[299] Lewinsky 8/6/98 GJ at 54–55.
[300] *Id.* at 55.
[301] *Id.* at 27–28; GJ Exhibit ML–7. Ms. Lewinsky testified that she met with the President in private after she left her position at the White House on eleven dates in 1997: February 28 (following the radio address), March 29, May 24, July 4, July 14, July 24, August 16, October 11, November 13, December 6, and December 28.
[302] See Appendix, Tab E (Table of Recorded Visits).
[303] Lewinsky 8/6/98 GJ at 55.
[304] Clinton 8/17/98 GJ at 117.
[305] Lewinsky 8/6/98 GJ at 123.
[306] *Id.* at 123–24 (emphasis added).

if he had met with Ms. Lewinsky "several times" while she worked at the White House, the President responded that he had seen her on two or three occasions during the government shutdown, "and then when she worked at the White House, I think there was one or two other times *when she brought some documents to me.*" [307] When asked if he was ever alone with Ms. Lewinsky in the Oval Office, the President stated:

> [W]hen she worked at the legislative affairs office, they always had somebody there on the weekends. * * * *Sometimes they'd bring me things on the weekends.* In that case, whatever time she would be in there, drop it off, exchange a few words and go, she was there. * * * It's possible that she, in, while she was working there, brought something to me and that at the time she brought it to me, she was the only person there, That's possible.[308]

The pattern of devising cover stories in an effort to forestall an inquiry into the relationship continued even after Ms. Lewinsky was subpoenaed to testify. On January 5, 1998, she met with her attorney, Frank Carter, and discussed questions that she might be asked at a deposition. One of the questions was how she had obtained her Pentagon job. Ms. Lewinsky worried that if the *Jones* lawyers checked with the White House about the transfer, some at the White House would say unflattering things about why she had been terminated.[309] Ms. Lewinsky spoke to President Clinton on the phone that evening and asked for advice on how to answer the question. Ms. Lewinsky testified that the President responded, "*[Y]ou could always say* that the people in Legislative Affairs got it for you or helped you get it"—a story that Ms. Lewinsky stated was misleading because Ms. Lewinsky in fact had been transferred because she was around the Oval Office too much.[310] President Clinton knew the truth.

D. THE PRESIDENT'S GRAND JURY TESTIMONY ON COVER STORIES

The President testified that *before* he knew that Ms. Lewinsky was a witness in the *Jones* case, he "might well" have told Ms. Lewinsky that she could offer the cover stories if questioned about her presence in the West Wing and Oval Office:

> Q: Did you ever say anything like that, you can always say that you were coming to see Betty or bringing me letters? Was that part of any kind of a, anything you said to her or a cover story, before you had any idea she was going to be part of Paula Jones?
>
> WJC: I might well have said that.
>
> Q: Okay.
>
> WJC: Because I certainly didn't want this to come out, if I could help it. And I was concerned about that. I was embarrassed about it. I knew it was wrong.[311]

However, no doubt aware of the significance of the question, the President testified that he did not remember whether he had dis-

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[307] Clinton 1/17/98 at 50–51 (emphasis added).

[308] *Id.* at 52–53.

[309] *Id.* at 192–93 (emphasis added).

[310] *Id.* at 197.

[311] Clinton 8/17/98 GJ at 119.

cussed the cover stories with Ms. Lewinsky during the December 17, 1997, conversation,[312] or at any time *after* Ms. Lewinsky's name appeared on the *Jones* witness list:

> Q: Did you tell [Ms. Lewinsky] anytime in December something to that effect: You know, you can always say that you were coming to see Betty or you were bringing me letters? Did you say that, or anything like that, in December '97 or January '98, to Monica Lewinsky?
>
> WJC: Well, that's a very broad question. I do not recall saying anything like that *in connection with her testimony.* I could tell you what I do remember saying, if you want to know. But I don't—we might have talked about what to do in a nonlegal context at some point in the past, but I have no specific memory of that conversation.
>
> I do remember what I said to her about the possible testimony.
>
> * * * * * * *
>
> Q: Did you say anything like [the cover stories] once you knew or thought she might be a witness in the Jones case? Did you repeat the statement, or something like it to her?
>
> WJC: *Well, again, I don't recall, and I don't recall whether I might have done something like that, for example, if somebody says, what if the reporters ask me this, that or the other thing.* I can tell you this: In the context of whether she could be a witness, I have a recollection that she asked me, well, what do I do if I get called as a witness, and I said, you have to get a lawyer. And that's all I said. And I never asked her to lie.
>
> Q: Did you tell her to tell the truth?
>
> WJC: Well, I think the implication was she would tell the truth.[313]

E. SUMMARY

There is substantial and credible information that the President and Ms. Lewinsky reached an understanding that both of them would lie under oath when asked whether they had a sexual relationship (a conspiracy to obstruct justice or to commit perjury, in criminal law terms). Indeed, a tacit or express agreement to make false statements would have been an essential part of their December and January discussions, lest one of the two testify truthfully in the *Jones* case and thereby incriminate the other as a perjurer.

There also is substantial and credible information that President Clinton endeavored to obstruct justice by suggesting that Ms. Lewinsky file an affidavit to avoid her deposition, which would "lock in" her testimony under oath, and to attempt to avoid ques-

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[312] *Id.* at 117. According to Ms. Lewinsky, this was the conversation in which the President told her that her name was on the *Jones* witness list, and in which she and the President discussed her filing an affidavit and the continued use of cover stories. Lewinsky 8/6/98 GJ at 121–23.

[313] Clinton 8/17/98 GJ at 118, 119–20 (emphasis added). The President repeated at several other points in his testimony that he did not remember what he said to Ms. Lewinsky in the phone conversation on December 17. *See id.* at 117 ("I don't remember exactly what I told her that night."); *id.* at 118–19 ("you are trying to get me to characterize something [the cover stories] that I'm—that I don't know if I said or not").

tions at his own deposition—all to impede the gathering of discoverable evidence in the *Jones* v. *Clinton* litigation.[314]

During the course of their relationship, the President and Ms. Lewinsky also discussed and used cover stories to justify her presence in and around the Oval Office area. The evidence indicates—given Ms. Lewinsky's unambiguous testimony and the President's lack of memory, as well as the fact that they both planned to lie under oath—that the President suggested the continued use of the cover stories even after Ms. Lewinsky was named as a potential witness in the *Jones* litigation. At no time did the President tell Ms. Lewinsky to abandon these stories and to tell the truth about her visits, nor did he ever indicate to her that she should tell the truth under oath about the relationship. While the President testified that he could not remember such conversations about the cover stories, he had repeated the substance of the cover stories in his *Jones* deposition. The President's use of false cover stories in testimony *under oath* in his *Jones* deposition strongly corroborates Ms. Lewinsky's testimony that he suggested them to her on December 17 as a means of avoiding disclosure of the truth of their relationship.

[314] The OIC is aware of no evidence that Mr. Bennett knew that Ms. Lewinsky's affidavit was false at the time of the President's deposition.

VII. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT PRESIDENT CLINTON ENDEAVORED TO OBSTRUCT JUSTICE BY HELPING MS. LEWINSKY OBTAIN A JOB IN NEW YORK AT A TIME WHEN SHE WOULD HAVE BEEN A WITNESS AGAINST HIM WERE SHE TO TELL THE TRUTH DURING THE JONES CASE.

The President had an incentive to keep Ms. Lewinsky from jeopardizing the secrecy of the relationship. That incentive grew once the Supreme Court unanimously decided in May 1997 that the case and discovery process were to go forward.

At various times during the *Jones* discovery process, the President and those working on his behalf devoted substantial time and attention to help Ms. Lewinsky obtain a job in the private sector.

A. EVIDENCE

The entire saga of Ms. Lewinsky's job search and the President's assistance in that search is discussed in detail in the Narrative section of this Referral. We summarize and analyze the key events and dates here.

Ms. Lewinsky first mentioned her desire to move to New York in a letter to the President on July 3, 1997. The letter recounted her frustration that she had not received an offer to return to work at the White House.[315]

On October 1, the President was served with interrogatories asking about his sexual relationships with women other than Mrs. Clinton.[316] On October 7, 1997, Ms. Lewinsky couriered a letter expressing dissatisfaction with her job search to the President.[317] In response, Ms. Lewinsky said she received a late-night call from President Clinton on October 9, 1997. She said that the President told her he would start helping her find a job in New York.[318]

The following Saturday, October 11, 1997, Ms. Lewinsky met with President Clinton alone in the Oval Office dining room from 9:36 a.m. until about 10:54 a.m. In that meeting, she furnished the President a list of New York jobs in which she was interested.[319] Ms. Lewinsky mentioned to the President that she would need a reference from someone in the White House; the President said he would take care of it.[320] Ms. Lewinsky also suggested to the President that Vernon Jordan might be able to help her, and President

[315] Lewinsky 8/6/98 GJ at 67–69.
[316] 849–DC–00000002–10.
[317] Ms. Lewinsky said that on October 6, 1997, she had been told by Linda Tripp that a friend of Tripp's at the National Security Council had reported that Lewinsky would not be getting a White House job. Ms. Lewinsky said that at that point she finally decided to move to New York. Lewinsky 7/31/98 Int. at 9–10.
[318] *Id.* at 10–11.
[319] *Id.* at 11.
[320] Lewinsky 8/13/98 Int. at 2–3.

Clinton agreed.[321] Immediately after the meeting, President Clinton spoke with Mr. Jordan by telephone.[322]

According to White House Chief of Staff Erskine Bowles, at some time in the summer or fall of 1997, President Clinton raised the subject of Monica Lewinsky and stated that "she was unhappy where she was working and wanted to come back and work at the OEOB [Old Executive Office Building]; and could we take a look." [323] Mr. Bowles referred the matter to Deputy Chief of Staff John Podesta.[324]

Mr. Podesta said he asked Betty Currie to have Ms. Lewinsky call him, but heard nothing until about October 1997, when Ms. Currie told him that Ms. Lewinsky was looking for opportunities in New York.[325] The Ambassador to the United Nations, Bill Richardson, said that Mr. Podesta told him that Ms. Currie had a friend looking for a position in New York.[326]

According to Ms. Lewinsky, Ambassador Richardson called her on October 21, 1997,[327] and interviewed her soon thereafter. She was then offered a position at the UN.[328] Ms. Lewinsky was unenthusiastic.[329] During the latter part of October 1997, the President and Ms. Lewinsky discussed enlisting Vernon Jordan to aid in pursuing private-sector possibilities.[330]

On November 5, 1997, Ms. Lewinsky met Mr. Jordan in his law office. Mr. Jordan told Ms. Lewinsky that she came "highly recommended." [331] Ms. Lewinsky explained that she hoped to move to New York, and went over her list of possible employers.[332] Mr. Jordan telephoned President Clinton shortly after the meeting.[333]

Ms. Lewinsky had no contact with the President or Mr. Jordan for another month.[334] On December 5, 1997, however, the parties in the *Jones* case exchanged witness lists. Ms. Jones's attorneys listed Ms. Lewinsky as a potential witness. The President testified that he learned that Ms. Lewinsky was on the list late in the day on December 6.[335]

The effort to obtain a job for Ms. Lewinsky then intensified. On December 7, President Clinton met with Mr. Jordan at the White

[321] Lewinsky 8/6/98 GJ at 103–04.

[322] 968–DC–00003569 (Presidential call log).

[323] Bowles 4/2/98 GJ at 67.

[324] *Id.* at 70.

[325] Podesta 2/5/98 GJ at 31–33, 35, 40–41.

[326] Richardson 4/30/98 Depo. at 28.

[327] Lewinsky 7/31/98 Int. at 12. Ms. Lewinsky said that she spoke to President Clinton about the phone call on October 23, during which she suggested to the President that she was interested in some job other than at the United Nations. *Id.* According to Ms. Lewinsky, the President replied that he just wanted her to have some options. *Id.*

Ms. Lewinsky said that she spoke to the President again on October 30 about the interview, in which she expressed anxiety about meeting with the Ambassador. Ms. Lewinsky said that the President told her to call Betty Currie after the interview so he would know how the interview went. *Id.* at 13.

[328] Lewinsky 7/31/98 Int. at 14.

[329] Lewinsky 8/26/98 Depo. at 67; Lewinsky 7/31/98 Int. at 14.

[330] Lewinsky 7/31/98 Int. at 14.

[331] *Id.* at 15. Ms. Lewinsky related this incident to her friend, Catherine Allday Davis, in a near-contemporaneous email. 1037–DC–00000017. *See also* Catherine Davis 3/17/98 GJ at 124.

[332] Lewinsky 7/31/98 Int. at 14–15.

[333] V004–DC–00000135 (Akin Gump phone records); Jordan 5/5/98 GJ at 52–55.

[334] Lewinsky 8/6/98 GJ at 26–27 and GJ Exhibit ML–7. Ms. Lewinsky stated that just before Thanksgiving, 1997, she called Betty Currie and asked her to contact Vernon Jordan and prod him along in the job search. Lewinsky 8/4/98 Int. at 8. It was Ms. Lewinsky's understanding that Jordan was helping her at the request of the President and Ms. Currie. *Id.*

[335] *See* Clinton 8/17/98 GJ at 84–85. Under the federal witness tampering statutes, it is a crime to corruptly persuade a witness to alter his testimony. *See* 18 U.S.C. §§ 1503, 1512.

House.[336] Ms. Lewinsky met with Mr. Jordan on December 11 to discuss specific job contacts in New York. Mr. Jordan gave her the names of some of his business contacts.[337] He then made calls to contacts at MacAndrews & Forbes (the parent corporation of Revlon), American Express, and Young & Rubicam.[338]

Mr. Jordan also telephoned President Clinton to keep him informed of the efforts to help Ms. Lewinsky. Mr. Jordan testified that President Clinton was aware that people were trying to get jobs for her, that Mr. Podesta was trying to help her, that Bill Richardson was trying to help her, but that she wanted to work in the private sector.[339]

On the same day of Ms. Lewinsky's meeting with Mr. Jordan, December 11, Judge Wright ordered President Clinton, over his objection, to answer certain written interrogatories as part of the discovery process in *Jones*. Those interrogatories required, among other things, the President to identify any government employees since 1986 with whom he had engaged in sexual relations (a term undefined for purposes of the interrogatory).[340] On December 16, the President's attorneys received a request for production of documents that mentioned Monica Lewinsky by name.

On December 17, 1997, according to Ms. Lewinsky, President Clinton called her in the early morning and told her that she was on the witness list, and they discussed their cover stories.[341] On December 18 and December 23, she interviewed for jobs with New York-based companies that had been contacted by Mr. Jordan.[342] On December 19, Ms. Lewinsky was served with a deposition subpoena by Ms. Jones's lawyers.[343] On December 22, 1997, Mr. Jordan took her to her new attorney; she and Mr. Jordan discussed the subpoena, the Jones case, and her job search during the course of the ride.[344]

The President answered the "other women" interrogatory on December 23, 1997, by declaring under oath: "None."[345]

On Sunday, December 28, 1997, Monica Lewinsky and the President met in the Oval Office.[346] During that meeting, the President and Ms. Lewinsky discussed both her move to New York and her involvement in the *Jones* suit.[347]

On January 5, 1998, Ms. Lewinsky declined the United Nations offer.[348] On January 7, 1998, Ms. Lewinsky signed the affidavit denying the relationship with President Clinton (she had talked on

[336] 1178–DC–00000026 (WAVES records).
[337] Lewinsky 8/4/98 Int. at 2.
[338] Jordan 3/3/98 GJ at 48–49.
[339] *Id.* at 65.
[340] 921–DC–000000459–66.
[341] Lewinsky 8/6/98 GJ at 121–23.
[342] *Id.* at 121; Lewinsky 8/1/98 Int. at 6, 10.
[343] Lewinsky 8/6/98 GJ at 127–28.
[344] *Id.* at 138–41; Lewinsky 2/1/98 Statement at 6; *cf.* Jordan 3/3/98 GJ at 182–90 (recalls discussion of job search only).
[345] V002–DC–000000052 (President Clinton's Supplemental Responses to Plaintiff's Second Set of Interrogatories).
[346] Lewinsky 8/6/98 GJ at 149.
[347] Lewinsky 8/6/98 GJ at 151–52; Lewinsky 7/27/98 Int. at 7. This was the same meeting where the President and Ms. Lewinsky discussed their concerns over the Lewinsky subpoena and its demand for the production of gifts.
[348] Sutphen 5/27/98 Depo. at 39; Lewinsky 7/27/98 Int. at 5.

the phone to the President on January 5 about it).[349] Mr. Jordan informed the President of her action.[350]

The next day, on January 8, 1998, Ms. Lewinsky interviewed in New York with MacAndrews & Forbes, a company recommended by Vernon Jordan. The interview went poorly. Mr. Jordan then called Ronald Perelman, the Chairman of the Board at MacAndrews & Forbes. Mr. Perelman said Ms. Lewinsky should not worry, and that someone would call her back for another interview. Mr. Jordan relayed this message to Ms. Lewinsky, and someone called back that day.[351]

Ms. Lewinsky interviewed again the next morning, and a few hours later received an informal offer for a position.[352] She told Mr. Jordan of the offer, and Mr. Jordan then notified President Clinton with the news: "*Mission accomplished.*" [353]

On January 12, 1998, Ms. Jones's attorneys informed Judge Wright that they might call Monica Lewinsky as a trial witness.[354] Judge Wright stated that she would allow witnesses with whom the President had worked, such as Ms. Lewinsky, to be trial witnesses.[355]

In a call on January 13, 1998, a Revlon employee formalized the job offer, and asked Ms. Lewinsky to provide references.[356] Either that day or the next, President Clinton told Erskine Bowles that Ms. Lewinsky "had found a job in the * * * private sector, and she had listed John Hilley as a reference, and could we see if he could recommend her, if asked." [357] Thereafter, Mr. Bowles took the President's request to Deputy Chief of Staff John Podesta, who in turn spoke to Mr. Hilley about writing a letter of recommendation. After speaking with Mr. Podesta, Mr. Hilley agreed to write such a letter, but cautioned it would be a "generic" one.[358] On January 14, at approximately 11:17 a.m., Ms. Lewinsky faxed her letter of acceptance to Revlon and listed Mr. Hilley as a reference.[359]

On January 15, the President responded to the December 15 request for production of documents relating to Monica Lewinsky by answering "none." On January 16, Ms. Lewinsky's attorney sent to the District Court in the *Jones* case her affidavit denying a "sexual relationship" with the President.[360] The next day, on January 17, the President was deposed and his attorney used her affidavit as the President similarly denied a "sexual relationship."

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[349] Lewinsky 8/6/98 GJ at 191–98, 205–06.
[350] Jordan 5/5/98 GJ at 223–25.
[351] *Id.* at 232; Lewinsky 8/6/98 GJ at 209.
[352] Lewinsky 8/6/98 GJ at 208–10.
[353] Jordan 5/28/98 GJ at 39 (emphasis added).
[354] Ms. Jones's attorney named the "other women" he planned to call at trial:

> Mr. Fisher: They would include * * * Monica Lewinsky.
> Judge Wright: Can you tell me who she is?
> Mr. Fisher: Yes, your Honor.
> Judge Wright: I never heard of her.
> Mr. Fisher: She's the young woman who worked in the White House for a period of time and was later transferred to a job in the Pentagon.

1414–DC–00001327–28.
[355] 1414–DC–00001334–46.
[356] Lewinsky 8/6/98 GJ at 214.
[357] Bowles 4/2/98 GJ at 78–79.
[358] Hilley 5/19/98 GJ at 74; Hilley 5/26/98 GJ at 11.
[359] 830–DC–0000007.
[360] 921–DC–00000775–78; 1292–DC–000000661–86.

B. SUMMARY

When a party in a lawsuit (or investigation) provides job or financial assistance to a witness, a question arises as to possible witness tampering. The critical question centers on the intent of the party providing the assistance. Direct evidence of that intent often is unavailable. Indeed, in some cases, the witness receiving the job assistance may not even know that the party providing the assistance was motivated by a desire to stay on good terms with the witness during the pending legal proceeding.[361] Similarly, others who are enlisted in the party's effort to influence the witness's testimony by providing job assistance may not be aware of the party's motivation and intent.

One can draw inferences about the party's intent from circumstantial evidence. In this case, the President assisted Ms. Lewinsky in her job search in late 1997, at a time when she would have become a witness harmful to him in the *Jones* case *were she to testify truthfully.* The President did not act half-heartedly. His assistance led to the involvement of the Ambassador to the United Nations, one of the country's leading business figures (Mr. Perelman), and one of the country's leading attorneys (Vernon Jordan).

The question, therefore, is whether the President's efforts in obtaining a job for Ms. Lewinsky were to influence her testimony[362] or simply to help an ex-intimate without concern for her testimony. Three key facts are essential in analyzing his actions: (i) the chronology of events, (ii) the fact that the President and Ms. Lewinsky *both* intended to lie under oath about the relationship, and (iii) the fact that it was critical for the President that Ms. Lewinsky lie under oath.

There is substantial and credible information that the President assisted Ms. Lewinsky in her job search motivated at least in part by his desire to keep her "on the team" in the *Jones* litigation.

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[361] The arrangement may not be explicitly spelled out. In this case, for example, there is no evidence that Ms. Lewinsky received an explicit proposal where someone said, "I'll give you a job if you lie under oath."

[362] In a recorded conversation, Ms. Lewinsky discussed the job assistance various individuals, including Vernon Jordan, gave Webster Hubbell, and she expressed her concern that someone could similarly consider the assistance she was provided as improper in some manner: "I think somebody could construe, okay? Somebody could construe or say, 'Well, they gave her a job to shut her up. They made her happy.'" T2 at 11.

VIII. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT THE PRESIDENT LIED UNDER OATH IN DESCRIBING HIS CONVERSATIONS WITH VERNON JORDAN ABOUT MS. LEWINSKY.

President Clinton was asked during his civil deposition whether he had talked to Mr. Jordan about Ms. Lewinsky's involvement in the *Jones* case. The President stated that he knew Mr. Jordan had talked to Ms. Lewinsky about her move to New York, but stated that he did not recall whether Mr. Jordan had talked to Ms. Lewinsky about her involvement in the *Jones* case. The testimony was false. A lie under oath about these conversations was necessary to avoid inquiry into whether Ms. Lewinsky's job and her testimony were improperly related.

A. PRESIDENT'S TESTIMONY IN THE JONES CASE

The President was questioned in his civil deposition about his conversations with Vernon Jordan regarding Ms. Lewinsky and her role in the *Jones* case. Beforehand, the President was asked a general question:

> Q: Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?
>
> WJC: *I don't think so.*[363]

The President later testified in more detail about conversations he may have had with Mr. Jordan concerning Ms. Lewinsky's role in the case:

> Q: Excluding conversations that you may have had with Mr. Bennett or any of your attorneys in this case, within the past two weeks has anyone reported to you that they had had a conversation with Monica Lewinsky concerning this lawsuit?
>
> WJC: I don't believe so. I'm sorry, I just don't believe so.
>
> * * * * * * *
>
> Q. Has it ever been reported to you that [Vernon Jordan] met with Monica Lewinsky and talked about this case?
>
> WJC: I knew that he met with her. I think Betty suggested that he meet with her. Anyway, he met with her. *I, I thought that he talked to her about something else. I didn't know that*— I thought he had given her some advice about her move to New York. *Seems like that's what Betty said.*[364]

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[363] Clinton 1/17/98 Depo. at 68–69 (emphasis added).

[364] *Id.* at 72 (emphasis added). *See also id.* at 73 ("[m]y understanding was . . . that she was going to move to New York and that she was looking for some advice [from Jordan] about what she should do when she got there").

B. EVIDENCE THAT CONTRADICTS THE PRESIDENT'S CIVIL DEPOSITION TESTIMONY

Vernon Jordan testified that his conversations with the President about Ms. Lewinsky's subpoena were, in fact, "a continuing dialogue." [365] When asked if he had kept the President informed about Ms. Lewinsky's status in the *Jones* case in addition to her job search, Mr. Jordan responded: "The two—absolutely." [366]

On December 19, Ms. Lewinsky phoned Mr. Jordan and told him that she had been subpoenaed in the *Jones* case.[367] Following that call, Mr. Jordan telephoned the President to inform him "that Monica Lewinsky was coming to see me, and that she had a subpoena" [368]—but the President was unavailable. [369] Later that day, at 5:01 p.m., Mr. Jordan had a seven-minute telephone conversation with the President: [370]

> I said to the President, "Monica Lewinsky called me up. She's upset. She's gotten a subpoena. She is coming to see me about this subpoena. I'm confident that she needs a lawyer, and I will try to get her a lawyer." [371]

Later on December 19, after meeting with Ms. Lewinsky, Mr. Jordan went to the White House and met with the President alone in the Residence.[372] Mr. Jordan testified: "I told him that Monica Lewinsky had been subpoenaed, came to me with a subpoena." [373] According to Mr. Jordan, the President "thanked me for my efforts to get her a job and thanked me for getting her a lawyer." [374]

According to Mr. Jordan, on January 7, 1998, Ms. Lewinsky showed him a copy of her signed affidavit denying any sexual relationship with the President.[375] He testified that he told the President about the affidavit, probably in one of his two logged calls to the White House that day:[376]

> Q: [W]alk us through what exactly you would have said on the portion of the conversation that related to Ms. Lewinsky and the affidavit.
>
> VJ: Monica Lewinsky signed the affidavit.

* * * * * * *

[365] Jordan 3/5/98 GJ at 26.

[366] Jordan 3/5/98 GJ at 29.

[367] 833–DC–0017890 (Pentagon phone records). *See also* Jordan 3/3/98 GJ at 92–93 (testifying that Ms. Lewinsky called him up and she was "very upset" about "being served with a subpoena in the Paula Jones case").

[368] Jordan 5/5/98 GJ at 142–43.

[369] *Id.* at 133–34. Mr. Jordan had told Ms. Lewinsky to come see him at 5:00 p.m. Lewinsky 8/6/98 GJ at 129. *See also* Jordan 5/5/98 GJ at 144 (relating why he wanted to tell the President about Ms. Lewinsky's subpoena).

[370] 1178–DC–00000014 (White House phone records); Jordan 5/5/98 GJ at 145.

[371] Jordan 5/5/98 GJ at 145–47.

[372] Jordan 3/3/98 GJ at 167–69. White House records indicate that Mr. Jordan was scheduled to arrive at 8:00 p.m., and actually arrived at 8:15 p.m. *See* 1178–DC–00000026 (WAVES record). Mr. Jordan testified, however, that he is certain that he did not arrive at the White House until after 10 p.m. Jordan 5/5/98 GJ at 164.

[373] Jordan 3/3/98 GJ at 169.

[374] *Id.* at 172.

[375] Jordan 5/5/98 GJ at 221–22.

[376] Jordan 3/5/98 GJ at 24–25, 33; Jordan 5/5/98 GJ at 223–26; V004–DC–00000159 (Akin Gump phone records).

Q: [L]et's say if it was January 7th, or whenever it was that you informed him that she signed the affidavit,[377] is it accurate that based on the conversations you had with him already, you didn't have to explain to him what the affidavit was?

VJ: I think that's a reasonable assumption.

Q: So that it would have made sense that you would have just said, "She signed the affidavit," because both you and he knew what the affidavit was?

VJ: I think that's a reasonable assumption.

Q: All right. When you indicated to the President that she had signed the affidavit, what, if anything, did he tell you?

VJ: I think he—his judgment was consistent with mine that that was—the signing of the affidavit was consistent with the truth.[378]

Mr. Jordan testified that "I knew that the President was concerned about the affidavit and whether or not it was signed. *He was, obviously.*"[379] When asked why he believed the President was concerned, Mr. Jordan testified:

> Here is a friend of his who is being called as a witness in another case and with whom I had gotten a lawyer, I told him about that, and told him I was looking for a job for her. He knew about all of that. *And it was just a matter of course that he would be concerned as to whether or not she had signed an affidavit foreswearing what I told you the other day, that there was no sexual relationship.*[380]

Mr. Jordan summarized his contacts with the President about Monica Lewinsky and her involvement in the *Jones* litigation as follows:

> I made arrangements for a lawyer and I told the President that. When she signed the affidavit, I told the President that the affidavit had been signed and when Frank Carter told me that he had filed a motion to quash, as I did in the course of everything else, I said to the President that I saw Frank Carter and he had informed me that he was filing a motion to quash. It was as a simple information flow, absent a substantive discussion about her defense, about which I was not involved.[381]

The President himself testified in the grand jury that he talked to Mr. Jordan about Ms. Lewinsky's involvement in the case. Despite his earlier statements at the deposition, the President testified to the grand jury that he had no reason to doubt that he had talked to Mr. Jordan about Ms. Lewinsky's subpoena, her lawyer, and her affidavit.[382]

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[377] The affidavit is dated January 7, 1998, so the conversation informing the President that it had been signed could not have occurred any earlier than this date.

[378] Jordan 5/5/98 GJ at 224–26.

[379] Jordan 3/5/98 GJ at 25. *Cf.* Jordan 5/5/98 GJ at 225–26 (When President was told Ms. Lewinsky signed affidavit, "[t]here was no elation. There was no celebration.").

[380] Jordan 3/5/98 GJ at 26 (emphasis added).

[381] *Id.* at 125.

[382] Clinton 8/17/98 GJ at 73–75.

C. SUMMARY

In his civil deposition, the President stated that he had talked to Vernon Jordan about Ms. Lewinsky's job. But as the testimony of Mr. Jordan reveals, and as the President as much as conceded in his subsequent grand jury appearance,[383] the President *did* talk to Mr. Jordan about Ms. Lewinsky's involvement in the *Jones* case—including that she had been subpoenaed, that Mr. Jordan had helped her obtain a lawyer, and that she had signed an affidavit denying a sexual relationship with the President. Given their several communications in the weeks before the deposition, it is not credible that the President forgot the subject of their conversations during his civil deposition. His statements "seems like that's what Betty said" and "I didn't know that" were more than mere omissions; they were affirmative misstatements.

The President's motive for making false and misleading statements about this subject in his civil deposition was straightforward. If the President admitted that he had talked with Vernon Jordan both about Monica Lewinsky's involvement in the *Jones* case *and* about her job, questions would inevitably arise about whether Ms. Lewinsky's testimony and her future job were connected. Such an admission by the President in his civil deposition likely would have prompted Ms. Jones's attorneys to inquire further into the subject. And such an admission in his deposition would have triggered public scrutiny when the deposition became public.

At the time of his deposition, moreover, the President was aware of the potential problems in admitting any possible link between those two subjects. A criminal investigation and substantial public attention had focused in 1997 on job assistance and payments made to Webster Hubbell in 1994. The jobs and money paid to Mr. Hubbell by friends and contributors to the President had raised serious questions about whether such assistance was designed to influence Mr. Hubbell's testimony about Madison-related matters.[384] Some of Mr. Hubbell's jobs, moreover, had been arranged by Vernon Jordan, which was likely a further deterrent to the President raising both Ms. Lewinsky's job and her affidavit in connection with Vernon Jordan.

[383] *Id.* at 75–77.
[384] That matter is still under criminal investigation by this Office.

IX. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT PRESIDENT CLINTON ENDEAVORED TO OBSTRUCT JUSTICE BY ATTEMPTING TO INFLUENCE THE TESTIMONY OF BETTY CURRIE.

In a meeting with Betty Currie on the day after his deposition and in a separate conversation a few days later, President Clinton made statements to her that he knew were false. The contents of the statements and the context in which they were made indicate that President Clinton was attempting to influence the testimony that Ms. Currie might have been required to give in the *Jones* case or in a grand jury investigation.[385]

A. EVIDENCE

1. Saturday, January 17, 1998, Deposition

President Clinton's deposition in *Jones* v. *Clinton* occurred on Saturday, January 17, 1998. In that deposition, the President testified that he could not recall being alone with Monica Lewinsky and that he had not had sexual relations, a sexual affair, or a sexual relationship with her. During his testimony, the President referred several times to Betty Currie and to her relationship with Ms. Lewinsky. He stated, for example, that the last time he had seen Ms. Lewinsky was when she had come to the White House to see Ms. Currie;[386] that Ms. Currie was present when the President had made a joking reference about the *Jones* case to Ms. Lewinsky;[387] that Ms. Currie was his source of information about Vernon Jordan's assistance to Ms. Lewinsky;[388] and that Ms. Currie had helped set up the meetings between Ms. Lewinsky and Mr. Jordan regarding her move to New York.[389]

At the deposition, Judge Wright imposed a protective order that prevented the parties from discussing their testimony with anyone else. "Before he leaves, I want to remind him, as the witness in this matter, * * * that this case is subject to a Protective Order regarding all discovery, * * * [A]ll parties present, including * * * the witness are not to say anything whatsoever about the questions they were asked, the substance of the deposition, * * *, any details. * * *"[390]

2. Sunday, January 18, 1998, Meeting with Ms. Currie

Because the President referred so often to Ms. Currie, it was foreseeable that she might become a witness in the *Jones* matter, particularly if specific allegations of the President's relationship

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[385] Under the federal witness tampering and obstruction of justice statutes, it is a crime to attempt to corruptly persuade another person with intent to influence the person's testimony in an official proceeding. *See* 18 U.S.C. §§1503, 1512.
[386] Clinton 1/17/98 Depo. at 68.
[387] *Id.* at 70–71.
[388] *Id.* at 72–73, 79.
[389] *Id.* at 80–82.
[390] *Id.* at 212–213.

with Ms. Lewinsky came to light.[391] Indeed, according to Ms. Currie, President Clinton at some point may have told her that she might be asked about Monica Lewinsky.[392]

Shortly after 7:00 p.m. on Saturday, January 17, 1998, two and a half hours after he returned from the deposition, President Clinton called Ms. Currie at home[393] and asked her to come to the White House the next day.[394] Ms. Currie testified that "[i]t's rare for [President Clinton] to ask me to come in on Sunday."[395]

At about 5:00 p.m. on Sunday, January 18, Ms. Currie went to meet with President Clinton at the White House. She told the grand jury:

> He said that he had had his deposition yesterday, and they had asked several questions about Monica Lewinsky. And I was a little shocked by that or—(shrugging). And he said—I don't know if he said—I think he may have said, "There are several things you may want to know," or "There are things—" He asked me some questions.[396]

According to Ms. Currie, the President then said to her in succession:[397]

- "You were always there when she was there, right? We were never really alone."[398]
- "You could see and hear everything."[399]
- "Monica came on to me, and I never touched her, right?"[400]
- "She wanted to have sex with me, and I can't do that."[401]

Ms. Currie indicated that these remarks were "more like statements than questions."[402] Ms. Currie concluded that the President

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[391] *Jones* v. *Clinton,* Order of Judge Susan Webber Wright, January 29, 1998, at 2.

[392] Currie 1/24/98 Int. at 8 ("CURRIE advised CLINTON may have mentioned that CURRIE might be asked about LEWINSKY"); Currie 5/6/98 GJ at 118 (Q: "Didn't the President talk to you about Monica's name coming up in those cases [Whitewater or Jones v. Clinton]?" BC: "I have a vague recollection of him saying that her name may come up. Either he told me, somebody told me, but I don't know how it would come up.").

[393] Currie 5/7/98 GJ at 80–81; GJ Exhibit BC 3–10, 1248–DC–00000307 (Presidential Call Log, Jan. 17, 1998). The White House call log indicates that the President called Ms. Currie at 7:02 p.m., they talked at 7:13 p.m., and the call ended at 7:14 p.m.

The President returned to the White House from the deposition at 4:26 p.m. 1248–DC–00000288 (Kearney's logs).

[394] Currie 1/27/98 GJ at 65–66. The President confirmed that he called Betty Currie shortly after his deposition, and that he asked her to come in on Sunday, her day off. Clinton 8/17/98 GJ at 148–49.

The next day at 1:11 p.m., the President again called Ms. Currie at home. Currie 5/7/98 GJ at 85. GJ Exhibit BC 3–11, 1248–DC–00000311 (Presidential Call Log, Jan. 18, 1998). Ms. Currie could not recall the content of the second call, stating: "He may have called me on Sunday at 1:00 after church to see what time I can actually come in. I don't know. That's the best I can recollect." *Id.* at 89.

[395] Currie 5/7/98 GJ at 91. *See also* Clinton 8/17/98 GJ at 149 (acknowledging that Ms. Currie normally would not be in the White House on Sunday).

[396] Currie 1/27/98 GJ at 70.

[397] Currie 1/24/98 Int. at 6.

[398] Currie 1/27/98 GJ at 71, 73–74. At different points in the grand jury testimony, there are minor variations in the wording used or agreed to by Ms. Currie in recounting the President's statements. *Compare id.* at 71 ("You were always there when Monica was there." (Currie statement)) *with id.* at 74 (Q: "'You were always there when she was there, right?' Is that the way you remember the President stating it to you?" BC: "That's how I remember him stating it to me.").

[399] *Id.* at 72.

[400] *Id.* at 72. *See also* Currie 1/24/98 Int. at 6.

[401] Ms. Currie interpreted this last comment as simply a statement, not necessarily one for which the President was seeking her agreement. Currie 1/27/98 GJ at 72–73.

[402] Currie 1/27/98 GJ at 71 (Q: "Okay. And then you told us that the President began to ask you a series of questions that were more like statements than questions." BC: "Right.").

wanted her to agree with him.[403] She based that conclusion on the way he made most of the statements and on his demeanor.[404] Ms. Currie also said that she felt the President made these remarks to see her reaction.[405]

Ms. Currie said that she indicated her agreement with each of the President's statements,[406] although she knew that the President and Ms. Lewinsky had in fact been alone in the Oval Office and in the President's study.[407] Ms. Currie also knew that she could not or did not in fact hear or see the President and Ms. Lewinsky while they were alone.[408]

In the context of this conversation, President Clinton appeared to be "concerned," according to Ms. Currie.[409]

The President's concern over the questions asked at the civil deposition about Ms. Lewinsky also manifested itself in substantial efforts to contact Monica Lewinsky over the next two days. Shortly after her meeting with the President, Ms. Currie made several attempts to contact Ms. Lewinsky. Ms. Currie testified it was "possible" she did so at the President's suggestion, and said "he may have asked me to call [Ms. Lewinsky] to see what she knew or where she was or what was happening."[410] Later that same night, at 11:01 p.m., the President again called Ms. Currie at home.[411] Ms. Currie could not recall the substance but suggested that the President had called to ask whether she had spoken to Ms. Lewinsky.[412] The next day, January 19, 1998, which was a holiday, Ms. Currie made seven unsuccessful attempts to contact Monica Lewinsky, by pager, between 7:00 a.m. and 9:00 a.m.[413] The President called Ms. Currie at home twice, and Ms. Currie called the President at the White House once that day.[414]

3. Conversation Between the President and Ms. Currie on Tuesday, January 20, 1998, or Wednesday, January 21, 1998

On either Tuesday, January 20 or Wednesday, January 21 of that week, the President again met with Ms. Currie and discussed the Monica Lewinsky matter. Ms. Currie testified as follows:

> BC: It was Tuesday or Wednesday. I don't remember which one this was, either. But the best I remember, when he called me in the Oval Office, *it was sort of a recap[it]ulation of what*

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[403] *Id.* at 72–76.
[404] *Id.*
[405] Currie 1/24/98 Int. at 7.
[406] *Id.* at 6.
[407] Currie 1/27/98 GJ at 32–34.
[408] *Id.* at 82–83.
[409] *Id.* at 76.
[410] Currie 5/7/98 GJ at 99–100. Ms. Lewinsky called Betty Currie shortly after 10:00 p.m., but told Ms. Currie that she could not talk to her that night. *Id.* at 101.
[411] GJ Exhibit BC 3–12, V006–DC–00002068 (call log). The call lasted approximately one minute.
[412] Currie 5/7/98 GJ at 102.
[413] 831–DC–00000009 (Lewinsky pager records). As the records reflect, Betty Currie used the name Kay or Kate when paging Monica Lewinsky. Lewinsky 8/6/98 GJ at 215–17; Currie 7/22/98 GJ at 148–49.
[414] V006–DC–00002069; V006–DC–00002070 (White House telephone records). Ms. Currie testified that she probably called the President to tell him that she had not yet spoken to Ms. Lewinsky. Ms. Currie does not remember the substance of the conversations with the President for either of the calls that he made to her. Currie 5/7/98 GJ at 106–07. The phone calls from the President were approximately one and two minutes in length. That Monday, January 19, was a holiday, and Ms. Currie was not at work.

we had talked about on Sunday—you know, "I was never alone with her"—that sort of thing.

Q: Did he pretty much list the same——

BC: To my recollection, sir, yes.

Q: *And did he say it in sort of the same tone and demeanor that he used the first time he told you on Sunday?*

BC: *The best I remember, sir, yes.*

* * * * * * *

Q: And the President called you into the Oval Office specifically to list these things?

BC: I don't know if that's specifically what he called me in for, but once I got inside, that's what he——

Q: That's what he told you?

BC: Uh-huh.[415]

B. THE PRESIDENT'S GRAND JURY TESTIMONY

The President was asked why he might have said to Ms. Currie in their meeting on Sunday, January 18, 1998, "we were never alone together, right?" and "you could see and hear everything." The President testified:

> [W]hat I was trying to determine was *whether my recollection was right* and that she was always in the office complex when Monica was there, and whether she thought she could hear any conversations we had, or did she hear any.
>
> * * * * * * *
>
> I was trying to—I knew * * * to a reasonable certainty that I was going to be asked more questions about this. I didn't really expect you to be in the Jones case at the time. I thought what would happen is that it would break in the press, and *I was trying to get the facts down. I was trying to understand what the facts were.*[416]

Later, the President stated that he was referring to a larger area than simply the room where he and Ms. Lewinsky were located. He also testified that his statements to Ms. Currie were intended to cover a limited range of dates:

> WJC: * * * [W]hen I said, we were never alone, right, I think I also asked her a number of other questions, because there were several times, as I'm sure she would acknowledge, when I either asked her to be around. I remember once in particular when I was talking with Ms. Lewinsky when I asked Betty to be in the, actually, in the next room in the dining room, and, as I testified earlier, once in her own office.
>
> But I meant that she was always in the Oval Office complex, in that complex, while Monica was there. *And I believe that this was part of a series of questions I asked her to try to quickly refresh my memory. So, I wasn't trying to get her to say something that wasn't so.* And, in fact, I think she would recall

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[415] Currie 1/27/98 GJ at 80–82 (emphasis added).

[416] Clinton 8/17/98 GJ at 56–57 (emphasis added). *See also id.* at 131–32 (Q: "You said that you spoke to her in an attempt to refresh your own recollection about the events involving Monica Lewinsky, is that right?" WJC: "Yes.").

that I told her to just relax, go in the grand jury and tell the truth when she had been called as a witness.

Q: So, when you said to Mrs. Currie that, I was never alone with her, right, you just meant that you and Ms. Lewinsky would be somewhere perhaps in the Oval Office or many times in your back study, is that correct?

WJC: That's right. We were in the back study.

Q: And then——

WJC: Keep in mind, sir, I just want to make it—I was talking about 1997. I was never, ever trying to get Betty Currie to claim that on the occasions when Monica Lewinsky was there when she wasn't anywhere around, that she was. I would never have done that to her, and I don't think she thought about that. I don't think she thought I was referring to that.

Q: Did you put a date restriction? Did you make it clear to Mrs. Currie that you were only asking her whether you were never alone with her after 1997?

WJC: Well, I don't recall whether I did or not, but I assumed—if I didn't, *I assumed she knew what I was talking about,* because it was the point at which Ms. Lewinsky was out of the White House and had to have someone WAVE her in, in order to get in the White House. And I do not believe to this day that I was—in 1997, that she was ever there and that I ever saw her unless Betty Currie was there. I don't believe she was.[417]

With respect to the word "alone," the President also stated that "it depends on how you define alone" and "there were a lot of times when we were alone, but I never really thought we were."[418]

The President was also asked about his specific statement to Betty Currie that "you could see and hear everything." He testified that he was uncertain what he intended by that comment:

Q: When you said to Mrs. Currie, you could see and hear everything, that wasn't true either, was it, as far as you knew. You've already—* * *

WJC: * * * My memory of that was that, that she had the ability to hear what was going on if she came in the Oval Office from her office. And a lot of times, you know, when I was in the Oval Office, she just had the door open to her office. Then there was—the door was never completely closed to the hall. *So I think there was—I'm not entirely sure what I meant by that, but I could have meant that she generally would be able to hear conversations, even if she couldn't see them.* And I think that's what I meant.[419]

The President then testified that when he made the comment to Ms. Currie about her being able to hear everything, he again was referring to only a limited period of time:

Q: * * * you would not have engaged in those physically intimate acts if you knew that Mrs. Currie could see or hear that, is that correct?

WJC: That's correct. But keep in mind, sir, I was talking about 1997. That occurred, to the—and I believe that occurred

[417] *Id.* at 132–34 (emphasis added).
[418] *Id.* at 134.
[419] *Id.* at 134–35 (emphasis added).

only once in February of 1997. I stopped it. I never should have started it, and I certainly shouldn't have started it back after I resolved not to in 1996. And I was referring to 1997.

And I—what—as I say, I do not know—her memory and mine may be somewhat different. I do not know whether I was asking her about a particular time when Monica was upset and I asked her to stand, stay back in the dining area. Or whether I was, had reference to the fact that if she kept the door open to the Oval Office, because it was always—the door to the hallway was always somewhat open, that she would always be able to hear something if anything went on that was, you know, too loud, or whatever.

I do not know what I meant. I'm just trying to reconcile the two statements as best I can, without being sure.[420]

The President was also asked about his comment to Ms. Currie that Ms. Lewinsky had "come on" to him, but that he had "never touched her":

Q: * * * [I]f [Ms. Currie] testified that you told her, Monica came on to me and I never touched her, you did, in fact, of course, touch Ms. Lewinsky, isn't that right, in a physically intimate way?

WJC: Now, I've testified about that. And that's one of those questions that I believe is answered by the statement that I made.[421]

Q: What was your purpose in making these statements to Mrs. Currie, if it weren't for the purpose to try to suggest to her what she should say if ever asked?

WJC: Now, Mr. Bittman, I told you, the only thing I remember is when all this stuff blew up, *I was trying to figure out what the facts were. I was trying to remember. I was trying to remember every time I had seen Ms. Lewinsky.*

* * * I knew this was all going to come out * * * . I did not know [at the time] that the Office of Independent Counsel was involved. *And I was trying to get the facts and try to think of the best defense we could construct in the face of what I thought was going to be a media onslaught.*[422]

Finally, the President was asked why he would have called Ms. Currie into his office a few days after the Sunday meeting and repeated the statements about Ms. Lewinsky to her. The President testified that although he would not dispute Ms. Currie's testimony to the contrary, he did not remember having a second conversation with her along these lines.[423]

C. SUMMARY

The President referred to Ms. Currie on multiple occasions in his civil deposition when describing his relationship with Ms. Lewinsky. As he himself recognized, a large number of questions about Ms. Lewinsky were likely to be asked in the very near fu-

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[420] *Id.* at 136–37.

[421] The President is referring to the statement he read at the beginning of his grand jury appearance.

[422] *Id.* at 139–40 (emphasis added).

[423] *Id.* at 141–42.

ture. The President thus could foresee that Ms. Currie either might be deposed or questioned or might need to prepare an affidavit.

The President called her shortly after the deposition and met with Ms. Currie the next day. The President appeared "concerned," according to Ms. Currie. He then informed Ms. Currie that questions about Ms. Lewinsky had been asked at the deposition.

The statements the President made to her on January 18 and again on January 20 or 21—that he was never alone with Ms. Lewinsky, that Ms. Currie could always hear or see them, and that he never touched Ms. Lewinsky—were false, but consistent with the testimony that the President provided under oath at his deposition. The President knew that the statements were false at the time he made them to Ms. Currie. The President's suggestion that he was simply trying to refresh his memory when talking to Ms. Currie conflicts with common sense: Ms. Currie's confirmation of *false* statements could not in any way remind the President of the facts. Thus, it is not plausible that he was trying to refresh his recollection.

The President's grand jury testimony reinforces that conclusion. He testified that in asking questions of Ms. Currie such as "We were never alone, right" and "Monica came on to me, and I never touched her, right," he intended a date restriction on the questions. But he did not articulate a date restriction in his conversations with Ms. Currie. Moreover, with respect to some aspects of this incident, the President was unable to devise any innocent explanation, testifying that he did not know why he had asked Ms. Currie some questions and admitting that he was "just trying to reconcile the two statements as best [he could]." On the other hand, if the most reasonable inference from the President's conduct is drawn—that he was attempting to enlist a witness to back up his false testimony from the day before—his behavior with Ms. Currie makes complete sense.

The content of the President's statements and the context in which those statements were made provide substantial and credible information that President Clinton sought improperly to influence Ms. Currie's testimony. Such actions constitute an obstruction of justice and improper influence on a witness.

X. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT PRESIDENT CLINTON ENDEAVORED TO OBSTRUCT JUSTICE DURING THE FEDERAL GRAND JURY INVESTIGATION. WHILE REFUSING TO TESTIFY FOR SEVEN MONTHS, HE SIMULTANEOUSLY LIED TO POTENTIAL GRAND JURY WITNESSES KNOWING THAT THEY WOULD RELAY THE FALSEHOODS TO THE GRAND JURY.

The President's grand jury testimony followed seven months of investigation in which he had refused six invitations to testify before the grand jury. During this period, there was no indication that the President would admit any sexual relationship with Ms. Lewinsky. To the contrary, the President vehemently denied the allegations.

Rather than lie to the grand jury himself, the President lied about his relationship with Ms. Lewinsky to senior aides, and those aides then conveyed the President's false story to the grand jury.[424]

In this case, the President lied to, among others, three current senior aides—John Podesta, Erskine Bowles, and Sidney Blumenthal—and one former senior aide, Harold Ickes. The President denied any kind of sexual relationship with Monica Lewinsky; said that Ms. Lewinsky had made a sexual demand on him; and denied multiple telephone conversations with Monica Lewinsky. The President, by his own later admission, was aware that his aides were likely to convey the President's version of events to the grand jury.

The President's aides took the President at his word when he made these statements. Each aide then testified to the nature of the relationship between Monica Lewinsky and the President based on those statements—without knowing that they were calculated falsehoods by the President designed to perpetuate the false statements that the President made during his deposition in the *Jones* case.

The aides' testimony provided the grand jury a false account of the relationship between the President and Ms. Lewinsky. Their testimony thus had the potential to affect the investigation—including decisions by the OIC and grand jury about how to conduct

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[424] Two federal criminal statutes, Sections 1512 and 1503 of Title 18 of the United States Code, prohibit misleading potential witnesses with the intent to influence their grand jury testimony. Section 1512 provides that whoever "corruptly * * * engages in misleading conduct toward another person, with intent to—(1) influence, delay, or prevent the testimony of any person in an official proceeding * * * shall be fined under this title or imprisoned not more than ten years, or both." 18 U.S.C. § 1512(b). It is no defense to a charge of witness tampering that the official proceeding had not yet begun, nor is it a defense that the testimony sought to be influenced turned out to be inadmissible or subject to a claim of privilege. 18 U.S.C. § 1512(e).

Section 1503 provides that whoever "corruptly or by threats or force * * * influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due administration of justice" has committed a felony. 18 U.S.C. § 1503(a)–(b).

The Governor of Guam was convicted of witness tampering for lying to a potential witness "intending that [the witness] would offer [the Governor's] explanation concerning the [illegally used] funds to the FBI." *United States* v. *Bordallo*, 857 F.2d 519, 525 (9th Cir. 1988), *amended on other grounds*, 872 F.2d 334 (9th Cir.), *cert. denied*, 493 U.S. 818 (1989).

the investigation (for example, whether to subpoena Secret Service agents) and whether to indict particular individuals.

A. THE TESTIMONY OF CURRENT AND FORMER AIDES

1. John Podesta

John Podesta, Deputy Chief of Staff,[425] testified that on several occasions shortly after the media first began reporting the Lewinsky allegations, the President either denied having a relationship with Ms. Lewinsky or otherwise minimized his involvement with her.

Mr. Podesta described a meeting with the President, Chief of Staff Erskine Bowles, and Deputy Chief of Staff Sylvia Matthews, in the morning of January 21, 1998.[426] During that meeting, the President stated: "Erskine, I want you to know that this story is not true."[427] Mr. Podesta further recalled that the President said "that he had not had a sexual relationship with her, and that he never asked anybody to lie."[428]

Several days later, on January 23, 1998, the President more adamantly told Mr. Podesta that he had not engaged in sex of any "kind, shape or manner" with Ms. Lewinsky. Mr. Podesta recalled:

JP: [H]e said to me that he had never had sex with her, and that—and that he never asked—you know, he repeated the denial, *but he was extremely explicit in saying he never had sex with her.*

Q: How do you mean?

JP: Just what I said.

Q: Okay. Not explicit, in the sense that he got more specific than sex, than the word "sex."

JP: Yes, he was more specific than that.

Q: Okay. Share that with us.

JP: Well, I think he said—*he said that—there was some spate of, you know, what sex acts were counted, and he said that he had never had sex with her in any way whatsoever——*

Q: Okay.

JP: ——*that they had not had oral sex.*[429]

Later, possibly that same day,[430] the President made a further statement to Mr. Podesta regarding his relationship with Ms. Lewinsky. Mr. Podesta testified that the President "said to me that after [Monica] left [her job at the White House], that when she had come by, she came by to see Betty, and that he—when she was there, either Betty was with them—either that she was with Betty when he saw her or that he saw her in the Oval Office with the door open and Betty was around—and Betty was out at her desk."[431] The President relayed to Mr. Podesta one of the false

[425] Podesta 2/5/98 GJ at 13. Mr. Podesta has served as Deputy Chief of Staff since January 1997, and previously served as Staff Secretary for the Clinton Administration from 1993 through 1995. Podesta 2/5/98 GJ at 9–10.

[426] Podesta 6/16/98 GJ at 84–85.

[427] *Id.* at 85.

[428] *Id.*

[429] *Id.* at 92 (emphasis added).

[430] Mr. Podesta dated this conversation as perhaps taking place on January 23, 1998. Podesta 6/16/98 GJ at 88.

[431] *Id.* at 88.

“cover stories” that the President and Ms. Lewinsky had agreed to use.

Both the President and Mr. Podesta knew that Mr. Podesta was likely to be a witness in the ongoing grand jury criminal investigation.[432] Nonetheless, Mr. Podesta recalled that the President “volunteered” to provide information about Ms. Lewinsky to him[433] *even though Mr. Podesta had not asked for these details*.[434]

Mr. Podesta “believe[d]” the President, and testified that it was important to him that the President denied the affair.[435] Mr. Podesta repeated to the grand jury the false and misleading statements that the President told him.

2. Erskine Bowles

Mr. Bowles, the White House Chief of Staff,[436] confirmed Mr. Podesta’s account of the President’s January 21, 1998, statement in which the President denied having a sexual relationship with Ms. Lewinsky. Mr. Bowles testified:

> EB: And this was the day this huge story breaks. And the three of us walked in together—Sylvia Matthews, John Podesta, and me—into the Oval Office, and the President was standing behind his desk.
>
> Q: About what time of day is this?
>
> EB: This is approximately 9:00 in the morning, or something—you know, in that area. And he looked up at us and he said the same thing he said to the American people. He said, “*I want you to know I did not have sexual relationships [sic] with this woman Monica Lewinsky*. I did not ask anybody to lie. And when the facts come out, you’ll understand.”[437]

Mr. Bowles testified that he took the President’s statements seriously: “All I can tell you is: This guy who I’ve worked for looked me in the eye and said he did not have sexual relationships with her. And if I didn’t believe him, I couldn’t stay. So I believe him.”[438] Mr. Bowles repeated the President’s false and misleading statement to the grand jury.

3. Sidney Blumenthal

Sidney Blumenthal, an Assistant to the President,[439] similarly testified that the President made statements to him denying the Lewinsky allegations shortly after the first media report.

Mr. Blumenthal stated that he spoke to Mrs. Clinton on the afternoon of January 21, 1998, and to the President early that evening. During those conversations, both the President and Mrs. Clinton offered an explanation for the President’s meetings with Ms. Lewinsky, and President Clinton offered an explanation for Ms. Lewinsky’s allegations of a sexual relationship.[440]

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[432] Mr. Podesta testified that he was “sensitive about not exchanging information because I knew I was a potential witness.” Podesta 6/23/98 GJ at 79.

[433] Podesta 6/16/98 GJ at 94; *see also* Podesta 6/23/98 GJ at 79.

[434] *See Id.* at 79 (emphasis added).

[435] Podesta 6/23/98 GJ at 77–78.

[436] Bowles 4/2/98 GJ at 12. Mr. Bowles has been the Chief of Staff for President Clinton since January 20, 1997. *Id.*

[437] *Id.* at 83–84 (emphasis added).

[438] *Id.* at 91.

[439] Blumenthal 2/26/98 GJ at 4–5.

[440] Blumenthal 6/4/98 GJ at 46–53.

Testifying before the grand jury, Mr. Blumenthal related his discussion with President Clinton:

> I said to the President, "What have you done wrong?" And he said, "Nothing. I haven't done anything wrong." * * * And it was at that point that he gave his account of what had happened to me and he said that Monica—and it came very fast. He said, "*Monica Lewinsky came at me and made a sexual demand on me." He rebuffed her. He said, "I've gone down that road before, I've caused pain for a lot of people and I'm not going to do that again*."
>
> *She threatened him. She said that she would tell people they'd had an affair, that she was known as the stalker among her peers, and that she hated it and if she had an affair or said she had an affair then she wouldn't be the stalker any more*.[441]

Mr. Blumenthal testified that the President appeared "upset" during this conversation.[442]

Finally, Mr. Blumenthal asked the President to explain alleged answering machine messages (a detail mentioned in press reports).

> He said that he remembered calling her when Betty Currie's brother died and that he left a message on her voice machine that Betty's brother had died and he said she was close to Betty and had been very kind to Betty. And that's what he recalled.[443]

According to Mr. Blumenthal, the President said that the call he made to Ms. Lewinsky relating to Betty's brother was the "only one he could remember."[444] That was false: The President and Ms. Lewinsky talked often on the phone, and the subject matter of the calls was memorable.

A grand juror asked Mr. Blumenthal whether the President had said that his relationship with Ms. Lewinsky included any kind of sexual activity. Mr. Blumenthal testified that the President's response was "the opposite. *He told me that she came on to him and that he had told her he couldn't have sexual relations with her and that she threatened him. That is what he told me*."[445]

Mr. Blumenthal testified that after the President relayed this information to him, he "certainly believed his story. It was a very heartfelt story, he was pouring out his heart, and I believed him."[446] Mr. Blumenthal repeated to the grand jury the false statements that the President made to him.

4. Harold Ickes

Mr. Ickes, a former Deputy Chief of Staff,[447] also related to the grand jury a conversation that he had with the President on the

[441] Blumenthal 6/4/98 GJ at 49 (emphasis added).
[442] Blumenthal 6/25/98 GJ at 41.
[443] Blumenthal 6/4/98 GJ at 50.
[444] Blumenthal 6/25/98 GJ at 27.
[445] Blumenthal 6/4/98 GJ at 52 (emphasis added).
[446] Blumenthal 6/25/98 GJ at 17. *See also* Blumenthal 6/25/98 GJ at 26 ("My understanding was that the accusations against him which appeared in the press that day were false, that he had not done anything wrong").
[447] Ickes 7/23/98 GJ at 8. Mr. Ickes worked as Deputy Chief of Staff for President Clinton from early 1994 through January 1997. *Id.*

morning of January 26, 1998,[448] during which the President denied the Lewinsky allegations.

Regarding that conversation, Mr. Ickes testified: "The two things that I recall, the two things that he again repeated in public—had already said publicly and repeated in public that same Monday morning was that *he had not had—he did not have a—or he had not had a sexual relationship with Ms. Lewinsky* and that he had done nothing—now I'm paraphrasing—had done nothing to ask anybody to change their story or suborn perjury or obstruct justice." [449]

Mr. Ickes recalled that the President probably volunteered this information.[450] Mr. Ickes repeated the President's false statements to the grand jury.

B. THE PRESIDENT'S GRAND JURY TESTIMONY

The President admitted to the grand jury that, after the allegations were publicly reported, he made "misleading" statements to particular aides whom he knew would likely be called to testify before the grand jury. The President testified as follows:

> Q: Do you recall denying any sexual relationship with Monica Lewinsky to the following people: Harry Thomasson, Erskine Bowles, Harold Ickes, Mr. Podesta, Mr. Blumenthal, Mr. Jordan, Ms. Betty Currie? Do you recall denying any sexual relationship with Monica Lewinsky to those individuals?
>
> WJC: *I recall telling a number of those people that I didn't have, either I didn't have an affair with Monica Lewinsky or didn't have sex with her.* And I believe, sir, that—you'll have to ask them what they thought. But I was using those terms in the normal way people use them. *You'll have to ask them what they thought I was saying.*
>
> Q: If they testified that you denied sexual relationship with Monica Lewinsky, or if they told us that you denied that, do you have any reason to doubt them, in the days after the story broke; do you have any reason to doubt them?
>
> WJC: *No.*

The President then was specifically asked whether he knew that his aides were likely to be called before the grand jury.

> Q: It may have been misleading, sir, and you knew though, after January 21st when the Post article broke and said that Judge Starr was looking into this, you knew that they might be witnesses. *You knew that they might be called into a grand jury, didn't you*?
>
> WJC: *That's right.* I think I was quite careful what I said after that. I may have said something to all these people to that effect, but I'll also—whenever anybody asked me any details, I said, look, I don't want you to be a witness or I turn you into a witness or give you information that would get you

[448] Ickes 6/10/98 GJ at 21–22, 66 (meeting occurred on Monday following the week that the media first reported the Lewinsky story).

[449] Ickes 6/10/98 GJ at 73 (emphasis added). *See also* Ickes 8/5/98 GJ at 88 ("[H]e denied to me that he had had a sexual relationship. I don't know the exact phrase, but the word 'sexual' was there. And he denied any obstruction of justice").

[450] Ickes 6/10/98 GJ at 73.

in trouble. I just wouldn't talk. I, by and large, didn't talk to people about this.

Q: If all of these people—let's leave out Mrs. Currie for a minute. Vernon Jordan, Sid Blumenthal, John Podesta, Harold Ickes, Erskine Bowles, Harry Thomasson, after the story broke, after Judge Starr's involvement was known on January 21st, have said that you denied a sexual relationship with them. Are you denying that?

WJC: *No.*

Q: And you've told us that you——

WJC: I'm just telling you what I meant by it. I told you what I meant by it when they started this deposition.

Q: You've told us now that you were being careful, but that it might have been misleading. Is that correct?

WJC: *It might have been.* * * * So, what I was trying to do was to give them something they could—that would be true, *even if misleading in the context of this deposition,* and keep them out of trouble, and let's deal—and deal with what I thought was the almost ludicrous suggestion that I had urged someone to lie or tried to suborn perjury, in other words.[451]

C. SUMMARY

The President made the following misleading statements to his aides:

- The President told Mr. Podesta that he had not engaged in sex "in any way whatsoever" with Ms. Lewinsky, "including oral sex".
- The President told Mr. Podesta, Mr. Bowles, and Mr. Ickes that he did not have a "sexual relationship" with Ms. Lewinsky.
- The President told Mr. Podesta that "when [Ms. Lewinsky] came by, she came by to see Betty [Currie]."
- The President told Mr. Blumenthal that Ms. Lewinsky "came on to him and that he had told her he couldn't have sexual relations with her and that she threatened him."
- The President told Mr. Blumenthal that he couldn't remember making any calls to Ms. Lewinsky other than once when he left a message on her answering machine.

During the President's grand jury testimony, the President admitted that his statements to aides denying a sexual relationship with Ms. Lewinsky "may have been misleading."[452] The President also knew his aides likely would be called to testify regarding any communications with him about Ms. Lewinsky. And he presumably expected his aides to repeat his statements regarding Ms. Lewinsky to all questioners, including to the grand jury. Finally, he himself refused to testify for many months. The combination of the President's silence and his deception of his aides had the effect of presenting a false view of events to the grand jury.

The President says that at the time he spoke to his aides, he chose his words with great care so that, in his view, his statements would be literally true because he was referring only to intercourse.

[451] Clinton 8/17/98 GJ at 105–109 (emphasis added).
[452] *Id.* at 107.

That explanation is undermined by the President's testimony before the grand jury that his denials "may have been misleading" and by the contradictory testimony by the aides themselves—particularly John Podesta, who says that the President specifically denied oral sex with Ms. Lewinsky. Moreover, on January 24, 1998, the White House issued talking points for its staff, and those talking points refute the President's literal truth argument: The talking points state as the President's view the belief that a relationship that includes oral sex is "of course" a "sexual relationship." [453]

For all of these reasons, there is substantial and credible information that the President improperly tampered with witnesses during the grand jury investigation.

[453] 1512–DC–00000037.

XI. THERE IS SUBSTANTIAL AND CREDIBLE INFORMATION THAT PRESIDENT CLINTON'S ACTIONS SINCE JANUARY 17, 1998, REGARDING HIS RELATIONSHIP WITH MONICA LEWINSKY HAVE BEEN INCONSISTENT WITH THE PRESIDENT'S CONSTITUTIONAL DUTY TO FAITHFULLY EXECUTE THE LAWS.

Before, during, and after his January 17, 1998, civil deposition, the President attempted to conceal the truth about his relationship with Ms. Lewinsky from the judicial process in the *Jones* case. Furthermore, the President has since lied under oath to the grand jury and facilitated the provision of false information to the grand jury by others.

The President also misled the American people and the Congress in his public statement of January 26, 1998, in which he denied "sexual relations" with Ms. Lewinsky. The President misled his Cabinet and his senior aides by denying the relationship to them. The Cabinet and senior aides in turn misled the American people and the Congress by conveying the President's denials and professing their belief in the credibility of those denials.

The President promised in January 1998 to cooperate fully with the grand jury investigation and to provide "more rather than less, sooner rather than later." At that time, the OIC was conducting a criminal investigation and was obligated to report to Congress any substantial and credible information that may constitute grounds for an impeachment.

The President's conduct delayed the grand jury investigation (and thereby delayed any potential congressional proceedings). He asserted, appealed, withdrew, and reasserted Executive Privilege (and asserted other governmental privileges never before applied in federal criminal proceedings *against* the government). The President asserted these privileges concerning the investigation of factual questions about which the President already knew the answers. The President refused six invitations to testify voluntarily before the grand jury. At the same time, the President's aides and surrogates argued publicly that the entire matter was frivolous and that any investigation of it should cease.

After being subpoenaed in July, the President made false statements to the grand jury on August 17, 1998. That night, the President again made false statements to the American people and Congress, contending that his answers in his civil deposition had been "legally accurate." The President then made an implicit plea for Congress to take no action: "Our country has been distracted by this matter for too long." [454]

The President has pursued a strategy of (i) deceiving the American people and Congress in January 1998, (ii) delaying and imped-

[454] Text of President's Address to Nation, *reprinted in* Washington Post, August 18, 1998, at A5.

ing the criminal investigation for seven months, and (iii) deceiving the American people and Congress again in August 1998.

A. BEGINNING ON JANUARY 21, 1998, THE PRESIDENT MISLED THE AMERICAN PEOPLE AND CONGRESS REGARDING THE TRUTH OF HIS RELATIONSHIP WITH MS. LEWINSKY.

On January 21, 1998, the day the *Washington Post* first reported the Lewinsky matter, the President talked to his long-time advisor Dick Morris. With the President's approval, Mr. Morris commissioned a poll that evening. The results indicated that voters were willing to forgive the President for adultery but *not* for perjury or obstruction of justice.[455] When the President telephoned him that evening, Mr. Morris explained that the President thus should not go public with a confession or explanation.[456] According to Mr. Morris, the President replied, "*Well, we just have to win, then*."[457]

The next evening, the President dissuaded Mr. Morris from any plan to "blast[ ] Monica Lewinsky 'out of the water.'" The President indicated that "there's some slight chance that she may not be cooperating with Starr and we don't want to alienate her."[458]

The President himself spoke publicly about the matter several times in the initial days after the story broke. On January 26, the President was definitive: "I want to say one thing to the American people. I want you to listen to me. I'm going to say this again: I did not have sexual relations with that woman, Miss Lewinsky. I never told anybody to lie, not a single time. Never. These allegations are false."[459]

The President's emphatic denial to the American people was false. And his statement was not an impromptu comment in the heat of a press conference. To the contrary, it was an intentional and calculated falsehood to deceive the Congress and the American people.[460]

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[455] Morris 8/18/98 GJ at 28.

[456] *Id.* at 30.

[457] *Id.* (emphasis added).

[458] *Id.* at 35.

[459] Televised Remarks by President Clinton at the White House Education News Conference, Monday, January 26, 1998, 10:17 a.m.

[460] Other than Ms. Lewinsky's status and age, several aspects of the relationship could have raised public concerns.

First, Ms. Lewinsky lost her job at the White House in April 1996 and was transferred to the Pentagon. Under oath, Ms. Lewinsky was asked: "Do you believe that if you hadn't had a sexual relationship with the President that you would have kept your job at the White House?" She answered: "Yes." Lewinsky 8/26/98 Depo. at 60.

Second, Ms. Lewinsky was asked, "Do you believe that your difficulty or inability to return to employment at the White House was because of your sexual relationship with him?" She answered: "Yes. Or the issues that, or that the problems that people perceived that really were based in truth because I had a relationship with the President." Lewinsky 8/26/98 Depo. at 60.

Third, in late 1997, the President saw to it that Ms. Lewinsky received extraordinary job assistance. Such assistance might have been tied to her involvement in the *Jones* case, as discussed earlier, as well as a benefit to an ex-paramour. If the latter was a factor, then the President's actions discriminated against all of those interns and employees who did not receive the same benefit.

B. THE FIRST LADY, THE CABINET, THE PRESIDENT'S STAFF, AND THE PRESIDENT'S ASSOCIATES RELIED ON AND PUBLICLY EMPHASIZED THE PRESIDENT'S DENIAL.

After the President lied to the American people, the President's associates argued that the allegations against the President were false and even scurrilous.

Mrs. Clinton forcefully denied the allegations on January 27, 1998, one day after the President's public denial. She admitted that the American people "should certainly be concerned" if a President had an affair and lied to cover it up. She acknowledged that it would be a "very serious offense." But she emphasized that the allegations were false—a "pretty bad" smear. She noted that the President "has denied these allegations on all counts, unequivocally." And Mrs. Clinton shifted the focus away from the President, indicated that "this is a battle" and stated that "some folks are going to have a lot to answer for" when the facts come out.[461]

The most senior officials in the Executive Branch served as additional (albeit unwitting) agents of the President's deception. The Cabinet and White House aides stated emphatically that the allegations were false. For example, White House spokesperson Michael McCurry was asked whether the President's denial covered all forms of sexual contact, and Mr. McCurry stated that "I think every American that heard him knows exactly what he meant."[462] So, too, White House Communications Director Ann Lewis said on January 26, 1998: "I can say with absolute assurance the President of the United States did not have a sexual relationship because I have heard the President of the United States say so. He has said it, he could not be more clear. He could not have been more direct."[463] She added: "Sex is sex, even in Washington. I've been assured."[464]

After a Cabinet meeting on January 23, 1998, in which the President offered denials, several members of the Cabinet appeared outside the White House. Secretary of State Albright stated: "I believe that the allegations are completely untrue."[465] Coupled with the President's firm denial, the united front of the President's closest advisors helped shape perception of the issue.

C. THE PRESIDENT REPEATEDLY AND UNLAWFULLY INVOKED THE EXECUTIVE PRIVILEGE TO CONCEAL EVIDENCE OF HIS PERSONAL MISCONDUCT FROM THE GRAND JURY.

When the allegations about Ms. Lewinsky first arose, the President informed the American people that he would cooperate fully. He told Jim Lehrer that "we are doing our best to cooperate here."[466] He told National Public Radio that "I have told people that I would cooperate in the investigation, and I expect to cooper-

[461] NBC News, "Today" Show, interview with Mrs. Clinton by Matt Lauer, Jan. 27, 1998, 1998 WL 5261146.
[462] Associated Press, Jan. 27, 1998, 1998 WL 7380187.
[463] Nightline, Jan. 26, 1998, 1998 WL 5372969.
[464] Associated Press, Jan. 26, 1998.
[465] Schmidt and Baker, *Ex-Intern Rejected Immunity Offer in Probe,* Washington Post, Jan. 24, 1998, at A1.
[466] "The NewsHour with Jim Lehrer," PBS, Jan. 21, 1998, 1998 WL 8056086. The President stated later in the interview: "I'll do my best to help them get to the bottom of it."

ate with it * * *. I'm going to do my best to cooperate with the investigation."[467] He told Roll Call "I'm going to cooperate with this investigation * * *. And I'll cooperate."[468]

Such cooperation did not occur. The White House's approach to the constitutionally based principle of Executive Privilege most clearly exposed the non-cooperation. In 1994, White House Counsel Lloyd Cutler issued an opinion that the Clinton Administration would not invoke Executive Privilege for cases involving personal wrongdoing by any government official.[469] By 1998, however, the President had blended the official and personal dimensions to the degree that the President's private counsel stated in a legal brief filed in the U.S. Court of Appeals for the District of Columbia Circuit: "In a very real and significant way, the objectives of William J. Clinton, the person, and his Administration (the Clinton White House) are one and the same."[470]

After the Monica Lewinsky investigation began, the President invoked Executive Privilege for the testimony of five witnesses: Bruce Lindsey, Cheryl Mills, Nancy Hernreich, Sidney Blumenthal, and Lanny Breuer. These claims were patently groundless. Even for *official* communications within the scope of the privilege, the Supreme Court ruled unanimously in 1974 in *United States* v. *Nixon*[471] that the Executive Privilege gives way in the face of the compelling need for evidence in criminal proceedings.

The President's assertion of Executive Privilege for Ms. Hernreich, an assistant who manages the secretarial work for the Oval Office,[472] was frivolous. At the time that the President was asserting Executive Privilege for one assistant, the President's other assistant (Betty Currie) had already testified extensively.

Based on *Nixon,* the OIC filed a motion to compel the testimony of Hernreich, Lindsey, and Blumenthal. The United States District Court held a hearing on March 20. Just before the hearing, the White House—without explanation—dropped its Executive Privilege claim as to Ms. Hernreich.[473]

On May 4, 1998, Chief Judge Norma Holloway Johnson ruled against the President on the Executive Privilege issue.[474] After the White House filed a notice of appeal, the OIC filed an expedited petition for certiorari before judgment in the Supreme Court. The President thereupon dropped his claim of Executive Privilege.

The tactics employed by the White House have not been confined to the judicial process. On March 24, while the President was traveling in Africa, he was asked about the assertion of Executive Privilege. He responded, "You should ask someone who knows." He

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[467] All Things Considered, National Public Radio, Jan. 21, 1998, 1998 WL 3643482.

[468] *Roll Call* Interview, Jan. 21, 1998, 1998 WL 5682372.

[469] Lloyd N. Cutler, Legal Opinion of September 28, 1994.

[470] Brief for President Clinton, filed June 15, 1998, at 30, *In re Lindsey,* 148 F.3d 1100 (D.C. Cir. 1998).

[471] 418 U.S. 683 (1974).

[472] Hernreich 2/25/98 GJ at 5–7.

[473] Even though the White House later withdrew the claim, the mere assertion of Executive Privilege as to Ms. Hernreich is important. Such an invocation causes a needless, but substantial, expenditure of litigation resources and delays and impedes the grand jury process. The overuse of Executive Privilege *against* the United States in the criminal process thus ultimately hinders the faithful execution of the laws—as the Supreme Court unanimously recognized twenty-four years ago in *United States* v. *Nixon.*

[474] *In re Grand Jury Proceeding,* 5 F. Supp. 2d 21 (D.D.C. 1998).

also stated "I haven't discussed that with the lawyers. I don't know." [475]

This was untrue. Unbeknownst to the public, in a declaration filed in District Court on March 17 (seven days before the President's public expression of ignorance), White House Counsel Charles F.C. Ruff informed Chief Judge Johnson that he "ha[d] discussed" the matter with the President, who had directed the assertion of Executive Privilege. [476]

The deception has continued. Because the President withdrew his Executive Privilege claim while the case was pending in the Supreme Court of the United States, it was assumed that the President would no longer assert Executive Privilege. But that assumption proved incorrect. White House attorney Lanny Breuer appeared before the grand jury on August 4, 1998, and invoked Executive Privilege. He would not answer, for example, whether the President had told him about his relationship with Monica Lewinsky and whether they had discussed the gifts he had given to Monica Lewinsky. [477] On August 11, 1998, Chief Judge Johnson denied the Executive Privilege claim as a basis for refusing to testify, and ordered Mr. Breuer to testify. [478]

On August 11, 1998, Deputy White House Counsel Cheryl Mills testified and repeatedly asserted Executive Privilege at the President's direction. [479] The breadth of the claim was striking: The privilege was asserted not only for Ms. Mills's communications with the President, senior staff, and staff members of the White House Counsel's Office—but also for Ms. Mills's communications with *private* lawyers for the President, *private* lawyers for grand jury witnesses, and Betty Currie. [480]

On August 17, the President testified before the grand jury. At the request of a grand juror, the OIC asked the President about his assertions of Executive Privilege and why he had withdrawn the claim before the Supreme Court. The President replied that "I didn't really want to advance an executive privilege claim in this case beyond having it litigated, so that we, we had not given up on principal [sic] this matter, without having some judge rule on it * * *. *I strongly felt we should not appeal your victory on the executive privilege issue.*" [481]

Four days after this sworn statement, on August 21, 1998, the President filed a notice of appeal with respect to the Executive Privilege claim for Lanny Breuer that Chief Judge Johnson had denied ten days earlier (and six days before the President's testimony). In addition, Bruce Lindsey appeared again before the grand jury on August 28, 1998, and the President *again* asserted Executive Privilege with respect to his testimony—even though the President had dropped the claim of Executive Privilege for Mr. Lindsey

[475] John F. Harris, *Clinton Finds There's No Escape; In Africa, President Sidesteps Executive Privilege Questions,* Wash. Post, Mar. 25, 1998, at A2.
[476] Declaration of Charles F.C. Ruff at ¶ 56 (Mar. 17, 1998).
[477] Breuer 8/4/98 GJ at 96–97, 108–09.
[478] *In re Grand Jury Proceedings,* Unpublished Order (under seal), August 11, 1998.
[479] Mills 8/11/98 GJ at 53–54.
[480] *Id.* at 53, 54, 64–66, 71–74, 77–78.
[481] Clinton 8/17/98 GJ at 167 (emphasis added).

while the case was pending before the Supreme Court of the United States in June.[482]

The Executive Privilege was not the only claim of privilege interposed to prevent the grand jury from gathering relevant information. The President also acquiesced in the Secret Service's attempt to have the Judiciary craft a new protective function privilege (rejecting requests by this Office that the President order the Secret Service officers to testify). The District Court and the U.S. Court of Appeals for the District of Columbia Circuit rejected the privilege claim. The litigation was disruptive to the Secret Service and to the grand jury. The frivolity of the claim is evidenced by the Chief Justice's decision to reject the Secret Service's request for a stay without even referring the matter to the full Court. All of that litigation would have been unnecessary had the President testified in February instead of August, or had he taken the position that relevant facts should be fully available to the grand jury.

D. THE PRESIDENT REFUSED SIX INVITATIONS TO TESTIFY TO THE GRAND JURY, THEREBY DELAYING EXPEDITIOUS RESOLUTION OF THIS MATTER, AND THEN REFUSED TO ANSWER RELEVANT QUESTIONS BEFORE THE GRAND JURY WHEN HE TESTIFIED IN AUGUST 1998.

This Office extended six separate invitations to the President to testify before the grand jury. The first invitation was issued on January 28, 1998. The OIC repeated the invitations on behalf of the grand jury on February 4, February 9, February 21, March 2, and March 13. The President declined each invitation. His refusals substantially delayed this Office's investigation.

Finally, in the face of the President's actions, this Office asked the grand jury to consider issuing a subpoena to the President. The grand jury deliberated and approved the issuance of a subpoena. On July 17, 1998, the OIC served the subpoena, in accordance with the grand jury's action, on the President's private counsel. The subpoena required the President to appear on July 28.

The President sought to delay his testimony.[483] Shortly after a hearing before the District Court on the President's motion for a continuance, the President and the OIC reached an agreement by which the President would testify on August 17 via live video feed to the grand jury. In a Rose Garden ceremony on July 31, 1998, the President stated to the country: "I'm looking forward to the op-

[482] Lindsey 8/28/98 GJ at 58. The President's use and withdrawal of Executive Privilege was not new to this Office. In August 1996, the White House invoked Executive Privilege to prevent White House attorneys from producing documents regarding their communications with Hillary Rodham Clinton. After the OIC filed a motion to compel in the United States District Court for the Eastern District of Arkansas, the claim was withdrawn, and the White House relied solely on a claim of government attorney-client privilege, which the United States Court of Appeals for the Eighth Circuit rejected. The public never knew at that time of the President's assertion of Executive Privilege in that case.

In 1997, the President again asserted Executive Privilege—this time to prevent Thomas "Mack" McLarty from testifying fully. The conversations in question related in part to Mr. McLarty's efforts to find employment for Webster Hubbell as Mr. Hubbell was resigning his position as Associate Attorney General. The President withdrew the assertion before the OIC filed a motion to compel.

[483] President Clinton's Motion for Continuance, filed July 28, 1998.

portunity * * * of testifying. I will do so completely and truthfully."[484]

At the outset of his grand jury appearance, the President similarly stated: "I will answer each question as accurately and fully as I can."[485] The President then read a prepared statement in which he admitted "inappropriate intimate contact" with Ms. Lewinsky.[486] Despite his statement that he would answer each question, the President refused to answer specific questions about that contact (other than to indicate that it was not intercourse and did not involve the direct touching of Ms. Lewinsky's breasts or genitals).[487]

E. THE PRESIDENT MISLED THE AMERICAN PEOPLE AND THE CONGRESS IN HIS PUBLIC STATEMENT ON AUGUST 17, 1998, WHEN HE STATED THAT HIS ANSWERS AT HIS CIVIL DEPOSITION IN JANUARY HAD BEEN "LEGALLY ACCURATE."

The President addressed the Nation on the evening of August 17, 1998, after his grand jury appearance. The President did not tell the truth. He stated: "As you know, in a deposition in January, I was asked questions about my relationship with Monica Lewinsky. While my answers were *legally accurate,* I did not volunteer information."[488] As this Referral has demonstrated, the President's statements in his civil deposition were *not* "legally accurate," and he could not reasonably have thought they were. They were deliberate falsehoods designed to conceal the truth of the President's sexual relationship with Monica Lewinsky.

The President's claim that his testimony during the civil deposition was legally accurate—which he made to the grand jury and to the American people on August 17—perpetuates the deception and concealment that has accompanied his relationship with Monica Lewinsky since his first sexual encounter with her on November 15, 1995.

F. SUMMARY

In this case, the President made and caused to be made false statements to the American people about his relationship with Ms. Lewinsky. He also made false statements about whether he had lied under oath or otherwise obstructed justice in his civil case. By publicly and emphatically stating in January 1998 that "I did not have sexual relations with that woman" and these "allegations are false," the President also effectively delayed a possible congressional inquiry, and then he further delayed it by asserting Executive Privilege and refusing to testify for six months during the Independent Counsel investigation. This represents substantial and credible information that may constitute grounds for an impeachment.

[484] DeFrank, *Prez Vows Cooperation Pledges Complete, Truthful Testimony,* N.Y. Daily News, Aug. 1, 1998, at 3.
[485] Clinton 8/17/98 GJ at 7.
[486] Clinton 8/17/98 GJ at 10.
[487] *E.g.,* Clinton 8/17/98 GJ at 12, 102, 109, 110.
[488] Text of President's Address to Nation, *reprinted in* Washington Post, August 18, 1998, at A5 (emphasis added).

CONCLUSION

This Referral is respectfully submitted on the Ninth day of September, 1998.

KENNETH STARR,
Independent Counsel.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division (94-1) for the Purpose of
Appointing Independent Counsels

REPORT ON THE DEATH OF VINCENT W. FOSTER, JR., BY THE OFFICE OF INDEPENDENT COUNSEL IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association — Division No. 94-1

Before: SENTELLE, *Presiding*, and BUTZNER and FAY, *Senior Circuit Judges*.

ORDER

Upon consideration of the motion of Independent Counsel Starr for leave to publicly release the Report on the Death of Vincent Foster, it is

ORDERED that the motion be granted. It is therefore

ORDERED, ADJUDGED, and DECREED that the Report on the Death of Vincent Foster, inclusive of an appendix containing all comments or factual information submitted by any individual pursuant to 28 U.S.C. § 594, shall be released to the public.

Per Curiam
For the Court:
Mark J. Langer, Clerk

by Marilyn R. Sargent
Marilyn R. Sargent
Chief Deputy Clerk

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division (94-1) for the Purpose of
Appointing Independent Counsels

REPORT ON THE DEATH OF VINCENT W. FOSTER, JR.,
BY THE OFFICE OF INDEPENDENT COUNSEL
IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION

I. INTRODUCTION

In accordance with 28 U.S.C. § 594(h), the Office of Independent Counsel In re: Madison Guaranty Savings & Loan Association (the OIC) files this summary report on the 1993 death of Deputy White House Counsel Vincent W. Foster, Jr.

On July 20, 1993, police and rescue personnel were called to Fort Marcy Park in suburban Northern Virginia. They found Mr. Foster lying dead with a gun in his right hand and gunshot residue-like material on that hand. There were no signs of a struggle. There was a gunshot wound through the back of his head and blood under his head and back. The autopsy determined that Mr. Foster's death was caused by a gunshot through the back of his mouth exiting the back of his head. The autopsy revealed no other wounds on Mr. Foster's body.

The police later learned that Mr. Foster had called a family doctor for antidepressant medication the day before his death.

He had told his sister four days before his death that he was depressed, and she had given him the names of three psychiatrists. He had written in the days or weeks before his death that he "was not meant for the job or the spotlight of public life in Washington. Here, ruining people is considered sport."

Two law enforcement investigations -- the initial United States Park Police investigation and a subsequent investigation conducted under the direction of regulatory Independent Counsel Robert B. Fiske, Jr. -- concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Two inquiries in the Congress of the United States reached the same conclusion. After analysis of the evidence gathered during those investigations, and further investigation including adducing evidence before the federal grand jury in Washington, D.C., the OIC likewise has concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park.

The OIC's conclusion is based on analyses and conclusions of a number of experienced experts and criminal investigators retained by the OIC. They include Dr. Brian D. Blackbourne, a forensic pathologist who is the Medical Examiner for San Diego County, California; Dr. Henry C. Lee, an expert in physical evidence and crime scene reconstruction who is Director of the Connecticut State Police Forensic Science Laboratory; Dr. Alan L. Berman, an expert suicidologist who currently is Executive Director of the American Association of Suicidology; and several

experienced investigators with extensive service in the Federal Bureau of Investigation (FBI) and other law enforcement agencies. These experts and investigators reviewed the evidence gathered during the prior investigations and conducted further investigation as necessary.

Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."[1] Dr. Lee reported that "[a]fter careful review of the crime scene photographs, reports, and reexamination of the physical evidence, the data indicate that the death of Mr. Vincent W. Foster, Jr. is consistent with a suicide. The location where Mr. Foster's body was found is consistent with the primary scene," that is, the location where he committed suicide.[2] Dr. Berman stated that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."[3] OIC investigators concurred, based on investigation and analysis of the evidentiary record, that Mr. Foster committed suicide by gunshot in Fort Marcy Park.

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[1] Report to the Office of the Independent Counsel Concerning the Death of Vincent Foster, submitted by Dr. Brian D. Blackbourne, M.D., at 5 (Blackbourne Report).

[2] Forensic Report to the Independent Counsel In Re Vincent W. Foster, Jr., submitted by Dr. Henry C. Lee, Ph.D., at 495 (Lee Report).

[3] Report to the Office of Independent Counsel, submitted by Dr. Alan L. Berman, Ph.D., at 15 (Berman Report).

II. BACKGROUND

A. 1993 Park Police Investigation

Because Mr. Foster's body was found in Fort Marcy, a park maintained by the National Park Service, the United States Park Police conducted the investigation of his death.[4] On the night of the death (July 20, 1993), Mr. Foster's body was transported to Fairfax County Hospital in Fairfax, Virginia. The next day, Dr. James C. Beyer, Deputy Chief Medical Examiner, Northern Virginia District of the Virginia Office of the Chief Medical Examiner, conducted an autopsy in the presence of an assistant and four Park Police officers.

The FBI assisted the Park Police in certain aspects of the ensuing death investigation, as did other federal and Virginia agencies. Moreover, the FBI, at the direction of the Department of Justice, opened a separate investigation of possible obstruction of justice after a note was reportedly found on Monday, July 26, 1993, in Mr. Foster's briefcase at the White House.

On August 10, 1993, the Department of Justice, FBI, and Park Police jointly announced the results of the death and note investigations. The Park Police concluded that Mr. Foster

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[4] See 16 U.S.C. § 1a-6(b). The FBI has mandatory jurisdiction to investigate possible murders of certain high-ranking individuals employed in the White House -- those appointed under Section 105(a)(2)(A) of title 3 employed in the Executive Office of the President. See 18 U.S.C. § 1751(a) (defining persons covered by statute). Mr. Foster was appointed under Section 105(a)(2)(B) and thus was not an official covered by Section 1751. OIC Doc. No. DC-210-5151.

committed suicide by gunshot in Fort Marcy Park. Robert Langston, Chief of the Park Police, explained:

> The condition of the scene, the medical examiner's findings and the information gathered clearly indicate that Mr. Foster committed suicide. Without an eyewitness, the conclusion of suicide is deducted after a review of the injury, the presence of the weapon, the existence of some indicators of a reason, and the elimination of murder. Our investigation has found no evidence of foul play. The information gathered from associates, relatives and friends provide us with enough evidence to conclude that Mr. Foster's -- that Mr. Foster was anxious about his work and he was distressed to the degree that he took his own life.[5]

Based on the evidence the FBI gathered in its investigation, the Department of Justice did not seek criminal charges for obstruction of justice relating to the handling of the note.[6]

B. 1994 Fiske Investigation

In 1992 and 1993, the Resolution Trust Corporation (RTC) examined the operations of Madison Guaranty Savings & Loan, a defunct savings and loan in Little Rock, Arkansas, that had been operated by James and Susan McDougal. The McDougals also had been partners with William Jefferson Clinton and Hillary Rodham Clinton in an Arkansas real estate venture known as the Whitewater Development Company. In October 1993, the RTC sent nine criminal referrals to the United States Attorney's Office in Little Rock concerning the activities of Madison Guaranty.[7]

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[5] Federal News Service (August 10, 1993).

[6] Id.

[7] In September 1992, the RTC sent one criminal referral regarding Madison Guaranty to the United States Attorney's Office in Little Rock.

Also in 1993, the FBI investigated the activities of Capital Management Services, Inc., a small business investment company in Little Rock that had been operated by David L. Hale. Mr. Hale was indicted by a federal grand jury in the Eastern District of Arkansas on September 23, 1993.

Both the Hale prosecution and the Madison investigation were transferred in November 1993 from the United States Attorney's Office in Little Rock to the Fraud Section of the Department of Justice in Washington. On December 20, 1993, the White House confirmed that Whitewater-related documents had been in Mr. Foster's White House office at the time of his death. On January 12, 1994, President Clinton asked Attorney General Reno to appoint an independent counsel, and on January 20, 1994, the Attorney General appointed Robert B. Fiske, Jr., to take over the investigation.

Mr. Fiske's jurisdictional mandate vested him with authority to investigate whether any individuals or entities committed federal crimes "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." After his appointment, Mr. Fiske took over both the Hale prosecution and the continuing Madison investigation.

Mr. Fiske also opened a new investigation of Mr. Foster's death, utilizing FBI resources and a panel of distinguished and

experienced pathologists. On June 30, 1994, Mr. Fiske issued a report concluding that "[t]he overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide in Fort Marcy Park on July 20, 1993."[8]

C. <u>Congressional Inquiries</u>

On February 24, 1994, Congressman William F. Clinger, Jr., then the Ranking Republican on the Committee on Government Operations of the United States House of Representatives, initiated a probe into the death of Mr. Foster. Mr. Clinger's staff interviewed emergency rescue personnel, law enforcement officials, and other persons involved in the Park Police investigation of Mr. Foster's death.[9] Mr. Clinger's staff obtained access to the Park Police reports and to photographs taken at the scene and at the autopsy.[10] Mr. Clinger issued a report on August 12, 1994, concluding that "all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993."[11]

The United States Senate Committee on Banking, Housing, and

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[8] Report of the Independent Counsel Robert B. Fiske, Jr., In Re Vincent W. Foster, Jr. at 58 (June 30, 1994) (Fiske Report).

[9] Summary Report by William F. Clinger, Jr., Ranking Republican, Committee on Government Operations, U.S. House of Representatives, on the Death of White House Deputy Counsel Vincent W. Foster, Jr., at 1 (Aug. 12, 1994).

[10] <u>Id.</u>

[11] <u>Id.</u> at 6.

Urban Affairs conducted an inquiry into the Park Police investigation of Mr. Foster's death. The Committee concluded its inquiry with a report issued on January 3, 1995, stating that "[t]he evidence overwhelmingly supports the conclusion of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self-inflicted gun shot wound to the upper palate of his mouth."[12] The additional views of Senators D'Amato, Faircloth, Bond, Hatch, Shelby, Mack, and Domenici stated that "[w]e agree with the majority's conclusion that on July 20, 1993 Vincent Foster took his own life in Fort Marcy Park."[13]

D. Appointment of the Independent Counsel

On August 5, 1994, after enactment of the Independent Counsel Reauthorization Act of 1994, the Special Division of the United States Court of Appeals for the District of Columbia Circuit appointed Kenneth W. Starr as Independent Counsel In re: Madison Guaranty Savings & Loan Association. The OIC was given jurisdiction to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

Due to continuing questions about Mr. Foster's death, the relationship between Mr. Foster's death and the handling of documents (including Whitewater-related documents) from Mr.

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[12] S. Rep. No. 103-433, at 4 (Jan. 3, 1995).

[13] Id. at 51.

Foster's office after his death, and Mr. Foster's possible role or involvement in other events under investigation by the OIC, the OIC reviewed and analyzed the evidence gathered during prior investigations of Mr. Foster's death and conducted further investigation.

III. OVERVIEW

A. Scrutiny

The gunshot death of a high-ranking White House lawyer who had been a law partner of the First Lady of the United States and friend to both the President and the First Lady was bound to be heavily scrutinized -- and it has been. Many persons have publicly identified specific issues regarding Mr. Foster's death that, in their view, might raise broader questions about the ultimate conclusion that Mr. Foster committed suicide in Fort Marcy Park. Those questions have arisen and to some extent persisted for many of the same reasons that numerous suicides are questioned. In this case, as in many suicides, no identified eyewitness saw Mr. Foster commit suicide, and Mr. Foster apparently did not leave a suicide note (that is, a note that specifically refers to or contemplates suicide).[14]

The primary issues that have been raised regarding the cause

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[14] The great majority of individuals committing suicide do not leave a note. See, e.g., Berman Report at 15; A. Leenaars, Suicide Notes, Communication, and Ideation in Assessment and Prediction of Suicide (R. Maris, A. Berman, J. Maltsberger & R. Yufit eds. 1992) (12-15% of suicide victims leave note); A. Berman, Suicide Notes and Communications in Comprehensive Textbook of Suicidology and Suicide Prevention (R. Maris, A. Berman & M. Silverman eds.) (forthcoming).

and manner of Mr. Foster's death can be grouped into several broadly defined categories: (1) forensic issues; (2) apparent differences in statements of private witnesses, Park Police personnel, and Fairfax County Fire and Rescue Department (FCFRD) personnel regarding their activities and observations at Fort Marcy Park on July 20; (3) physical evidence (such as the fatal bullet) that could not be recovered; and (4) the conduct of the Park Police investigation and the autopsy.[15]

B. OIC Personnel

To ensure that these issues were fully considered, carefully examined, and properly assessed in analyzing the cause and manner of Mr. Foster's death, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman.

Dr. Blackbourne has been County Medical Examiner for San Diego County, California, since 1990. He was Chief Medical Examiner for the Commonwealth of Massachusetts from 1983 to 1990; Deputy Chief Medical Examiner in Washington, D.C., from 1972 to 1982; and Assistant Medical Examiner in Metropolitan Dade County, Florida, from 1967 to 1972. He has taught and written widely, and has testified in court on numerous occasions. He has performed over 5,500 autopsies, over 700 of which have involved gunshot wounds. The autopsies have included over 800 homicides

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[15] Numerous individuals, including members of the news media, analyzed the information made public by the Senate after its inquiry and published or sent the OIC theories, articles, and reports. OIC investigators have reviewed that sizeable body of information and have taken it into account.

and over 700 suicides. He is a Fellow of the American Academy of Forensic Sciences and a member of the National Association of Medical Examiners.

Dr. Lee has served as Director of the Connecticut State Police Forensic Science Laboratory since 1980. He has numerous professional affiliations and has served as a consultant to a variety of organizations. He has received over 400 awards and commendations, including a 1986 Distinguished Service Award and a 1994 Distinguished Fellow Award from the American Academy of Forensic Sciences. He has been qualified in many state and federal courts as an expert witness or an expert involved in forensic science, forensic serology, bloodspatter analysis, crime scene investigation, crime scene profiling, crime scene reconstruction, fingerprints, imprints, and general physical evidence. He has written or edited many books and articles, including Physical Evidence (1995), Crime Scene Investigation (1994), Physical Evidence and Forensic Science (1985), and Physical Evidence and Crime Scene Investigation (1983).

Since 1995, Dr. Berman has been Executive Director of the American Association of Suicidology. He was President of that Association in 1984-85. From 1991 to 1995, he was Director of the National Center for the Study and Prevention of Suicide. Since 1971, he has engaged in the private practice of psychotherapy and psychological consultation. In 1982, he received the Edwin S. Shneidman Award for outstanding contribution in research by the American Association of

Suicidology. He has taught and written extensively on the subject of suicide, and has testified before committees of the United States House of Representatives and the United States Senate. He is a Distinguished Adjunct Professor of Psychology at the American University in Washington, D.C., and was a tenured professor in the Department of Psychology from 1979 to 1991. He was co-editor of Assessment and Prediction of Suicide (1992). He has been a Consulting Editor of the journal Suicide and Life-Threatening Behavior since 1981.

OIC investigators who worked with these outside, independent experts included an FBI agent detailed from the FBI-MPD[16] Cold Case Homicide Squad in Washington, D.C. Agents with the Cold Case Squad work with MPD homicide detectives in reviewing and attempting to solve homicides that have remained unsolved for more than one year. Another OIC investigator has extensive homicide experience as a detective with the MPD in Washington, D.C., for over 20 years. Two other OIC investigators assigned to the Foster death matter have experience as FBI agents investigating homicides of federal officials and others.[17]

C. Methodology

The OIC devoted substantial effort to gathering, examining, and analyzing evidence to render as conclusive a determination as possible of the cause and manner of Mr. Foster's death. In this

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[16] "MPD" refers to the Metropolitan Police Department of Washington, D.C.

[17] These investigators did not work on previous investigations of Mr. Foster's death.

kind of investigation -- a reconstruction based in part on evidence gathered and tested during prior investigations -- the important information in assessing the cause and manner of death includes testimonial, documentary, and photographic evidence relating to the scene and the autopsy; physical and forensic evidence gathered at the scene and the autopsy; a variety of tests and analyses of the evidence; and testimonial and documentary evidence revealing the decedent's activities and state of mind in the days and weeks before his death.[18]

In particular, the OIC obtained information gathered during the prior investigations of Mr. Foster's death, including physical evidence; photographs taken at the scene and the autopsy; and incident reports, interview reports, and other documents produced or gathered by the Park Police, the FCFRD, the FBI, and Mr. Fiske's Office. The OIC questioned the known and identified civilian witnesses who were in Fort Marcy Park in the late afternoon of July 20, the Park Police and FCFRD personnel who responded to Fort Marcy Park, and the medical personnel who were involved in the Foster matter. Many of these persons were questioned before the federal grand jury.[19]

As to forensic information, the OIC attempted to obtain certain physical and forensic evidence in addition to that which had been gathered in prior investigations. Experts retained by

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[18] See Crime Scene Investigation (Lee ed. 1994); see also Practical Homicide Investigation (Geberth ed. 1996).

[19] The OIC also took appropriate steps to inquire into all allegations and information it received.

the OIC reviewed and examined the evidence. Dr. Lee reviewed and studied scene and autopsy photographs and documentation; studied, re-examined, and tested physical evidence; reviewed FBI Laboratory tests and the autopsy results; met with FBI Laboratory personnel and Dr. Beyer, the medical examiner who conducted the autopsy; and toured and examined the Fort Marcy Park scene. Dr. Lee submitted a report summarizing his work on the physical and forensic evidence and setting forth his analysis.[20]

Dr. Blackbourne reviewed the relevant reports and the scene and autopsy photographs; reviewed microscopic slides; examined the Fort Marcy Park area; and interviewed Dr. Beyer, Dr. Haut (the medical examiner who responded to the Fort Marcy scene on July 20), and FBI and Virginia laboratory personnel. Dr. Blackbourne prepared a report summarizing his work on the forensic issues and setting forth his analysis.

As to information regarding Mr. Foster's activities and state of mind before his death, the OIC both re-interviewed certain persons who had been interviewed during prior investigations and interviewed persons not previously

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[20] As Dr. Lee explained, a perfect reconstruction of the circumstances of Mr. Foster's death was not possible at the time of the OIC's investigation. The reasons include the lack of complete documentation of the original shooting scene; the lack of subsequent records and photographs of each item of physical evidence prior to examination; the lack of x-rays of Mr. Foster's body from the autopsy; the lack of documentation of the amount of blood, tissue, and bone fragments in the areas at the scene under and around Mr. Foster's head; the lack of close-up photographs of any definite patterns and quantity of the bloodstains found on Mr. Foster's clothing and body at the scene; and the unknown location of the fatal bullet, which makes complete reconstruction of the bullet trajectory difficult. Lee Report at 485.

interviewed. These individuals included a variety of family members, friends, and associates who could potentially shed light on Mr. Foster's activities and state of mind. The OIC reviewed documents gathered in prior investigations, and sought and reviewed new documents.

The OIC provided Dr. Berman with relevant state-of-mind information (the bulk of which consisted of interview reports and transcripts), which he studied and analyzed. Dr. Berman submitted a report to the OIC summarizing his work and providing his analysis.

The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, considering the analyses and conclusions of the OIC experts and investigators, and preparing this report.

D. Report

This report will describe the factual background; the forensic evidence and analyses, including the autopsy findings; the analysis of Dr. Lee; and the analyses and reports prepared by Dr. Blackbourne and the pathologists retained by Mr. Fiske's Office. Above all, the Foster death case is a forensic matter, and the forensic evidence and analyses provide the foundation for the ultimate conclusion. The report then will discuss investigative work conducted with respect to other, specific issues. Finally, the report will summarize Dr. Berman's

conclusions regarding Mr. Foster's state of mind.[21]

The OIC has filed this summary report with the Special Division of the United States Court of Appeals. Because of the secrecy restrictions of Federal Rule of Criminal Procedure 6(e), the OIC has not submitted the report to the Congress or released it directly to the public.[22] The Special Division retains discretion to authorize public release of this report, and the OIC has prepared the report with the assumption that the Special Division, consistent with past practice, would see fit to authorize public release. While some descriptions of forensic evidence are necessarily graphic, the OIC has sought to comply with the 1994 Independent Counsel Reauthorization Act regarding the contents of reports.[23]

Some of the best evidence of the condition of Mr. Foster's body at the time of his death is contained in photographs taken

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[21] The OIC's summary report is based on, among other sources, Dr. Lee's analysis, Dr. Blackbourne's analysis, Dr. Berman's analysis, and a number of internal OIC memoranda prepared by OIC personnel. Those documents were based on and incorporate grand jury information. The documents represent the work product of the OIC and were part of the OIC's deliberative process used to reach a decision on the Foster death matter.

[22] Because considerable testimonial evidence was gathered before the grand jury, the OIC filed a Rule 6(e) disclosure application permitting the inclusion of grand jury information in this report to the Court. See In re North, 16 F.3d 1234, 1244 (D.C. Cir. 1994). The Court granted that motion.

[23] The Conference Report stated that an independent counsel must exercise "restraint" in a report and that "the conferees want to make it clear that the final report requirement is not intended in any way to authorize independent counsels to make public findings or conclusions that violate normal standards of due process, privacy or simple fairness." H.R. Conf. Rep. No. 103-511, at 19 (1994).

by Park Police officers at Fort Marcy Park and in photographs taken at the autopsy. However, based on traditional privacy considerations, this report does not include death scene or autopsy photographs. The potential for misuse and exploitation of such photographs is both substantial and obvious.[24]

IV. FACTUAL SUMMARY

A. Mr. Foster's Background and Activities on July 20, 1993

Vincent W. Foster, Jr., was born on January 15, 1945, in Hope, Arkansas, to Alice Mae and Vincent W. Foster. He had two sisters, Sheila and Sharon. He was graduated from Hope High School in 1963 and from Davidson College in 1967. He married Elizabeth (Lisa) Braden in 1968, and they had three children, two boys and a girl. Mr. Foster was graduated first in his class from the University of Arkansas School of Law in 1971, where he was Managing Editor of the Law Review. He joined the Rose Law Firm in Little Rock in 1971 as an associate, and he became a Member of the Firm in 1974. Mr. Foster left the Rose Law Firm and moved to Washington in January 1993 to serve as Deputy White

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[24] Cf., e.g., Navy Report Omits Suicide Notes, N.Y. Times, Nov. 2, 1996, at 9 (regarding suicide of Admiral Boorda: "The Navy Department decided not to make the notes public. . . . Many other items in the report are blacked out, like the autopsy report and the identities of people interviewed by investigators."); Katz v. National Archives and Records Administration, 68 F.3d 1438, 1441 (D.C. Cir. 1995) ("Out of concern for the Kennedy family's privacy, . . . the x-rays and photographs did not become a part of the record of the Warren Commission.").

House Counsel.[25] He initially lived in Washington with his sister Sheila Anthony and her husband Beryl Anthony. Mrs. Lisa Foster moved to Washington in early June 1993, and the family lived in a house in the Georgetown section of Washington.

On the morning of Tuesday, July 20, 1993, six months into the Clinton Administration, Mr. Foster drove his gray Honda Accord to the White House from the house in Georgetown where he and his family were living. After dropping off his older son and his daughter on the way to work, Mr. Foster arrived at the suite on the second floor of the White House's West Wing where White House Counsel Bernard Nussbaum and Mr. Foster had offices. Three assistants (Mr. Nussbaum's assistants Betsy Pond and Linda Tripp and Mr. Foster's assistant Deborah Gorham) and an intern (Thomas Castleton) had desks in the outer office of the suite.

According to the testimony of a number of witnesses, Mr. Foster attended the morning Rose Garden ceremony announcing the nomination of Louis J. Freeh to be Director of the FBI. According to Ms. Tripp and Ms. Pond, at about 12:00 or 12:30 p.m., Mr. Foster asked them for lunch from the White House mess.[26]

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[25] President and Mrs. Clinton had long-standing friendships with Mr. Foster. President Clinton and Mr. Foster first knew each other as children in Hope, Arkansas; Mrs. Clinton and Mr. Foster were long-time colleagues at the Rose Law Firm in Little Rock.

[26] USPP Report, 7/22/93, at 1 (Pond interview); Tripp 302, 4/12/94, at 4.

As used in citations herein, the term "OIC" refers to a transcript of either an interview or a grand jury appearance by a

After eating lunch in his office, Mr. Foster left the Counsel's suite. He was seen leaving by Ms. Tripp, Ms. Pond, and Mr. Castleton.[27] The OIC, like the other investigative bodies before us, has not learned of or located anyone who definitively[28] saw Mr. Foster from the time he left the White House until near 6:00 p.m., at which time a private citizen found Mr. Foster dead in Fort Marcy Park.

B. Fort Marcy

Fort Marcy was constructed as a Civil War earthwork fortification. It is located between the George Washington Memorial Parkway (GW Parkway) and Chain Bridge Road in the Virginia suburbs of Washington, D.C., approximately 6.5 miles by car from downtown Washington. The GW Parkway, on which there is virtually constant automobile traffic, runs along the Virginia side of the Potomac River from Mount Vernon to the Capital Beltway. Several bridges connect the Parkway (or roads leading

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witness. The term "302" is the traditional term used to refer to FBI interview reports and refers here to interview reports of investigators assigned to Mr. Fiske's Office or the OIC. For reports of interviews, the dates listed are those on which the interviews took place.

[27] When he left, Mr. Foster reportedly said something to the effect that there were M&M's in his office and "So long" or "I'll be back." See USPP Report, 7/22/93, at 1 (Castleton interview); Castleton 302, 5/3/94, at 2; USPP Report, 7/22/93, at 1 (Pond interview). As will be fully discussed below, Ms. Tripp and Ms. Pond said that Mr. Foster was not carrying a briefcase when he left the suite. Mr. Castleton stated that Mr. Foster was carrying a briefcase when he left.

[28] The one possible exception is a citizen who observed a car entering Fort Marcy in the mid-afternoon. His statements are described below.

to the Parkway) to Washington. A parking lot for the park is adjacent to the outbound side of the GW Parkway.[29] Inside the park, as of July 1993, were two cannons -- one closer to the GW Parkway and a second (the one near which Mr. Foster was found) closer to Chain Bridge Road. That second cannon is approximately 200 yards from the parking area.[30]

Thirty-one witnesses, 19 of whom observed Mr. Foster's body, have provided relevant testimony about their activities and observations in and around the Fort Marcy Park area on July 20, 1993. They include:

> 6 private citizens (one of whom discovered and observed Mr. Foster's body);[31]
>
> 13 Park Police personnel (9 of whom observed Mr. Foster's body);
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> 11 Fairfax County Fire and Rescue Department (FCFRD) personnel (8 of whom observed the body); and
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> Dr. Haut, the doctor representing the Medical Examiner's Office who responded to the scene and examined the body.

Between about 2:45 and 3:05 p.m., a citizen (C1) driving

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[29] A pedestrian can enter Fort Marcy Park from Chain Bridge Road, but a chain-link fence prevents vehicle entry and did so in July 1993, according to information provided by the Park Service. OIC Doc. No. DC-229-1. Moreover, trees and thick vines are growing through the fence in a manner that reveals that the fence has been there for some years. OIC Investigators' Memorandum, 3/1/96, at 72.

[30] The trees, brush, and hills within the park were such that one would not walk in an absolutely straight line from the parking lot to the second cannon.

[31] For privacy reasons, the names of the private citizens will not be included in this report.

outbound on GW Parkway saw "a dark metallic grey, Japanese sedan" occupied by a single, white male abruptly enter Fort Marcy Park.[32] C1 said in his initial 1993 statement to the Park Police that the license plate was from Ohio or Arkansas.[33] Months later, on April 18, 1994, during Mr. Fiske's investigation, C1 was shown photographs of Mr. Foster's car. C1 stated that the car in the photographs looked "similar" to the car he recalled, but that the license plate on it differed from that which he recalled.[34]

Another citizen (C2) drove his rental car into the Fort Marcy parking lot at approximately 4:30 p.m. While there, C2 saw one unoccupied car, which he described as a "rust brown colored car with Arkansas license plates."[35] C2 also saw another nearby car; that car was occupied by a man who exited his car as C2 exited his own car.[36] C2 described this man as having "a look like he had a -- an agenda," although "everything I based my observation of this guy, was from my gut, more than anything else."[37] C2 and the man did not speak to one another.[38] C2

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[32] USPP Report, 7/26/93 and 8/2/93, at 1 (C1 interviews). Mr. Foster's car was a gray Honda Accord, 4-door, with Arkansas license plates.

[33] Id.

[34] 302, 4/18/94, at 2.

[35] OIC, 11/1/95, at 22, 28.

[36] Id. at 25.

[37] Id. at 27, 62.

[38] Id. at 61-62.

went into the park to urinate, and the other man had reentered his car by the time C2 returned to the parking lot.[39] C2 then left the park in his car.[40]

A man (C3) and woman (C4) pulled into the Fort Marcy parking area in C4's white Nissan at about 5:00 p.m. and were still at Fort Marcy when police and rescue personnel arrived shortly after 6:00 p.m.[41] While C3 and C4 were at Fort Marcy, another citizen (C5) drove his white van into the parking lot to urinate. C5 said that he exited his van, and while walking through the park, found Mr. Foster's body near the second cannon, the cannon closer to Chain Bridge Road.[42] C5 then left Fort Marcy and drove approximately 2.75 miles further outbound on the GW Parkway to a parking area near GW Parkway Headquarters; there, C5 reported the dead body to two off-duty Park Service employees who called 911.[43] Numerous Park Police and FCFRD personnel then responded

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[39] Id. at 38.

[40] Id. at 61-62.

[41] USPP Report, 7/20/93, at 1 (C3 and C4 interviews).

[42] OIC, 2/23/95, at 11, 22-33. The Fiske Report referred to this man as CW.

C5, among other observations, said that certain vegetation in the area appeared trampled, id. at 28-29, although no one else reported such an observation, see, e.g., Fornshill 302, 4/29/94, at 4.

[43] C5 OIC, 2/23/95, at 39, 41-43. Records show that the 911 call was placed from a phone at that parking area. Investigators' 302, 4/29/94, at 1.

to Fort Marcy Park.[44]

In the initial response, two groups of FCFRD personnel, as well as Park Police Officer Kevin Fornshill, arrived at Fort Marcy Park at approximately the same time -- about 6:10 p.m.[45] They then split into teams to search the park. Officer Fornshill and FCFRD personnel George Gonzalez and Todd Hall composed one group; FCFRD personnel Richard Arthur, James Iacone, Jennifer Wacha, and Ralph Pisani formed the other. The Fornshill-Hall-Gonzalez group first reached the body of Mr. Foster, and the other group joined them soon thereafter.

Twelve additional Park Police personnel subsequently arrived at Fort Marcy Park. Officer Franz Ferstl was the responding beat officer and, as such, was responsible for preparing the incident report. He responded to the scene at the same time as Officer Julie Spetz. Sergeant Robert Edwards, the District supervisor, also arrived on the scene. Ferstl, Spetz, and Edwards arrived

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[44] In the meantime, a woman (C6) had left her broken-down blue Mercedes, with hazard lights flashing, on the entrance road leading to the Fort Marcy parking area. She walked along GW Parkway to a nearby exit to obtain assistance (as there was no phone at Fort Marcy Park). C6 302, 4/11/94, at 1-2.

[45] Fairfax County records reflect that 911 was first called at 5:59:59 p.m. The Park Police dispatcher was notified at 6:02:35 p.m. The first FCFRD personnel (Pisani, Iacone, and Wacha in Engine 1) arrived at Fort Marcy Park at 6:09:58 p.m. and the second group (Gonzalez, Hall, and Arthur in Medic 1) arrived at 6:10:16 p.m. Officer Fornshill of the Park Police arrived at 6:11:50 p.m., according to Park Police records. Fairfax County records show that the FCFRD personnel indicated at 6:37 p.m. that they were available on radio, which means that they had completed their duties, although it does not mean they necessarily had departed Fort Marcy Park at that time. Arthur OIC, 1/5/95, at 72-76.

before approximately 6:15 p.m., according to the report of Officer Christine Hodakievic, who arrived at approximately 6:15 p.m. and recorded the names of those officers already on the scene (Fornshill, Ferstl, Spetz, and Edwards). Lieutenant Patrick Gavin arrived in a supervisory role at roughly 6:30 p.m., according to his recollection.

According to their reports, Investigators Cheryl Braun and John Rolla, the lead Park Police investigators, arrived along with Investigator Renee Abt at about 6:35 p.m. They received investigative assistance from Officer Hodakievic, who was an investigator in training at that time. Peter Simonello, the Park Police identification technician responsible for gathering physical evidence, arrived shortly thereafter.[46]

At the scene, Park Police investigators and the Park Police identification technician conducted interviews, examined the body and Mr. Foster's car, made notes, took photographs, and collected evidence. Later, five of the Park Police personnel prepared typed reports: the responding beat officer (Ferstl), the two lead investigators (Rolla and Braun), Officer Hodakievic, and the identification technician (Simonello). Several evidence receipts were prepared to record physical evidence obtained at the scene.

When the Park Police and rescue personnel found Mr. Foster's body, he was lying on his back on a berm in front of the second

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[46] Officer William Watson and an intern later came to provide any needed assistance, as did Lieutenant Ronald Schmidt.

cannon, the cannon nearer Chain Bridge Road.[47] He was dead and had a gun in his right hand[48] (with his thumb trapped in the

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[47] See FCFRD Report (Gonzalez) at 1-2 ("We came across the first cannon. I searched around this area and found nothing. We searched further to the next cannon and found a dead male [with] suit pants and dress shirt."); USPP Report (Ferstl) at 1 ("Ofc. Fornshill advised that he located the body just north of the second cannon"); USPP Report (Rolla) at 1 ("decedent was located . . . at the second cannon"); see also C5 302, 4/14/94, at 3 (referring to body's location at second cannon); Arthur OIC, 1/5/95, at 40 (same); Braun 302, 4/28/94, at 2 (same); Fornshill Senate Deposition, 7/12/94, at 15-16 (same); Gavin OIC, 2/23/95, at 12 (same; "last cannon"); Hall OIC, 1/5/95, at 18-19 (same); Hodakievic 302, 5/2/94, at 1 (same); Simonello 302, 4/28/94, at 1 (same); Wacha OIC, 1/10/95, at 32 (same). Walk-throughs conducted at the scene by investigative personnel with the witnesses confirmed this location within the park. In addition, two reporters and Park Police officers separately visited the scene on July 21 and 22, 1993, and identified the spot where the body had been located by the blood in the ground near the second cannon. Reporter 302, 4/18/96, at 1; Hill 302, 3/1/95, at 3.

Two botanists from the Department of Agriculture examined both the scene and the photographs that had been taken at the scene on July 20. They said that the plants depicted in the photographs were consistent with those observed during their examination of the second cannon area. 302, 6/2/95, at 1.

[48] Both Hall and Gonzalez observed the gun in the right hand. See Hall OIC, 1/5/95, at 30-31; Hall Senate Deposition, 7/20/94, at 10; Gonzalez 302, 4/27/94, at 3; Gonzalez 302, 5/15/96, at 2. According to Officer Fornshill, as Hall was examining the body, Hall said words to the effect that "we've got a gun here" and pointed in the general direction of the decedent's right hand. Fornshill 302, 4/29/94, at 3; Senate Deposition, 7/12/94, at 21; OIC, 1/11/95, at 93, 114. Fornshill did not see the gun, however. 302, 4/29/94, at 3; OIC, 1/11/95, at 79. He said that he could not see the gun either because of his position or the vegetation around the hand. 302, 4/29/94, at 3; Senate Deposition, 7/12/94, at 21; OIC, 1/11/95, at 114. As to why he did not move into a position to confirm the existence of the gun, Fornshill said, "I'm not the investigator. I let the investigator do that. I'm maintaining the scene. If there's a gun at the scene, I'm making sure nobody touches the gun, I'm making sure nobody disturbs the gun. . . . If the EMT [emergency medical technician] tells me there's a gun there then I'll go with that." OIC, 1/11/95, at 115.

C5, when he earlier observed the body, did not see a gun in

trigger guard). Gunshot residue-like material was observed on his right hand.[49] When the Park Police lifted and turned over the body later that evening, they noted a wound out the back of his head,[50] and blood on the ground underneath his head and back.[51] They observed no signs of a struggle.[52]

Park Police also found a gray, 4-door Honda Accord with Arkansas plates in the parking lot; that car, the police discovered later that evening, was registered to Mr. Foster.[53] The two lead Park Police investigators (Braun and Rolla) photographed and examined the car and, during that examination, found Mr. Foster's White House identification.[54] The car was

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Mr. Foster's hand. 302, 4/14/94, at 4. The issue raised by C5's statement is discussed further below.

Mr. Foster was right-handed. See, e.g., Beryl Anthony 302, 4/11/95, at 1; Sheila Anthony 302, 4/11/95, at 1; Lisa Foster 302, 4/7/95, at 1; Foster Younger Son 302, 4/7/95, at 3; Foster Older Son 302, 4/7/95, at 5; Foster Daughter 302, 4/7/95, at 4.

[49] See Rolla 302, 2/7/95, at 3; USPP Report (Simonello) at 1. The residue is apparent in Polaroid photographs taken at the scene.

[50] Rolla OIC, 2/9/95, at 28-29; Hodakievic OIC, 2/14/95, at 15.

[51] This issue will be discussed further below.

[52] Fornshill 302, 4/29/94, at 4; Ferstl 302, 5/2/94, at 2; Rolla Senate Deposition, 7/21/94, at 99; Simonello 302, 2/7/95, at 3.

[53] USPP Report (Rolla) at 1.

[54] See USPP Report (Braun) at 2; Braun 302, 4/28/94, at 3; USPP Report (Rolla) at 2. Lieutenant Gavin said he was notified by the investigators at about 8:00 p.m. that the decedent was a White House employee. Gavin OIC, 2/23/95, at 24. Gavin subsequently notified an officer of the Uniformed Division of the Secret Service, Lieutenant Woltz. Id. at 25. To Lieutenant

towed to a Park Police impoundment lot that night.[55] The next day, the car was further photographed and examined at the impoundment lot.[56]

Dr. Haut, the medical examiner's representative, arrived at Fort Marcy Park at approximately 7:40 p.m. on July 20 and confirmed the death.[57] The body was then transported by FCFRD ambulance personnel to a morgue at Fairfax Hospital in Fairfax,

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Gavin's knowledge, he was the first person to notify anyone at the White House or the Secret Service about Mr. Foster's death. Id. at 26-27. According to a Secret Service memorandum prepared at 10:01 p.m. on July 20, the Secret Service was notified of Mr. Foster's death at 8:30 p.m. when Lieutenant Woltz was contacted by Lieutenant Gavin. OIC Doc. No. DC-211-147.

[55] Raley's Towing Receipt, Case No. 30502; USPP Impounded Car Record, Case No. 30502.

[56] USPP Report (Smith) at 1. Photographs were taken at the impound lot of the interior of the trunk of the car. Those photographs show stray papers, moccasin-type shoes, a book, cassette tapes, and the like (no evidence that a body had been in the trunk).

[57] Officer Hodakievic's report and Technician Simonello's report indicate that Dr. Haut arrived at 7:40 p.m. USPP Report (Hodakievic) at 1; USPP Report (Simonello) at 1. Investigator Abt's contemporaneous notes place Dr. Haut's arrival at 7:43 p.m. Although Dr. Haut subsequently recalled arriving at an earlier time, see 302, 4/14/94, at 1 (6:45 p.m.); OIC, 2/16/95, at 8 (7:15 p.m.), Dr. Haut did not contemporaneously record the time of his arrival. The several contemporaneously prepared notes and reports of the Park Police officers therefore are likely more accurate.

Dr. Haut completed a "Report of Investigation by Medical Examiner" after the incident; the report is stamped with the date July 30, 1993. OIC Doc. No. DC-106A-1 to DC-106A-2. The report states that the cause of death was "perforating gunshot wound mouth-head" and the means of death was "38 caliber handgun." Id. It states that the manner of death was "suicide." Id. Dr. Haut signed the death certificate. It states that the cause of death was "perforating gunshot wound mouth - head" and that the manner of death was "suicide" by "self-inflicted gunshot wound mouth to head."

Virginia.[58]

The witnesses' recollections of precise details at Fort Marcy Park vary in some respects (the differences will be explored below). Nonetheless, the evidence from the scene -- including the gun, the apparent residue, the nature of the wound, the blood, the lack of any signs of a struggle -- points to the conclusion that death resulted from suicide by gunshot. A final determination of the manner of death depends on a variety of further investigative steps -- most importantly, those associated with forensic science.

V. FORENSIC ANALYSES

The forensic analyses, in conjunction with the evidence from the scene, confirm that Mr. Foster committed suicide in Fort Marcy Park.

A. Autopsy

The autopsy occurred on July 21, 1993, in the presence of six persons. Dr. James Beyer, Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner, conducted the autopsy, aided by an assistant. Park Police Sergeant Robert Rule and Officer James Morrissette observed the autopsy.[59] Park

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[58] The body arrived at the hospital at approximately 8:30 p.m., according to logs of the FCFRD. Hospital and morgue logs show that Dr. Julian Orenstein viewed the body at the hospital in the ambulance at 8:49 p.m., and that the body was received at the morgue at 9:00 p.m. OIC Doc. Nos. DC-108-12 to DC-108-16.

[59] Officer Morrissette's report on the autopsy states: "After briefing him with the available information surrounding the crime scene and the victim he started the autopsy on the victim." USPP Report (Morrissette) at 1.

Police Identification Technicians Hill and Johnson took photographs at the autopsy and collected evidence such as clothing, blood samples, and hair samples. Dr. Beyer prepared an autopsy report. He has supplemented the report with testimony on several occasions.

Dr. Beyer has performed over 20,000 autopsies.[60] His responsibility is to determine cause of death and, in the case of a gunshot wound, to determine with the police the manner of death -- suicide, homicide, accident, or undetermined.[61]

Dr. Beyer said Dr. Haut contacted him early on July 21, 1993, to advise him of Mr. Foster's death.[62] Dr. Beyer recalled that Dr. Haut indicated that there was a perforating gunshot wound (that is, a gunshot wound with an entrance and exit) and that the Park Police was the investigating agency.[63]

Dr. Beyer recalled that when he opened the body bag, there was blood on the right side of the face and on the right shoulder area of the shirt.[64] Dr. Beyer found a large amount of blood in the body bag.[65]

The autopsy report states that Mr. Foster's height was 6

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[60] Beyer OIC, 2/16/95, at 4.

[61] Id. at 5.

[62] Id. at 8.

[63] Id. at 9. Dr. Beyer had no conversations with members of the White House, the Foster family, or Foster family attorneys in connection with the autopsy. Id. at 6.

[64] Id. at 10-11.

[65] Lee Report at 495.

feet and 4 1/2 inches and his weight was 197 pounds. The report indicates no problems or abnormalities with the cardiovascular system, respiratory system, liver, gall bladder, spleen, pancreas, adrenal and thyroid glands, gastrointestinal tract, genitourinary tract, kidneys, urinary bladder, or genitalia. The report states that the "[s]tomach contains a considerable amount of digested food material whose components cannot be identified."[66]

As to the head, the report indicates:

> Perforating gunshot wound mouth-head; entrance wound is in the posterior oropharynx at a point approximately 7 1/2" from the top of the head; there is also a defect in the tissues of the soft palate and some of these fragments contain probable powder debris. The wound track in the head continues backward and upward with an entrance wound just left of the foramen magnum with tissue damage to the brain stem and left cerebral hemisphere with an irregular exit scalp and skull defect near the midline in the occipital region. No metallic fragments recovered.

The report contains a diagram of the head and brain area that depicts the entrance wound and the fracture line. A separate diagram depicts the fracture lines, exit, and skull damage. A third page of diagrams of the head area states "perforating gunshot wound" and describes the entrance wound as follows: "Entrance -- mouth -- posterior oropharynx -- large defect -- soft palate defect / powder debris identified." It describes the

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[66] Officer Morrissette's report also indicates that Dr. Beyer stated at the autopsy "that it appeared that the victim had eaten a 'large' meal which he [Dr. Beyer] believed to have occurred within 2-3 hours prior to death." USPP Report (Morrissette) at 1. An exact time of death has not been established.

exit wound as a wound of 1 1/4" x 1". The report indicates "backward" and "upward" as the direction of the bullet through the head.[67]

With respect to the wound, Dr. Beyer stated: "The entrance wound was in the back of the mouth, what we call the posterior oropharynx, where a large defect was present. There was also a soft palate tissue defect, and powder debris could be identified in the area of the soft palate and the back of the mouth. The exit wound is depicted [in the autopsy report] as being present three inches from the top of the head, approximately in the midline, and there is an irregular wound measuring one and one-quarter inch by one inch."[68] There was "good alignment" between the entrance and exit wounds, and there was "no reason to think that this was not an entrance and exit defect configuration."[69] As the report indicates, Dr. Beyer did not recover any bullets or bullet fragments from the body.[70]

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[67] Officer Morrissette's report similarly indicates that "[t]he cause of death was determined to be 'perforated gunshot wound in and out.' The point of entry was in the back of the mouth with the exit in the back of the head." Id.

[68] OIC, 2/16/95, at 19.

[69] Id. at 20.

[70] Id. at 16. The lack of a bullet or bullet fragments was confirmed by others who attended the autopsy. Dr. Beyer's assistant recalled that Dr. Beyer inserted a probe through the path of the bullet before the skull was opened and commented that the path was clear. (Autopsy photographs clearly depict the wound and the probe through the wound path.) The assistant recalled that after the brain was removed and visually inspected, Dr. Beyer dissected it with cuts of approximately one-eighth inch thickness, and that no bullet fragments were located in the brain. 302, 9/11/95, at 2-3. According to Officer Morrissette's

The report states that "[s]ections of soft palate" were "positive for powder debris," and Dr. Beyer said that the gunpowder debris in the mouth was "grossly present," meaning that it could be seen with the naked eye, and was present in a "large amount."[71] Thus, Dr. Beyer stated that "the obvious finding was that the muzzle of the weapon had to be in his mouth, close to the back of his throat, back of his mouth."[72]

Dr. Beyer said that he performed "an external examination of the body, with photography of the body. We then examine the body for any identifying marks, such as scars, tatoos or wounds."[73] Dr. Beyer stated that he recalls observing powder debris on the right hand.[74] He recalled gunpowder debris on the left hand to

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report, Dr. Beyer stated "that the bullet trajectory was 'upward and backward' exiting in the center line of the back of the head" and that "there was no evidence of bullet fragments in the head." USPP Report (Morrissette) at 1. Officer Johnson recalled the examination of the wound path and said that no projectile or bullet fragment was recovered. Johnson recalled that Dr. Beyer may have mentioned that it was a clean wound, meaning that it was a through-and-through shot. 302, 2/2/95, at 2. Sergeant Rule similarly recalled being present when the skull was opened and the wound track examined; no projectile or fragments were recovered. 302, 2/3/95, at 2. Technician Hill recalled that a trajectory rod was inserted in the wound track and that no bullet or bullet fragment was recovered. 302, 3/1/95, at 1-2.

[71] OIC, 2/16/95, at 20, 22.

[72] Id. at 22.

[73] Id. at 12.

[74] Id. at 16. Officer Morrissette's report states that Dr. Beyer "pointed out what he thought to be gunpowder residue on the right hand forefinger of the victim. I supplied him with a picture of the crime scene in which the suspected residue was evident." USPP Report (Morrissette) at 1. Officer Johnson also recalled black marks on the right hand. 302, 2/2/95, at 2. Technician Hill recalled apparent gunshot residue on Mr. Foster's

a much lesser degree.[75] (The diagrams in the autopsy report indicate "black material" on both the right hand and the left hand.) Dr. Beyer also recalled a "tannish brown indentation" across the back of the right thumb (the thumb which had been in the trigger guard).[76]

Dr. Beyer said that observation of Mr. Foster's body revealed no wounds on the neck, hands, buttocks, shoulder, back, or any portion of the body other than the head; he said, moreover, that any such wounds would have been registered on the anatomic diagram.[77] Dr. Beyer stated that "[t]here was no

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hand. 302, 3/1/95, at 2. Sergeant Rule recalled apparent gunshot residue on Mr. Foster's right hand. 302, 2/3/95, at 2.

[75] OIC, 2/16/95, at 16.

[76] Id. Semen was found on Mr. Foster's shorts by the FBI Laboratory. FBI Lab Report, 5/9/94, at 10. Involuntary urination and secretion of seminal fluid often occur upon death. Berman Report at 15; Hirsch OIC, 2/16/95, at 46; Beyer OIC, 2/16/95, at 15; OIC Memorandum (Blackbourne).

[77] OIC, 2/16/95, at 12-13. The lack of other wounds was confirmed by others at the autopsy. Dr. Beyer's assistant, for example, said he did not see any other wounds on Mr. Foster's body. 302, 9/11/95, at 3. Officer Johnson stated that he did not observe any trauma or other marks on the body other than the gunshot wound to the mouth and skull. 302, 2/2/95, at 2. Sergeant Rule stated that he did not observe or hear mention of any trauma to Mr. Foster other than the bullet wound to the mouth and skull. 302, 2/3/95, at 2. Technician Hill recalled the damage to the rear of the skull as the only trauma she observed. 302, 3/1/95, at 2. Officer Morrissette stated that he relied on Dr. Beyer's observations and descriptions at the autopsy and that he recalled neither Dr. Beyer nor anyone else making any mention of other wounds or trauma. 302, 2/10/95, at 3.

An interview report of George Gonzalez, one of the FCFRD personnel on the scene at Fort Marcy Park, stated that Gonzalez believed he had seen a wound in the upper-right-front portion of the skull. 302, 2/23/94, at 2. In another interview, Gonzalez stated that that report does not reflect "what [he] recalls or

evidence of any trauma to the individual other than the gunshot wound."[78]

Dr. Beyer concluded that this was a self-inflicted wound[79] based upon the fact that there was no evidence of any trauma other than the gunshot wound, and "no evidence of any central nervous system depression or diseased state that would have permitted, in my estimation, somebody to walk up and put a gun in his mouth and pull the trigger."[80]

Dr. Beyer's conclusions were reviewed by two sets of experts, one set retained by the OIC and the other by Mr. Fiske's Office. Their analyses of Dr. Beyer's findings and of the relevant laboratory analyses are outlined below. They confirm the conclusions reached at the autopsy.

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what he intended to report." 302, 5/15/96, at 3. Another of the FCFRD personnel, Richard Arthur, initially said he saw what "appeared to be a bullet wound, an entrance wound" on the neck. OIC, 1/5/95, at 63. After examining autopsy photos, which he said were taken from a better angle and a better view, he said he may have been mistaken about such a wound. 302, 4/24/96, at 1.

The initial statements of Gonzalez and Arthur were explored during the Senate's inquiry into Mr. Foster's death, the probe by Mr. Clinger, and the Fiske investigation. Those investigations included examination of the scene and autopsy photographs and found that the only wound to Mr. Foster was the gunshot wound through the back of his mouth and out the back of his head. <u>See, e.g.,</u> Fiske Report at 33 n.* ("The autopsy results, the photographs taken at the scene, and the observations made by Park Police investigators conclusively show that there were no such wounds" as those recalled by Gonzalez and Arthur.). OIC experts and investigators carefully reviewed the evidence and reached that same conclusion, as will be discussed further below.

[78] OIC, 2/16/95, at 26.

[79] <u>Id.</u> at 23.

[80] <u>Id.</u> at 26.

B. Laboratory Analyses

A number of photographs were taken at Fort Marcy Park and at the autopsy.[81] In addition, at both the scene and the autopsy, the Park Police obtained physical evidence. Evidence receipts show that, at the Fort Marcy scene, the Park Police obtained physical evidence and clothing, including the following:

* Colt Army Special .38 caliber revolver, 4", 6-shot
  (obtained from "right hand victim")
* round .38 caliber RP 38 SPL HV
  (from "revolver")
* casing .38 caliber RP 38 SPL HV
  (from "revolver")
* eyeglasses
  (from berm)
* Seiko quartz wrist watch
  (from "Deceased left wrist")
* pager
  (from "Deceased right side waist area")
* silver colored ring
  (from "Deceased right ring finger")
* gold colored band type ring
  (from "Deceased left ring finger")
* black suit jacket
  (from "front passenger seat of gray Honda")
* blue silk tie with swans
  (on "top of coat on front passenger seat")
* White House Identification
  (from "under coat on front passenger seat")
* brown leather wallet
  (from "inside suit jacket pocket of suit jacket from front passenger seat")

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[81] The issue of photographs taken at Fort Marcy is discussed further below.

At the autopsy, the Park Police obtained physical evidence and clothing, including the following:

* one vial of blood
* lock seal envelope containing pulled head hairs
* white colored long sleeve button down shirt with blood stain
* white colored short sleeve t-shirt with blood stain
* pair white colored boxer shorts
* pair blue gray colored pants with black colored belt
* pair black colored socks
* pair black colored dress shoes, size 11M

The Park Police and Medical Examiner's Office caused several laboratory tests of the evidence to be performed during the initial 1993 investigation. In addition, Mr. Fiske's Office and the OIC submitted physical evidence collected during the investigation of Mr. Foster's death to the FBI Laboratory, which has produced reports analyzing physical evidence. The OIC also submitted physical evidence to Dr. Lee, and he, too, produced a report based on his laboratory analyses. The following summarizes the relevant laboratory analyses.

1. <u>Gun</u>

a. <u>Operation</u>

The .38 caliber revolver recovered from Mr. Foster's hand at Fort Marcy Park had a four-inch barrel and a capacity of six shots.[82] It had one live round and one spent casing.[83] Had the

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[82] USPP Evidence/Property Control Receipt (Simonello) at 1.

trigger been pulled again, the next shot would have fired the remaining round.[84]

In August 1993, at the request of the Park Police, the Bureau of Alcohol, Tobacco and Firearms (ATF) Laboratory examined the revolver and found that it functioned. The ATF Laboratory determined that the cartridge case found in the cylinder under the hammer was fired in that gun.[85] The FBI Laboratory also test-fired the gun and determined that it "functioned normally" and that the trigger pulls were normal.[86] The .38 caliber cartridge case "was identified as having been fired in the . . . revolver."[87] Like the expended cartridge, the unexpended cartridge was .38 caliber manufactured by Remington. They bore similar headstamps.[88] Dr. Lee also test-fired the revolver and found that it was operable.[89]

b. Serial Numbers

An ATF report on the gun's two serial numbers revealed a purchase at the Seattle Hardware Company in Seattle, Washington, on September 14, 1913, and at the Gus Habich Company in

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[83] Id.

[84] OIC Investigators' Memorandum, 6/22/95, at 2.

[85] ATF Lab Report, 8/17/93, at 1.

[86] FBI Lab Report, 5/9/94, at 6.

[87] Id.

[88] Id.

[89] Lee Report at 451-54.

Indianapolis, Indiana, on December 29, 1913.[90] The gun could not be further traced.[91] Laboratory examination of the gun

> found no indication of any alteration of the serial number of the weapon. . . . The additional serial number on the crane of the firearm most likely occurred at some time when the eighty year-old weapon was repaired. There is no realistic way to determine when such a repair occurred. The exchange of the two numbers between the frame and the crane is a condition noted on many similar firearms in the Laboratory's Reference Firearms Collection and is not considered significant.[92]

c. **Ammunition**

Dr. Lee noted that the ammunition found in this weapon was type "RP .38 SPL HV," manufactured by Remington Peters. Dr. Lee stated that information from the manufacturer indicated that this ammunition was discontinued in 1975, and that the cartridge therefore would have been manufactured prior to that time.[93]

d. **DNA**

DNA consistent with Mr. Foster's DNA was detected on the muzzle portion of the barrel of the revolver. In particular, DNA type DQ alpha 2, 4 was detected on the gun and in Mr. Foster's blood.[94]

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[90] ATF Report of Firearms Tracing, National Tracing Center.

[91] Id.

[92] FBI Lab Report, 6/21/94, at 1.

[93] Lee Report at 488-89. That finding is consistent with the fact that, as is explained below, the gun at one time likely was located in the home of Mr. Foster's parents in Hope, Arkansas.

[94] FBI Lab Report, 5/9/94, at 10.

e. Blood

The gun was recovered at the scene by Park Police Technician Simonello and subsequently packaged in brown paper for storage in an evidence locker.[95] While the Park Police's subsequent examinations for fingerprints and other evidence could have removed some trace evidence that might have existed on the gun, Dr. Lee examined the gun and reported that "[s]mall specks of brownish-colored deposits were noted."[96] Dr. Lee found that "[s]ome of these deposits gave positive results with a chemical test for blood" although the "quantity of sample present was insufficient for further analysis."[97]

Dr. Lee also reported that "[m]acroscopic and microscopic examination of [the] piece of paper" originally wrapped around the barrel of the revolver for evidence storage "revealed the presence of reddish-colored particles. These stains also gave positive results with a chemical test for blood."[98] Dr. Lee stated that "[t]his fact suggests that the barrel of the weapon was in contact or at close range to a source of liquid blood."[99]

Dr. Lee further stated that "[b]lood spatters and tissue-like materials were noted on the fingerprint lift tape from the

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95 USPP Report (Simonello) at 1 ("I then wrapped the barrel in brown paper"); USPP Report (Smith) at 1.

96 Lee Report at 286.

97 Id.

98 Id. at 488.

99 Id.

weapon."[100] He reported that "[c]hemical tests for blood were positive with some of these materials."[101] Dr. Lee concluded that "[t]he presence of blood and tissue-like materials on the lifts is another strong indication that this weapon was fired while in contact with or close to a blood source."[102]

f. **Fingerprints**

Identification Technician E.J. Smith of the Park Police examined the gun for latent fingerprints[103] on July 23, 1993. The results were negative.[104] The FBI Laboratory later examined the gun and similarly detected no latent prints on the exterior surface of the weapon.[105]

In his report to the OIC, Dr. Lee explained that "[t]he handle grip area of [the .38 Colt revolver] is textured and is not typical of the type of surface which commonly results in the development of identifiable latent fingerprints."[106] He also

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[100] Id.

[101] Id.

[102] Id.

[103] Fingerprint examiners can perform fingerprint identifications when they obtain a sufficient number of ridge details to allow an identification. See generally Physical Evidence at 171 (Lee ed.).

[104] USPP Report (Smith) at 1. Identification Technician Simonello noted in his report of July 29, 1993, that "[o]n Sunday July 25, 1993, I was advised by Tech. S. Hill that item #1 had been processed for latent prints by Tech. E.J. Smith and that the results were negative." USPP Report (Simonello) at 1.

[105] FBI Lab Report, 6/9/94, at 2.

[106] Lee Report at 487.

noted that the fingerprint powder method was used when the Park Police initially tested the gun; "[a]lthough the fingerprint powder method is one of the most common techniques used in the latent print field, there are also newer technologies, such as cyanoacrylate fuming, laser, and forensic lighting techniques which could have been used in this case. It is unknown at this time whether these techniques would have provided additional information" had they initially been employed.[107]

The FBI Laboratory also noted that a lack of fingerprints is not extraordinary and that "[g]enerally, the determining factors in leaving latent prints are having a transferable substance, i.e., sweat, sebaceous oil or other substance on the fingers, and having a surface that is receptive to receiving the substance that forms the latent prints. A clean, smooth, flat surface is most receptive for transfer of any substance from the fingers,"[108] and the surface of the grip handle at issue here was textured, not smooth.

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[107] Id. at 487-88.

[108] FBI Lab Report, 6/9/94, at 2. The FBI Laboratory, during its examinations, found one latent fingerprint on the underside of the pistol grip (that is, not on an exterior surface of the gun). FBI Lab Report, 7/19/95, at 1. This print has been compared to prints of Mr. Foster and of evidence technicians who initially handled the gun, but no identifications were effected. FBI Lab Report, 12/13/95, at 1; FBI Lab Report, 8/14/95, at 1. This print would have been left by someone who assembled or disassembled the gun, for example, to repair it or to put on new grips or for some other reason.

g. **Marks on Body from Gunshot and Gun**

(1) **Gunshot Residue on Hands**

The photographs of Mr. Foster's right hand taken at Fort Marcy Park and during the autopsy depict black gunshot residue-like material on the right forefinger and the area between the thumb and forefinger. The autopsy report also noted material on the forefinger area of the left hand.

During the Park Police investigation, the ATF Laboratory found that gunshot residue patterns reproduced in the laboratory were consistent with those seen in the photographs taken by the Park Police at the scene.[109] The FBI Laboratory similarly stated that gunshot residue on the right forefinger area of the right hand is "consistent with the disposition of smoke from muzzle blast or cylinder blast when the . . . revolver is fired using ammunition like that represented by" the cartridge and casing recovered from the gun "when this area of the right hand is positioned near the front of the cylinder or to the side of and near the muzzle."[110]

Dr. Lee conducted test firings using a laboratory standard weapon and the same kind of ammunition that was found in the revolver recovered from Mr. Foster's hand. With the standard weapon, little or no observable gunpowder particles were released from the cylinder area or onto the shooter's hand.[111] However,

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[109] ATF Lab Report, 8/17/93, at 1.

[110] FBI Lab Report, 5/9/94, at 7.

[111] Lee Report at 489.

Dr. Lee reported that each test-fired shot of the revolver found in Mr. Foster's hand at Fort Marcy Park produced a significant amount of unburned and partially burned gunpowder.[112] Relatedly, Dr. Lee reported that the gun had an "extraordinary front cylinder gap"[113] (the space between the cylinder and the barrel) of .01 inch through which gunpowder residue is expelled when the gun is fired. Dr. Lee stated that the gap was one "possible cause[] of the deposit of a large amount of gunshot residue particles on Mr. Foster's body and clothing."[114]

(2) Indentation on Thumb

The revolver was recovered from Mr. Foster's right hand at the scene at Fort Marcy Park by Park Police Technician Simonello. Technician Simonello reported that Mr. Foster's thumb was trapped in the trigger guard of the gun.[115] Consistent with Technician Simonello's observation, the autopsy photographs depict an indentation mark on the inside of the right thumb.

> The mark on the inside of the right thumb which is visible in the [autopsy] photograph is consistent with a mark produced by the trigger of the . . . revolver when this portion of the right thumb is wedged between the front of the trigger and the inside of the front of the trigger guard of the . . . revolver when the trigger rebounds (moves forward). The trigger of the . . . revolver automatically rebounds when released

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[112] Id.

[113] Id. at 487.

[114] Id.

[115] USPP Report (Simonello) at 1 ("The right thumb was trapped between the trigger and inside front edge of the trigger guard."). Thus, Technician Simonello indicated that the revolver could not be easily removed. 302, 2/7/95, at 3.

after firing (single or double action) or whenever the trigger is released after it is moved to the rear. This mark is consistent with the position of the right thumb of the victim in the trigger guard of the revolver in [three Polaroid] photographs.[116]

h. Summary: Gun

Dr. Lee concluded, "[b]ased on laboratory observations and the examination of the scene photographs," that "the revolver . . . is consistent with the weapon which resulted in the death of Mr. Vincent Foster. The barrel of this weapon was likely in Mr. Foster's mouth at the time the weapon was discharged. Gunshot residue noted on Mr. Foster's right hand and the lesser amount of deposits on his left hand indicated that Mr. Foster held the weapon when it was fired."[117]

2. Clothing

At the autopsy, clothing was removed from Mr. Foster's body and placed on a table in the autopsy room.[118] Park Police Officer Johnson took this clothing and placed it in a single bag for return to the Park Police offices.[119] There, brown wrapping

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[116] FBI Lab Report, 5/9/94, at 7.

[117] Lee Report at 488.

[118] Johnson 302, 2/2/95, at 2. As noted above, this clothing consisted of the shirt, t-shirt, pants, belt, boxer shorts, shoes, and socks.

[119] Id. Because the clothing was packaged together before trace evidence was collected, specific trace evidence (in particular, that which is more readily transferred) cannot be conclusively linked to particular items of clothing that Mr. Foster was wearing at the time of his death. To obtain precise trace evidence analyses, each item must be kept separate before trace evidence is collected. See Crime Scene Investigation at 89 (Lee ed. 1994) ("The collection and preservation of physical evidence is the most important building block available to the

paper was laid on the floor of a photography room and the clothes placed on that paper.[120] The clothes were left to dry in the photography room until Monday, July 26, when Technician Simonello packaged the clothing and put it into an evidence locker.[121]

The FBI Laboratory and Dr. Lee independently examined the clothing, examined debris collected from the clothing by the FBI Laboratory during the 1994 investigation conducted by Mr. Fiske's Office, studied photographs taken at the scene and autopsy, and reported a number of findings related to the clothing.

a. **Gunshot Residue**

Dr. Lee, in his examinations, reported "[s]mall deposits of gunpowder residue and partially burned gunpowder particles" on the shirt.[122] Earlier FBI Laboratory examination of the shirt resulted in a positive reaction for vaporized lead and very fine particulate lead on the front of the shirt. "This type of reaction is consistent with the type of reaction expected when a firearm is discharged in close proximity to this portion of the shirt. It is consistent with muzzle blast or cylinder blast from a revolver like the [submitted] revolver using ammunition like" the cartridge and cartridge case submitted with the gun.[123] The

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crime scene investigator. . . . Each type of physical evidence has unique properties and must be collected and preserved carefully to avoid contamination.").

[120] Id. at 2-3.

[121] USPP Report (Simonello) at 1.

[122] Lee Report at 490.

[123] FBI Lab Report, 5/9/94, at 6.

FBI Laboratory further stated that

> [s]ubsequent chemical processing of the . . . shirt in the Laboratory revealed lead residues in a small area near the sixth button from the collar on the front of the . . . shirt. This reaction could have been caused by contact with a source of lead residues. Lead residues were also detected on the underside of the edge of the collar on the left side of the . . . shirt. This small area of lead residues could have been caused by the discharge of a firearm consistent with the positive reaction noted above when the [submitted] shirt was received in the Laboratory.[124]

The FBI Laboratory reported that these gunshot residues "are consistent with the cylinder blast or the muzzle blast" which would be produced if the revolver was fired "in close proximity to the front of th[is] shirt."[125]

Similarly, when the ATF Laboratory, at the request of the Park Police, tested Mr. Foster's shirt, it found "a positive reaction consistent with the discharge of a revolver in close proximity to the upper front of the shirt."[126]

b. Bloodstain Patterns as Depicted in Photographs from Scene

The FBI Laboratory examined the bloodstain patterns depicted in the Polaroids taken at the scene. The Laboratory Report

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[124] Id.

[125] FBI Lab Report, 6/13/94, at 2. In debris collected from the clothing, the FBI Laboratory found approximately 20 gunpowder particles that were similar to the gunpowder in the fired cartridge case of the gun found in Mr. Foster's hand, and two that were not. The Laboratory stated that one of the two dissimilar particles was "not consistent with having originated from a fired cartridge" and the other one was found "on a piece of paper used to dry Foster's clothes." Id. at 3. From these facts, the Laboratory stated that these two particles are "not likely associated with this investigation." Id.

[126] ATF Lab Report, 8/17/93, at 2.

stated:

> Photographs of the victim at the incident scene depict apparent blood stains on his face and the right shoulder of his dress shirt. The staining on the shirt covers the top of the shoulder from the neck to the top of the arm and consists of saturating stains typical of having been caused by a flow of blood onto or soaking into the fabric. The stains on his face take the form of two drain tracks and one larger contact stain. . . .
>
> The contact stain on the right cheek and jaw of the victim is typical of having been caused by a blotting action, such as would happen if a blood-soaked object was brought in contact with the side of his face and taken away, leaving the observed pattern behind. The closest blood-bearing object which could have caused this staining is the right shoulder of the victim's shirt. The quantity, configuration and distribution of the blood on the shirt and the right cheek and jaw of the victim are consistent with the jaw being in contact with the shoulder of the shirt at some time.[127]

Dr. Lee also examined the photographs taken at Fort Marcy Park. He noted that the photographs of the shirt show several areas of bloodstains, including "saturated-type bloodstains" on the "shoulder and collar region."[128]

On a separate bloodstain issue, Dr. Lee examined the photographs and reported that "[h]igh velocity impact type blood spatters were observed on Mr. Foster's face, hands, and shirt."[129] Dr. Lee stated that "[t]his type of blood spatter typically is produced at the time when a weapon is discharged and

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[127] FBI Lab Report, 5/9/94, at 9.

[128] Lee Report at 494. The FBI Laboratory determined that blood on the shirt and t-shirt was consistent with Mr. Foster's blood type. FBI Lab Report, 5/9/94, at 10.

[129] Lee Report at 495.

the spatters result from the backspatter of the gunshot wound."[130] Dr. Lee reported that "[t]hese blood spatters are intact and no signs of alteration or smudging were observed."[131] This finding is in conflict with any theory that the fatal shot was fired elsewhere and the head wrapped during movement or cleaned upon arrival -- because those actions likely would have altered, smudged, or eliminated the blood spatters, contrary to what Dr. Lee found.[132]

c. <u>Blood Drainage After Movement from Fort Marcy Park and Bloodstains on Clothing at Autopsy</u>

Dr. Lee noted that Dr. Beyer had "observed a large amount of liquid blood in the body bag and in Mr. Foster's body," which "further indicates that the location where the body was found is consistent with the primary scene [and that it] is, therefore, unlikely that Mr. Foster's body was moved to the Fort Marcy Park scene from another location."[133]

The shirt itself, which was removed at the autopsy after movement of the body to the morgue, contains bloodstains on areas where blood does not appear in the photographs of the body at the

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[130] <u>Id.</u>

[131] <u>Id.</u>

[132] OIC Investigators' Memorandum (Lee). In addition, Dr. Lee examined the shoes and found "[n]o heavy bloodstains or dripping type bloodstain patterns," Lee Report at 492, contrary to what might have been found had the body somehow been moved in an upright position. OIC Investigators' Memorandum (Lee).

[133] Lee Report at 495.

scene.[134] Dr. Lee stated that these stains on the shirt "most likely occurred when the body was placed into the body bag and moved from the scene and/or when in the body bag, prior to the collection of the decedent's clothing."[135] As noted below, the experts concluded that the shirt likely would have been more extensively stained when the body was found at the second cannon area at Fort Marcy Park had the body been moved from another location.

d. Mineral/Vegetative Material

Dr. Lee reported that examination of a photograph of Mr. Foster's shoes taken by the FBI Laboratory at the time of its initial examination revealed brownish smears on the left heel.[136] Dr. Lee further stated that his own macroscopic and microscopic examinations of the shoes revealed the presence of soil-like debris.[137] (The FBI Laboratory photo of the shoes, taken in 1994 at the time of the Laboratory's examination of the

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[134] Id. at 490, 494.

[135] Id. at 490. As to the pants, which also were removed after the body was moved in the body bag to the morgue, "[m]acroscopic and microscopic examination . . . revealed the presence of bloodstains. The majority of these bloodstains were consistent with contact transfer type bloodstain patterns." Id. at 492. Dr. Lee reported that no bloodstains or gunpowder particles were found on the jacket. That fact, Dr. Lee stated, "indicates that Mr. Foster was not wearing the jacket or the jacket was not in close proximity to the weapon at the time the weapon was discharged." Id. at 490. That finding comports with the evidence: Mr. Foster was not wearing a suit jacket when he was found; rather, his jacket was recovered from his car at Fort Marcy Park. See supra at 35.

[136] Lee Report at 491.

[137] Id.

clothing, shows traces of soil visible to the naked eye.) Dr. Lee found that "[t]race materials were located embedded in the grooves of the sole patterns at the heel of [the left shoe]. A portion of this material subsequently was removed. Microscopic and macroscopic examination showed this material to contain mineral particles, including mica, other soil materials, and vegetative matter."[138] Dr. Lee stated that this fact "indicates the sole of the shoe had direct contact with a soil surface containing these materials."[139]

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[138] Id. at 492.

[139] Id. It was not possible to associate definitively any of these mica or soil materials with Fort Marcy Park. As the FBI Laboratory explained, "[t]he trace amount of loose, unconsolidated soil" like that found on Mr. Foster's shoes and in the debris from the clothing "limits the meaningfulness regarding a comparison with other soils." Therefore, these materials "could have originated from the micaceous soil found at Fort Marcy, but the nature of this soil precludes an unambiguous association." FBI Lab Report, 7/9/96, at 1.

There has been misunderstanding of the statement in an earlier FBI Lab report that no "coherent soil" was found in the samples. FBI Lab Report, 5/9/94, at 12 (emphasis added). The FBI Lab Report's statement regarding a lack of coherent soil simply means, as explained in the preceding paragraph, that there was insufficient soil to effect a comparison with soil samples from Fort Marcy Park. But a lack of coherent soil is not the same as a lack of any trace of soil. And as Dr. Lee concluded, examination of Mr. Foster's shoes revealed particles of soil materials, indicating that the sole of the shoe did in fact have direct contact with a soil surface.

Regarding the lack of mud or "coherent" soil, the weather on July 20, 1993, and throughout the month of July was hot and dry in the area surrounding Fort Marcy Park. Weather information for National Airport, a few miles from Fort Marcy Park, from the National Oceanic and Atmospheric Administration indicates that on July 20, 1993, the temperature ranged from a low of 75 degrees to a high of 96 degrees. There was no recorded precipitation. For the month of July 1993, total precipitation was 1.36 inches, which is 2.44 inches below normal. The average temperature for

e. Lack of Rips, Tears, or Scraping on Clothing

Dr. Lee found a small amount of vegetative material on Mr. Foster's shirt that could have resulted from contact with the ground in the park.[140] Dr. Lee found no ripping, tearing, or scratch or scraping-type marks on the shirt. Dr. Lee stated that this fact "suggests that no prolonged moving contact with a soil surface occurred which would cause the type of damage commonly resulting from dragging or similar action."[141]

Dr. Lee reported that soil and grasslike materials were similarly present on the pants in the area of the rear pocket, which indicates that the pants had direct contact with a soil surface.[142] Dr. Lee reported that "[n]o dragging-type soil patterns or damage which could have resulted from dragging-type action were observed on these pants."[143]

f. Bone Chip

Dr. Lee examined debris collected from Mr. Foster's clothing and reported that the debris was "found to contain a bone chip."[144] Dr. Lee stated that DNA was extracted from this bone fragment and amplified, and the DNA profile generated for this

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the month was 83.1 degrees, 3.1 degrees above normal. OIC Doc. No. DC-BI-6.

[140] Lee Report at 491.

[141] Id.

[142] Id. at 492.

[143] Id.

[144] Id. at 130, 243, 493.

bone sample was consistent with the DNA types of Mr. Foster.[145] Based on his analysis of the evidence, Dr. Lee concluded that "[t]his bone chip originated from Mr. Foster and separated from his skull at the time the projectile exited Mr. Foster's head."[146]

g. Pants Pocket and Oven Mitt

William Kennedy, Associate White House Counsel, eventually took possession of Mr. Foster's car on behalf of the Foster family after the Park Police released it on July 28, 1993. Mr. Kennedy maintained contents of the car that had not been taken into evidence by the Park Police, and he produced those contents to investigators from Mr. Fiske's Office.[147] The contents included a kitchen oven mitt that had been in the glove compartment in Mr. Foster's car (the mitt is depicted in the glove compartment in the Park Police photographs of the car taken at the impoundment lot on July 21).[148]

Dr. Lee's examinations of this oven mitt and of Mr. Foster's pants (taken into evidence by the Park Police at the autopsy on July 21) produced circumstantial evidence relevant to the investigation.

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[145] Id.

[146] Id.

[147] Kennedy 302, 5/6/94, at 11-12; 302, 6/16/94, at 1.

[148] Investigators Rolla and Braun also recalled the oven mitt in the glove compartment of the car on July 20. Braun OIC, 2/9/95, at 95-96; Rolla 302, 4/17/96, at 6.

Dr. Lee reported that "[m]acroscopic and microscopic examination of the inside of the front pants pockets revealed the presence of fibers and other materials, including a portion of a sunflower seed husk in the front left pocket. Instrumental analysis of particles removed from the pocket surface revealed the presence of lead. These materials were also found inside the oven mitt located in the glove compartment of Mr. Foster's vehicle. . . . The presence of these trace materials could indicate that they share a common origin. These materials in the pants pocket clearly resulted from the transfer by an intermediate object, such as the Colt weapon."[149]

As noted, Dr. Lee also examined the oven mitt recovered from Mr. Foster's car. He reported: "Dark particle residues were located inside of the oven mitt. Instrumental analysis revealed the presence of the elements lead and antimony in these particles; this finding could indicate that an item which had gunshot residue on it, such as the revolver . . ., came in contact with the interior of [the oven mitt]."[150]

Dr. Lee further stated that "[s]unflower-type seed husks were located on the inner surfaces of this oven mitt. These sunflower seed particles were similar to the sunflower seed husks found in Mr. Foster's front, left pants pocket."[151] Dr. Lee stated that "[t]his finding suggests that the sunflower seed husk

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[149] Lee Report at 492-93.

[150] Id. at 494.

[151] Id.

found inside the pants pocket could have been transferred from the oven mitt through an intermediate object, such as the revolver."[152]

Virtually all theories that the manner of death was not suicide assume that Mr. Foster did not previously possess the gun recovered from his hand at Fort Marcy Park. Apart from a variety of other compelling circumstantial and testimonial evidence (discussed below) that the gun belonged to Mr. Foster, the evidence regarding the pants pocket and oven mitt also tends to link Mr. Foster to the gun. Mr. Foster was found by police and rescue personnel with the gun that fired the fatal shot in his hand, and the oven mitt was found in the glove compartment in his car. There is no evidence, moreover, that anyone other than Mr. Foster did place or would have placed this or any other gun into Mr. Foster's pants pocket and into the oven mitt. Those pieces of evidence, when considered together and with all of the other evidence, tend to link Mr. Foster to the gun and thus tend to refute a theory that the manner of death was not suicide. The evidence regarding the pants pocket and oven mitt does not itself compel a finding as to location of death, but it is consistent with a scenario in which Mr. Foster transported the gun from the Foster home in the oven mitt,[153] and carried the gun in his

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[152] Id.

[153] Statements by Foster family members provide circumstantial support for this part of the scenario. Lisa Foster and the Fosters' older son indicated that the oven mitt was usually in the kitchen, and they were unable to explain why it might have been in the Honda. Lisa Foster 302, 4/7/95, at 8;

pants pocket as he walked from his car in Fort Marcy Park to the berm near the second cannon.

h. Hairs and Fibers

In debris collected from Mr. Foster's clothing, the FBI Laboratory reported finding two blond to light brown head hairs of Caucasian origin that were suitable for comparison purposes and dissimilar to those of Mr. Foster.[154] The hairs did not appear to have been forcibly removed.[155] Hair evidence can become important or relevant in a criminal investigation when there is a known suspect and a significant evidentiary question whether the suspect can be forensically linked to another person (a rape or murder victim, for example) or to a particular location.[156] If the suspect is a stranger to the victim or the scene, the presence of the suspect's hair is relevant in assessing whether he or she had contact with the victim or scene. In this case, however, the only known individuals who reasonably might have been compelled to provide hair samples were persons already known to have had contact with Mr. Foster.

Older Son 302, 4/7/95, at 4.

[154] FBI Lab Report, 5/9/94, at 11; OIC Investigators' Memorandum, 3/2/95, at 4 (Lab Conference). As explained above, the clothing was packaged together before trace evidence was obtained, and particular trace evidence cannot be conclusively linked to particular items of clothing that Mr. Foster was wearing at the time of his death.

[155] OIC Investigators' Memorandum, 3/2/95, at 4 (Lab Conference).

[156] See Crime Scene Investigation 4-5 (Lee ed. 1994) (discussing importance of evidence linking a suspect with a victim).

The FBI Laboratory reported 35 definitive carpet-type fibers in the debris collected from the clothing. Of those fibers, 23 were white fibers. OIC investigators sought to determine a possible source for the fibers[157] -- for the white fibers in particular, in light of the number of white fibers in comparison to the limited number of fibers of other colors.[158] The logical known sources for possible comparison were carpets from locations with which Mr. Foster was known to have been in contact -- his car, home, and workplace. OIC investigators obtained carpet samples from those sources, including from a white carpet located in 1993 in the house in Washington where Mr. Foster lived with his family. The FBI Laboratory determined that the white fibers obtained from Mr. Foster's clothing were consistent with the samples obtained from that carpet.[159]

In sum, therefore, the carpet fiber evidence -- the determination that the white fibers were consistent with a carpet from the Fosters' house and the variety and insignificant number of other fibers -- does not support speculation that Mr. Foster

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[157] Carpet fibers cannot be conclusively identified as having a specific origin but can be identified for consistency with a particular origin. OIC Investigators' Memorandum (Lee).

[158] The remaining 12 were various colors, including blue gray, blue, gold-brown, light brown, gray, pink, and orange. No more than three fibers of any of these colors was found. OIC Investigators' Memorandum (FBI Lab Reports on Fibers). The variety of colors suggests that those fibers did not originate from a single carpet.

[159] Id. The Laboratory also determined that four of the non-white fibers were consistent with samples obtained from the White House or Mr. Foster's car. Id.

was wrapped and moved in a carpet on July 20.[160] Indeed, the fiber evidence, when considered together with the entirety of the evidence, is inconsistent with such speculation.

3. Eyeglasses

When found, Mr. Foster's body was located on a steep berm with his head higher than his feet and his feet pointed essentially straight down the berm. Mr. Foster's eyeglasses were recovered by Park Police Technician Simonello approximately 13 feet below Mr. Foster's feet.[161]

a. Blood

Dr. Lee stated that "[b]loodstains were found on both sides of the lenses" of Mr. Foster's eyeglasses.[162] These bloodstains "were less than or equal to 1 mm in size. In addition, blood-like and tissue-like materials were identified on the [fingerprint] lifts of the eyeglasses."[163]

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[160] In addition, one of the 23 white carpet-type fibers was scraped from Mr. Foster's jacket and tie. That also contrasts with such speculation; the jacket and tie were in Mr. Foster's car at Fort Marcy (and not on his body) and were subsequently packaged separately from the other clothing.

[161] A report by Technician Simonello states: "Approximately 13 ft. downslope from the victim's feet (west) I observed a pair of prescription glasses laying on the ground." USPP Report (Simonello) at 1. The prescription was consistent with Mr. Foster's prescription, and the glasses contained marks on the earpieces consistent with Mr. Foster's habit of chewing the earpieces. FBI Lab Report, 5/9/94, at 11-12; Lisa Foster 302, 5/9/94, at 14.

[162] Lee Report at 493.

[163] Id.

b. **Gunpowder**

The FBI Laboratory found one piece of ball smokeless powder on the eyeglasses, and it was "physically and chemically similar" to the gunpowder identified in the cartridge case.[164]

c. **Summary: Glasses**

Dr. Lee stated that the above facts "support the interpretation that Mr. Foster was wearing his eyeglasses at the time the gun was discharged."[165] The analyses and conclusions of the experts and investigators in this and prior investigations reveal that the location where the glasses were found is consistent with the conclusion that Mr. Foster was wearing the glasses at the time the shot was fired.[166]

4. **Surrounding Area**

a. **Gunshot Residue in Soil**

As part of his examination, Dr. Lee went to Fort Marcy Park with OIC investigators and obtained soil and other materials from the berm on which Mr. Foster's body was found.[167] Dr. Lee examined the soil samples; he reported that "[a] few unburned and partially deformed gunpowder-like particles were recovered from

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[164] FBI Lab Report, 5/9/94, at 8; see also Lee Report at 489, 493.

[165] Lee Report at 493.

[166] E.g., OIC Investigators' Memorandum (Lee).

[167] Lee Report at 422. No intensive review of the area under and around Mr. Foster's body occurred on July 20 or during the 1993 Park Police investigation.

the soil in the area where Vincent Foster's body was found."[168] It cannot be determined "[w]hether these particles were deposited on the ground at the time of Mr. Foster's death or at any other period of time."[169]

b. Possible Bloodstains on Vegetation at Scene

Dr. Lee stated that one photograph of the scene "shows a view of the vegetation in the areas where Mr. Foster's body was found. Reddish-brown, blood-like stains can be seen on several leaves of the vegetation in this area."[170] He also noted that "[a] close-up view of some of these blood-like stains can be seen in [a separate] photograph."[171]

5. Contents of Bodily Fluids

During the 1993 investigation, the Laboratory of the Virginia Division of Forensic Science found that the blood, vitreous humor, and urine were negative for alcohols and ketones.[172] The Laboratory did not detect "phencyclidine, morphine, cocaine, [or] benzoylecgonine"; "other alkaline extractable drugs"; or "acidic [or] neutral drugs."[173]

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[168] Id. at 489.

[169] Id.

[170] Id. at 495.

[171] Id. Dr. Lee said that "[i]f these stains are, in fact, blood spatters, this finding is consistent with the shot having been fired at the location where Mr. Foster's body was found." Id.

[172] Commonwealth of Virginia, Division of Forensic Science, Certificate of Analysis, Case No. 93-353, 7/26/93 (Huynh).

[173] Id.

The FBI Laboratory later conducted more sensitive testing and determined that the blood sample from Mr. Foster contained trazodone.[174] Trazodone was an antidepressant medication prescribed as Desyrel by Mr. Foster's physician on July 19, 1993, and Mr. Foster took one tablet that night, according to his wife.[175]

C. Review by Pathologists

Because of the importance of the forensic evidence to the conclusion about cause and manner of death, the OIC retained Dr. Brian Blackbourne as an expert pathologist to assist the investigation. Dr. Blackbourne reviewed the relevant reports, photographs, and microscopic slides; toured Fort Marcy Park; and interviewed Dr. Beyer, Dr. Haut, and FBI and Virginia laboratory personnel. He provided a report to the OIC summarizing his work on the forensic issues and setting forth his analysis.

Dr. Blackbourne concluded that Mr. Foster "died of a contact

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[174] FBI Lab Report, 5/9/94, at 8.

[175] Lisa Foster 302, 5/9/94, at 13. She produced to investigators the prescription container with 29 tablets enclosed. The label on the container indicated that it initially had contained 30 tablets.

Dr. Berman reported that "[o]ne pill would have had no significant therapeutic effect as the majority of those prescribed this drug do not report benefit for at least two weeks' treatment." Berman Report at 6.

The Lab also detected diazepam and nordiazepam below recognized therapeutic levels. FBI Lab Report, 5/9/94, at 8. Diazepam is valium, and nordiazepam is its metabolite.

gunshot wound of the mouth, perforating his skull and brain."[176] Dr. Blackbourne based that conclusion "upon the autopsy report, diagrams and photographs and my examination of the microscopic slides of the entrance wound in the soft palate and posterior oropharynx which demonstrated extensive soot."[177]

Dr. Blackbourne concluded that Mr. Foster was alive at the time the shot was fired. Dr. Blackbourne based this conclusion

> upon the autopsy report and photographic evidence that there was bleeding beneath the scalp about the gunshot exit wound and beneath the fractures of the back of the skull. Such bleeding requires the heart to be beating at the time these injuries occurred. The autopsy report and my microscopic observation that blood was aspirated into the lungs requires that the person be breathing in order to suck the blood into the small air sacks of the lung.[178]

Dr. Blackbourne concluded that Mr. Foster "fired the gun with the muzzle in his mouth, his right thumb pulling the trigger and supporting the gun with both hands and with both index

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[176] Blackbourne Report at 2. Mr. Fiske's Office previously retained a panel of pathologists to prepare a report. The pathologists were Dr. Charles S. Hirsch, Chief Medical Examiner for the City of New York; Dr. James L. Luke, Investigative Support Unit, FBI Academy; Dr. Donald T. Reay, Chief Medical Examiner for King County, Washington; and Dr. Charles J. Stahl, Medical Examiner, Armed Forces Institute of Pathology, Washington, D.C. These pathologists likewise reported that "the bullet wound of Mr. Foster's head and brain, with its vital reaction, represents the definitive cause of death." Pathologists' Report at 1.

[177] Blackbourne Report at 2. In his report, Dr. Lee similarly stated -- based on examination of the scene photographs, the medical examiner's report, and the autopsy photographs -- that "it is clear that Mr. Foster died as a result of a single gunshot wound," that "[t]he entrance of this wound was in his mouth," and that "the bullet appears to have exited through the back of Mr. Foster's head." Lee Report at 486.

[178] Blackbourne Report at 2.

fingers relatively close to the cylinder gap (the space between the cylinder and the barrel)."[179] Dr. Blackbourne reasoned that "the dense deposit of soot on the soft palate and oropharynx indicated that the gun was discharged in close proximity to the soft palate."[180] In addition, the DNA from the muzzle of the gun was consistent with that of Mr. Foster.[181] Furthermore, "[t]he right thumb was entrapped within the trigger guard by the forward motion of the trigger after the revolver was fired."[182] Finally, Dr. Blackbourne stated that "[w]hen a revolver is fired, smoke issues out of the space between the cylinder and the barrel. This smoke will be deposited on skin, clothing or other objects close to the cylinder gap. The autopsy report documents that smoke deposits were noted on the radial aspect of both right and left index fingers. Dr. Beyer told me that there was more deposit on the right as compared to the left index fingers."[183]

Dr. Blackbourne concluded that "[a]t the time of his death Vincent Foster was not under the influence of alcohol, narcotics,

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[179] Id. at 4.

[180] Id.

[181] Id.

[182] Id.

[183] Id. Similarly, the panel of pathologists concluded that the large quantity of gunpowder residue on the soft palate "indicates that Mr. Foster placed the barrel of the weapon into his mouth with the muzzle essentially in contact with the soft palate when he pulled the trigger." Pathologists' Report at 1. In addition, the pathologists noted that DNA consistent with that of Mr. Foster had been recovered from the muzzle of the revolver. Id.

[or] cocaine."[184] Dr. Blackbourne based this conclusion upon the toxicology reports of the Virginia Division of Forensic Science Toxicology Laboratory and the FBI Laboratory; a meeting with the personnel of the FBI Laboratory; and a discussion with the toxicologist for the Virginia Division of Forensic Science who performed work on the Foster case in 1993.[185]

Dr. Blackbourne concluded that the gunshot wound that caused Mr. Foster's death occurred in Fort Marcy Park at the location where his body was discovered.[186] Dr. Blackbourne based this conclusion

> upon the fact that he would be immediately unconscious following the gunshot wound through the brain. Movement of the body, after the gunshot, by another person(s) would have produced a trail of dripping blood and displaced some of his clothing. If he had been transported from another location, such movement would have resulted in much greater blood soilage of his clothing (as was seen when he later was placed in a body bag and transported to Fairfax Hospital and later to the Medical Examiner's Office). No trail of dripping blood was observed about the body on the scene. His clothing was neat and not displaced. The blood beneath the head and on the face and shoulder is consistent with coming from the entrance and exit wounds.[187]

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[184] Blackbourne Report at 3.

[185] Id. at 4.

[186] Id. at 2.

[187] Id. at 3. The panel of pathologists retained by Mr. Fiske's Office similarly concluded that "death occurred where the body was found at Fort Marcy Park, Virginia. The relatively pristine nature of the exposed skin surfaces of the deceased and of his clothing precludes any other scenario. Substantially greater contamination of skin surfaces and clothing by spilled and/or smeared blood would have been unavoidable, had the body been transported postmortem to the place where it was found. . . . There was no such contamination when the body was

Dr. Blackbourne concluded that the blood draining from the right nostril and right side of the mouth, as documented by Polaroid scene photographs, suggests that an early observer may have caused movement of the head.[188] Dr. Blackbourne based this conclusion

upon the fact that blood will pool in the mouth and

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examined and photographed at the scene." Pathologists' Report at 2. The report continued: "[A] pool of blood was, in fact, found under the head of the deceased when the body was turned, and the upper back of his shirt was noted to be blood soaked." Id. at 3.

[188] Blackbourne Report at 4. Dr. Blackbourne stated that a mark on the side of the right upper neck, just below the jawline, seen in autopsy photographs, represents small fragments of dried blood and does not represent any form of injury. Id. Dr. Blackbourne based this conclusion upon his "experience in many autopsies. Blood dries overnight, prior to the autopsy. If one is not meticulous in washing the body prior to photographing it, small portions of blood may remain adherent to the skin. This mark is composed of two rectangular shaped dark spots approximately 2mm X 3mm. These marks have none of the features of a gunshot wound or other antemortem trauma." Id. at 5. Similarly, Dr. Hirsch, an expert pathologist retained during the Fiske investigation, examined the autopsy photographs and stated that he saw "flecks of dried blood" depicted on the neck and that he saw "nothing in the photographs, and there certainly is nothing described in the autopsy to make me suspect that there is in any way any trauma to the side of his neck." OIC, 2/16/95, at 43, 45. The panel of pathologists further stated that, apart from the wound through the back of the head, "there was no other trauma identified." Pathologists' Report at 1. Dr. Beyer, who conducted the autopsy, was shown an enlarged autopsy photograph of the side of the neck, and said, "I see blood, but I don't see any trauma." OIC, 2/16/95, at 15. Dr. Lee reviewed the scene and autopsy photographs and evidence and indicated that there was only an entrance wound through the back of the mouth and an exit wound out the back of the head. Lee Report at 89-92, 486. The scene and autopsy photographs were reviewed during Congressman Clinger's probe and the Senate's inquiry into Mr. Foster's death, both of which concluded that he committed suicide by gunshot through the back of the mouth out the back of the head. Moreover, as outlined above, all six persons who attended the autopsy, and who therefore were able to examine the body itself, confirmed that there were no wounds on Mr. Foster's body other than the mouth-head bullet wound. See supra note 77, at 33-34.

> nasopharynx while the heart is still beating following a gunshot wound of the back of the mouth. This blood may drain toward the dependent side of the head if the volume of blood exceeds the capacity of the mouth. There will be a thin trickle. The broad area of blood covering the right lower face, chin and right side of his neck and extending over the right shoulder and right collar of his shirt would result from the sudden drainage of all of the blood in his mouth. . . . This event occurred prior to taking the Polaroid scene photographs.[189]

Based on all of the above evidence, analyses, and conclusions, Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."[190]

VI. ISSUES RELATING TO EVIDENCE AT SCENE

Evidence from the scene and regarding the activities and observations of persons in and around Fort Marcy Park on July 20, 1993, raised certain issues requiring further investigative work.

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[189] Blackbourne Report at 4. Similarly, the panel of pathologists stated: "A broad transfer-type blood smear was present at the right side of the chin and neck, precisely corresponding to a similar blood stain of the right collar area of the shirt. For obvious reasons, the head must have been facing to the right when the body was found or have been turned to the right when the body was being examined at the scene. In either circumstance, blood accumulated in the nose and mouth from the bullet defect of the soft palate and base of the skull would have spilled over the face and soiled the right shoulder and collar of the shirt." Pathologists' Report at 3. The transfer stain issue is discussed further below.

[190] Blackbourne Report at 5. The panel of pathologists reached the same conclusion. Pathologists' Report at 4. As reflected by the findings of the various pathologists and investigators, the fact that the gun was found in Mr. Foster's hand is consistent with this conclusion.

A. Blood Transfer Stain

The Polaroids of the body at the scene depict, and many witnesses who observed the body at the scene describe, the position of the head as facing virtually straight, not tilting noticeably to one side or the other. The Polaroids depict a blood transfer stain in the area of the right side of the face. As explained in previous sections, the expert pathologists and Dr. Lee analyzed this blood evidence and the Polaroid photographs. They concluded, based on the blood transfer stain, that the head made contact with the right shoulder at some point before the Polaroids were taken. The testimony and contemporaneous reports point to the conclusion that rescue personnel at the scene handled the decedent's head to check for vital signs and open an airway.[191]

B. Quantity of Blood

Many who saw the body at Fort Marcy Park after it was lifted and rolled over at the scene described a quantity of blood

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[191] Fornshill OIC, 1/11/95, at 92-93, 104, 105 (describing movements of FCFRD personnel Hall and Gonzalez around head of body); Hall Senate Deposition, 7/20/94, at 22 ("I recall attempting to check the carotid pulse."); Gonzalez Senate Deposition, 7/20/94, at 19 ("I believe Todd [Hall] did" check the pulse.); Gonzalez OIC, 1/10/95, at 56-57 (Hall may have checked for pulse); USPP Report (Hodakievic) at 1 ("Gonzoles [sic] notified me that . . . Gonzoles [sic] and Hall checked the body for vital signs and found none."); Iacone OIC, 1/10/95, at 22 (Iacone checked for pulse); USPP Report (Ferstl) at 1 ("Ofc. Fornshill advised that a medic checked the subjects [sic] neck for a pulse"); Gavin OIC, 2/23/95, at 15 (learned at scene that FCFRD personnel had checked for vital signs); USPP Report (Rolla) at 1 (FCFRD personnel "felt for a pulse in the carotid artery and got none."). The action of checking for vital signs and an airway may have caused some spillage of blood and may have caused the head to make contact with the right shoulder.

behind Mr. Foster's head, under his body, and on the back of his shirt.[192] A reporter and Park Police officers separately visited the scene on July 21 and 22, 1993, and stated that they could identify the spot where the body had been located by the blood soaked into the ground.[193] A reporter placed a stick into the ground where the blood spot was located and estimated the blood depth at one-eighth inch.[194]

In addition, as Dr. Lee stated regarding the quantity of blood, the photographs at the autopsy reveal blood staining on the clothes that was not depicted at the scene.[195] Moreover,

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[192] Abt OIC, 2/9/95, at 30 ("We noted that there was a good amount of blood again on the back portion of the shirt and the collar, things like that."); Haut OIC, 2/16/95, at 13 ("[o]n the ground, underneath the head, there was a pool of congealed blood"); Hodakievic 302, 2/7/95, at 4 (recalls "lot of blood" underneath the decedent's head); Hodakievic OIC, 2/14/95, at 16 (describing blood on ground and on back of head and shirt when body moved); USPP Report (Rolla) at 1-2 ("I observed blood . . . underneath his head . . . . I rolled the decedent over and observed a large blood stain three quarters down the back of the decedent's shirt."); Rolla 302, 4/17/96, at 4 ("When Rolla rolled the body he observed new, wet blood pouring out of the nose and possibly the mouth of the decedent. Rolla also observed a pool of blood, approximately 4-inches across, which had been under the head and neck area. Rolla also observed the back of the shirt was soaked with blood from the collar to the waist."); USPP Report (Simonello) at 1 ("When the body was turned onto its stomach I observed a large area of blood pooled where the head had been resting. . . . I also observed a larger area of blood where the victim's back had been, coinciding with blood stains on the back of shirt."); Simonello 302, 2/7/95, at 3 ("after the body was rolled, Simonello observed a large blood pool under the head of the decedent and on the back of the decedent's shirt").

[193] Reporter 302, 4/18/96, at 1 (recalled a blood spot approximately 12 inches in diameter); Hill 302, 3/1/95, at 3 (located position of body by blood stain on the ground).

[194] 302, 4/18/96, at 1.

[195] Lee Report at 490, 494.

Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag.[196] These facts indicate that still more blood drained from the body during movement from the Fort Marcy scene to the autopsy.

There has been occasional public suggestion, premised on the supposedly low amount of blood observed at the Fort Marcy scene, that blood must already have drained from the body elsewhere and that the fatal shot therefore must have been fired elsewhere. As revealed by the foregoing descriptions of the evidence, the underlying premise of this theory is erroneous: A quantity of blood was observed at the park under the body and on the back of the head and shirt. Moreover, the suggestion fails to account for the blood that subsequently drained from Mr. Foster's body during movement to the autopsy. The blood-quantity evidence, even when considered in isolation from other evidence, does not support (and indeed contravenes) a suggestion that the fatal shot was fired at a place other than where Mr. Foster was found at Fort Marcy Park.[197]

C. **Unidentified Persons and Cars**

The evidence establishes that at least three cars belonging to civilians were in and around the Fort Marcy parking lot area when the first Park Police and FCFRD personnel arrived: (1) Mr. Foster's gray Honda Accord with Arkansas tags; (2) the white

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[196] Id. at 495.

[197] There also are a number of other items of evidence that contradict any such suggestion, as noted elsewhere in this report.

Nissan with Maryland tags driven by C4; and (3) the broken-down blue Mercedes driven by C6. The three cars belonging to Mr. Foster, C4, and C6 are the only cars positively identified and known to law enforcement and the OIC that were in the Fort Marcy Park parking lot area in the 6:00-8:30 p.m. time frame and that belong to persons other than FCFRD personnel, Park Police personnel, towing personnel,[198] and Dr. Haut.

During the afternoon, before Park Police and FCFRD personnel were called to the scene at Fort Marcy Park, C2 saw a man in a car next to him; C3 and C4's statements suggest the presence of at least one man in the parking lot and perhaps a jogger;[199] and C6, after her car broke down, saw a man on the entrance ramp to the parking lot who asked her if she needed a ride.[200] Law

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[198] A tow truck came to tow C6's car after the Park Police had arrived on the scene. Hodakievic OIC, 2/14/95, at 25. A tow truck later came to tow Mr. Foster's car. Raley's Towing Receipt, Case No. 30502; USPP Impounded Car Record, Case No. 30502.

[199] According to the reports of their interviews at the scene on July 20, 1993, C3 and C4 did not see anyone in or touching Mr. Foster's car. USPP Report, 7/20/93, at 1 (C3 and C4 interview). C4 said that a contrary statement in a report of an April 7, 1994, interview was inaccurate. 302, 2/2/95, at 2. C3 said simply that, at the time he provided subsequent statements in 1994 and thereafter, "he [wa]s not at all sure" of "his specific observations." 302, 2/2/95, at 3.

[200] Officer Fornshill stated that he was told later by Park Police personnel that there were what he described as "volunteers" along one of the trails in the park. Senate Deposition, 7/12/94, at 13; OIC, 1/11/95, at 93, 94. The evidence suggests that the people referred to as "volunteers" likely were C3 and C4. The investigators found C3 and C4 in the park but no "volunteers." In addition, the Park Service has uncovered no records that any Park Service workers were in the park near 6:15 p.m. on July 20, OIC Doc. No. DC-229-1, and no other witness known to the OIC saw such workers in the park.

enforcement and the OIC are not aware of the identities of the persons (other than C5) described by C2, C3, C4, and C6. There is no evidence that any of those unidentified persons (or any identified persons, for that matter) had any connection to Mr. Foster's death; and the totality of the forensic, circumstantial, testimonial, and state-of-mind evidence contrasts with any such speculation.

D. Car Locks

The Park Police investigators (Braun and Rolla) who entered and searched Mr. Foster's car at Fort Marcy Park said that they were able to enter the car without keys because the car was not locked.[201] James Iacone of the FCFRD stated that he had tried

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After initially looking at the body, Todd Hall of the FCFRD said he thought he heard someone else in the woods and subsequently saw something red moving in the woods. 302, 3/18/94, at 2. Upon discovering during the course of a later interview that there was a road in the area where he had seen the motion, Hall believed it could have been vehicular traffic. 302, 4/27/94, at 2. Hall later stated that "I seen something. It was woody and I seen something go past, like a car. . . . [I]t was probably a car or truck that drove past the bushes." Senate Deposition, 7/20/94, at 17-18. In another statement, Hall said that he "believe[d] someone was down there." OIC, 1/5/95, at 20. Hall believed that he saw something orange and that it was an orange vest. Id. at 22-23, 28. Hall said that he told an officer (Fornshill) when he made this observation and that Fornshill did not respond. Id. at 23. (According to Officer Fornshill, none of the rescue personnel said anything to the effect that someone was in the area. OIC, 1/11/95, at 93.) In yet another later statement, Hall said that he did not recognize this orange flash as a person. 302, 5/13/96, at 3.

[201] Braun 302, 4/24/96, at 2; Rolla 302, 4/17/96, at 5-6; see also USPP Report (Simonello) at 1 (car doors "had been c[l]osed but not locked"); Ferstl OIC, 1/11/95, at 98, 101-02, 118 (saw Braun open car, believes car was unlocked).

at least one of the doors and that it was locked.[202] That statement contrasts with that of Ralph Pisani of the FCFRD, who said that he, Jennifer Wacha, and Iacone looked into the Honda, but that no one tried the doors.[203] In any event, even were Iacone's recollection more accurate than the others,[204] the statement would be of uncertain significance, inasmuch as it is, of course, possible that one or more of the four doors was locked and one or more unlocked.[205]

E. Neighborhood

OIC investigators canvassed the area surrounding Fort Marcy Park to determine whether anyone observed, heard, or had knowledge of relevant activity on July 20.[206] That effort did

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[202] 302, 3/11/94, at 3; OIC, 1/10/95, at 34; 302, 4/29/96, at 2.

[203] 302, 3/11/94, at 2-3. Wacha did not recall that anyone determined whether the car was locked. OIC, 1/10/95, at 50.

[204] Two other witnesses gave changing accounts on the locked-car issue. Gonzalez said that when he returned to the parking lot from the body, he learned that both of the civilian vehicles were locked. 302, 4/27/94, at 4. In another statement, he said "I'd be guessing" as to whether the doors to Mr. Foster's car were locked. Senate Deposition, 7/20/94, at 96-97.

In one statement, Hall said that the doors of the car were locked. OIC, 1/5/95, at 52-53. In a Senate deposition, however, Hall stated "I don't recall" in response to the question "Did you know if the car was locked?" Senate Deposition, 7/20/94, at 28.

[205] There are a number of possible scenarios consistent with the evidence in which one or more of Mr. Foster's car doors could have been locked and one or more unlocked.

[206] There is no record of any effort to canvass the neighborhood near the time of the death to determine whether anyone had seen or heard relevant information.

not yield relevant information.[207]

F. Pager

A Park Police evidence control receipt indicates that at the scene, Investigator Rolla took possession of Mr. Foster's pager from his right waist area. The receipt reveals that the pager, along with other personal property such as Mr. Foster's wallet, rings, and watch, were released to the White House on the evening of July 21 to be returned to the Foster family.[208] Investigator Rolla said that Mr. Foster's pager was off when he recovered it.[209] White House records of pager messages do not indicate messages sent to or from Mr. Foster on July 20.[210]

VII. ISSUES RELATING TO CONDUCT OF INITIAL INVESTIGATION

Certain issues related to the conduct of the initial 1993 investigation into Mr. Foster's death warrant discussion in this report.

A. Photographs

Park Police Identification Technician Simonello took 35-

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[207] With respect to sound, Fort Marcy Park is adjacent to the thoroughfares of GW Parkway and Chain Bridge Road; planes to and from National Airport regularly fly in patterns near the park; and security officers at the nearby Saudi Ambassador's residence on Chain Bridge Road reported that construction was ongoing at that time. 302, 4/20/94, at 1; 302, 4/20/94, at 2; OIC Investigators' Memorandum (Fort Marcy Park).

[208] USPP Evidence/Property Control Receipt (Rolla) at 1-2.

[209] Rolla OIC, 2/9/95, at 27. Investigator Braun also said the pager was turned off. 302, 2/7/95, at 8. Investigator Abt's notes taken at the scene also indicate that the pager was turned off.

[210] OIC Doc. No. DC-210-2620.

millimeter photographs of Mr. Foster's body and of the scene.[211] Park Police investigators also took a number of Polaroids of Mr. Foster's body and of the scene. Polaroids taken at a crime or death scene develop immediately, and thus are useful in the event that problems subsequently occur in developing other film (as occurred here[212]).

Thirteen of the Polaroids provided to Mr. Fiske's Office and the OIC are of the body scene, and five are of the parking lot scene. Of the 13 Polaroids of the body scene, eight are initialed by Investigator Rolla. The backs of the other five say "from C202 Sgt. Edwards 7-20-93 on scene."[213] Officer Ferstl said that he took Polaroids and, without initialing or marking them, gave them to Sergeant Edwards, who gave them to the investigators.[214] Sergeant Edwards does not recall taking

[211] Simonello OIC, 2/14/95, at 40-42.

[212] The 35-millimeter photographs were underexposed; thus, the Polaroids were of greater investigative utility.

[213] The handwriting on these photographs is that of Investigator Abt.

[214] OIC, 1/11/95, at 85, 87. Investigator Rolla initially suggested in a Senate deposition that he had taken photographs of the back of Mr. Foster's body. Senate Deposition, 7/21/94, at 89-90. After reviewing the Polaroids, Investigator Rolla stated that he intended to take such Polaroids, but he believes Investigator Braun took the Polaroid camera back to the parking lot before Dr. Haut arrived and the body was turned. 302, 4/17/96, at 4. The records are consistent with Investigator Rolla's statement, as the time "1930" is indicated on the back of the Polaroids taken by Investigator Braun at the parking lot scene, and Dr. Haut appears not to have arrived at the park until approximately 7:40 p.m.

Polaroids himself.[215]

B. Keys

Investigator Rolla said he felt into Mr. Foster's pants pockets at the scene in looking for personal effects.[216] Later, when it became apparent to Investigators Rolla and Braun that they did not have the keys to the car, they went to the hospital to check more thoroughly for keys.[217] The hospital logs indicate that Investigators Rolla and Braun were at the morgue at 9:12 p.m.[218] Investigator Braun thoroughly searched the pants pockets by pulling the pockets inside out, and she found two sets of keys.[219] She prepared an evidence receipt indicating that the keys were taken from the right pants pocket, and she subsequently placed the keys in an evidence locker.[220]

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[215] OIC, 1/12/95, at 7, 199-203. Investigator Abt recalled Sergeant Edwards taking Polaroids, OIC, 1/12/95, at 11, but Sergeant Edwards said he only carried the Polaroid camera and the Polaroids taken by Ferstl, but does not recall taking any Polaroids himself, OIC, 1/12/95, at 7, 199-203.

[216] OIC, 2/9/95, at 34-35. Investigator Rolla removed Mr. Foster's watch, pager, and two rings from the body at the scene. USPP Evidence/Property Control Receipt (Rolla) at 1. Investigator Rolla has said that he did not reach to the bottom of the suit pants pockets at the time he took personal effects into evidence at the scene. 302, 4/17/96, at 3.

[217] Rolla, OIC, 2/9/95, at 35-36; Braun OIC, 2/9/95, at 75-76.

[218] OIC Document No. DC-108-14. The safety and security officer at the hospital stated that he escorted Investigators Braun and Rolla to the body in the morgue. He described the entire incident as "very routine." 302, 4/13/95, at 1-2.

[219] Braun 302, 4/24/96, at 3; Braun OIC, 2/9/95, at 76.

[220] USPP Evidence/Property Control Receipt (Braun) at 1-2. The evidence indicates that no persons other than police, rescue, medical, and hospital personnel had access to the body from the

C. **X-Rays**

Although no x-rays were produced from the autopsy, the gunshot wound chart in the autopsy report has a mark next to "x-rays made." Dr. Beyer has stated that either he did not take x-rays because the machine was not functioning properly at the time, or that if he attempted to take x-rays, they did not turn out. He stated:

> I had intended to take x-rays, but our x-ray machine was not functioning properly that day. And if we took any all we got was a totally black, unreadable x-ray, so I have no x-rays in the file. . . . I could very well have tried to use it on the Foster autopsy and got an unreadable x-ray. If his wound had been a penetrating wound, where there was only a wound of entrance, and the missile was retained within the body, then there would have been a requirement that I have an x-ray. Since this was a perforating wound, where there was a wound of entrance and a wound of exit, and I was going to examine the tissue through which the missile path had taken, I concluded we could proceed without the x-ray, rather than delay it six to eight hours.[221]

Dr. Beyer's assistant recalled that, at the time of the Foster autopsy, the laboratory had recently obtained a new x-ray machine and that it was not functioning properly. The assistant stated that the machine sometimes would expose the film and

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time when Investigator Rolla patted the pants at the park until the time when Investigator Braun recovered the keys in the pants pocket at the hospital. Two White House officials (William Kennedy and Craig Livingstone) viewed the body at the hospital, but the hospital logs reflect that they viewed the body near 10:30 p.m., OIC Doc. No. DC-108-13 -- well <u>after</u> Investigators Braun and Rolla had retrieved the keys. Moreover, a Fairfax County Police officer stationed on regular assignment at the hospital that evening and a nursing supervisor escorted Mr. Kennedy and Mr. Livingstone, and allowed them to see the body only through a glass window. Officer 302, 2/10/95, at 2.

[221] OIC, 2/16/95, at 17.

sometimes would not. In this case, the assistant recalled moving the machine over Mr. Foster's body in the usual procedure and taking the x-ray. He said that he did not know until near the end of the autopsy that the machine did not expose the film.[222] In addition, like Dr. Beyer and the assistant, the administrative manager of the Medical Examiner's Office recalled "numerous problems" with the x-ray machine in 1993 (which, according to records, had been delivered in June 1993).[223]

With respect to the check of the x-ray box on the report, Dr. Beyer stated that he checked that box before the autopsy while completing preliminary information on the form and that he mistakenly did not erase that check mark when the report was finalized.[224]

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[222] 302, 9/11/95, at 2.

[223] 302, 1/27/95, at 1.

[224] Senate Hearing, 7/29/94, at 236, 242. The primary purpose of x-rays in this case, given the nature of the entrance and exit wounds, would have been to determine whether any bullet fragments remained in the head. Dr. Beyer said he felt "confident" without the x-rays that "you can examine the brain for a bullet or bullet fragments and identify them." OIC, 2/16/95, at 18. As previously set forth, Dr. Beyer, his assistant, and the four Park Police officers at the autopsy (Morrissette, Hill, Johnson, and Rule), all recalled that Dr. Beyer examined the head and brain (and dissected the brain) and found no bullet or fragments. See supra note 70, at 31-32. Officer Morrissette's report, prepared after the autopsy, stated that "Dr. Byer [sic] stated that X-rays indicated that there was no evidence of bullet fragments in the head." USPP Report (Morrissette) at 1. As explained above, however, Dr. Beyer made that statement and reached that conclusion without x-rays.

VIII. OTHER ISSUES

Several other issues have arisen and been examined by the OIC.

A. Gun Observations and Ownership

The OIC conducted investigation and analysis with respect to the gun, both as to observations of the gun at the scene and ownership of the gun.

1. Observations of Gun at Scene

According to the testimony of the first three official personnel to find the body (Park Police Officer Fornshill and FCFRD personnel Hall and Gonzalez), the gun was in Mr. Foster's hand when they found the body (although Officer Fornshill himself did not see or look for it, but rather was told of it by the others). Those statements contrast with the testimony of C5, the individual who first saw Mr. Foster's body and did not see a gun. Careful evaluation of all of the circumstances and evidence leads to the conclusion that C5 simply did not see the gun that was in Mr. Foster's hand.

First, when questioned by the OIC, C5 agreed with a statement attributed to him in an interview report that "there was extreme dense and heavy foliage in the area and in close proximity to the body, and the possibility does exist that there was a gun on rear of hand that he might not have seen."[225] That is supported, moreover, by the testimony of several witnesses

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[225] OIC, 2/23/95, at 52-53. C5 also had previously reviewed and adopted the interview report containing that statement. See 302, 4/14/94, at 4 (reviewed and initialed by witness).

establishing that the gun was difficult to see in Mr. Foster's hand when standing in a position above the head on the top of the berm.[226] That is further confirmed by Polaroids taken from above the head that reveal the difficulty of seeing the gun from that angle.

The forensic evidence and analyses outlined above also support the conclusion that the gun was in Mr. Foster's hand when C5 saw him. As explained by the pathologists and Dr. Lee, Mr. Foster's DNA was consistent with that on the muzzle of the gun, traces of blood evidence were derived from the gun, residue was on his hand, and residues were on his shirt. In addition, an indentation mark on his thumb suggests that the gun was in the hand for some period of time. The totality of the evidence leads to the conclusion that the gun recovered from Fort Marcy Park was in fact in Mr. Foster's hand when C5 happened upon the body, but that C5 simply did not see it.[227]

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[226] Abt OIC, 2/9/95, at 27 ("It was rather difficult for me to see, because I was looking from down the hill and the decedent's hand was covering part of the top of the gun."); Arthur OIC 1/5/95, at 52 ("I remember it kind of laying underneath the right hand"); Hall Senate Deposition, 7/20/94, at 22 (did not see gun until bent over); Hodakievic OIC, 2/14/95, at 14-15 ("Yes" in response to "was it difficult to see the gun?"); Rolla Senate Deposition, 7/21/94, at 22 ("it was difficult to see his right hand and the gun because of the plant and material around there"); Simonello OIC, 2/14/95, at 16-17 (gun was a "little difficult from a distance to observe . . . . The hand almost covered it entirely.").

[227] On a separate issue, C5 saw what he described as a partially filled wine bottle near Mr. Foster's body. 302, 4/14/94, at 4. Investigator Rolla observed a bottle of what he thought was wine cooler about 15 feet to the right of the second cannon, but he recalled that the bottle was empty and its label faded. 302, 4/27/94, at 3; 302, 4/17/96, at 1. The bottle is

There are discrepancies in the descriptions of the color and kind of gun seen in Mr. Foster's hand.[228] However, the descriptions provided by the first two persons to observe the gun, as well as of numerous others, are consistent with the gun retrieved from the scene and depicted in the on-the-scene Polaroids.[229] That gun was taken into evidence by Technician Simonello on July 20, and has been maintained by law enforcement since then.[230]

2. Ownership of Gun

One follow-up investigative issue concerning the gun relates to its ownership. Virtually all theories that the manner of death was not suicide rest on an assumption that the gun did not belong to Mr. Foster. But testimony, circumstantial evidence,

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not depicted in photographs of the scene, and it was not taken into evidence by investigators or the technician on the scene.

[228] These discrepancies are created by statements of FCFRD personnel Arthur and Iacone, which themselves are not consistent. Arthur stated that the gun was blackish-brownish but not a revolver (based on the fact that he did not recall seeing a cylinder). OIC, 1/5/95, at 46-47. After viewing a photograph of the weapon in the decedent's hand, Arthur stated, according to the interview report, "My memory is, I saw a semi-automatic, however, I must have been mistaken." 302, 4/24/96, at 2. Iacone stated that the gun was a silver-colored revolver-type weapon. 302, 4/27/94, at 3; OIC, 1/10/95, at 27.

[229] See Gonzalez 302, 5/15/96, at 4; Gonzalez OIC, 1/10/95, at 43 (saw black or dark revolver in hand); Hall OIC, 1/5/95, at 31 (saw black gun in hand); see also Wacha OIC, 1/10/95, at 41-42.

[230] There are minor (but insignificant on this record) differences in descriptions by FCFRD and Park Police personnel of the estimated number of inches from Mr. Foster's right hand to his thigh and of the exact position of the hand and gun in relation to the thigh.

and forensic evidence support the conclusion that the gun did in fact belong to Mr. Foster.

Mrs. Alice Mae Foster, Mr. Foster's mother, stated that Mr. Foster, Sr., died in 1991. He had kept a revolver in a drawer of his bedside table, in addition to other guns in the house.[231] In 1991, when Mr. Foster, Sr., had been ill and bedridden for a period of time, Mrs. Alice Mae Foster had all the handguns in the house placed in a box and put into a closet. Subsequent to the death of Mr. Foster, Sr., in 1991, Mrs. Alice Mae Foster gave Mr. Foster, Jr., the box of handguns.[232]

Mrs. Lisa Foster similarly recalls that her husband took possession of several handguns from his parents' house near the time of his father's death.[233] She recalled that, after they moved to Washington in 1993, some guns were kept in a bedroom closet.[234] She recalled what she described as a silver-colored

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[231] In August 1994, Sharon Bowman (the sister of Vincent Foster, Jr.) found five .38 caliber cartridges at the family home in Hope. 302, 12/1/94, at 1-2. That is further evidence suggesting that Mr. Foster, Sr., possessed a .38 caliber gun or guns. FBI Laboratory examination revealed that four of the cartridges were of the same manufacture (Remington) as in the revolver found in Mr. Foster's hand; they were manufactured at a different time than the cartridge and casing recovered from Mr. Foster's gun. FBI Lab Report, 2/21/95, at 2.

[232] 302, 5/2/95, at 1-2. Mrs. Alice Mae Foster and her long-time housekeeper viewed the gun recovered from Mr. Foster's hand, but they could not specifically identify it as one of the guns previously possessed by Mr. Foster, Sr. Id. at 2, 4.

[233] 302, 5/9/94, at 16.

[234] Id.; 302, 4/7/95, at 7.

gun[235] (she also has referred to it as a "cowboy gun"[236]), which had been packed in Little Rock and unpacked in Washington. She also recalled a .45 caliber semi-automatic pistol. She said she found one gun in its usual location on July 20, 1993,[237] the .45 caliber semi-automatic pistol.[238] She did not find the other gun on or after July 20, 1993.[239]

On July 29, 1993, Mrs. Foster was shown a photograph of the gun retrieved from the scene and, according to the Park Police interview report, was unable to identify it from the photograph.[240] On May 9, 1994, she was shown the actual gun that was recovered and said, according to the interview report, that the gun "may be a gun which she formerly saw in her residence in Little Rock, Arkansas" and that "she may have seen the handgun . . . at her residence in Washington."[241] She stated to the OIC in November 1995, when viewing the gun recovered from Mr. Foster's hand, that it was the gun she unpacked in Washington but had not subsequently found,[242] although she said she seemed to remember the front of the gun

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[235] 302, 5/9/94, at 15.

[236] 302, 11/8/95, at 3.

[237] 302, 5/9/94, at 16.

[238] 302, 11/8/95, at 3.

[239] Id.

[240] USPP Report, 7/29/93, at 2 (L. Foster interview).

[241] 302, 5/9/94, at 14, 15.

[242] 302, 11/8/95, at 2.

looking lighter in color when she saw it during the move to Washington.[243]

Webster Hubbell stated that, on the night of Mr. Foster's death, Lisa Foster went upstairs in the Foster house with him. While there, she looked into the top of a closet, pulled out a "squared-off" gun, and said, according to Hubbell, that one of the guns was missing.[244] To Hubbell's knowledge, the "other gun" was never found at the Foster house.[245]

Sharon Bowman, one of Mr. Foster's sisters, recalled that her father kept a black revolver in a drawer of his bedside table.[246] She said that she had retrieved various handguns from her parents' house, placed them in a shoebox, and put them in her mother's closet (and Ms. Bowman said they later were given to Mr. Foster, Jr.).[247] During the 1993 Park Police investigation, John Sloan, a family friend of the Fosters, wrote a letter to Captain Hume of the Park Police, stating that he had shown Sharon Bowman a photograph of the gun. According to the letter, Ms. Bowman stated that it "looked like a gun she had seen in her father's collection," and particularly pointed out the

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[243] Id.

[244] 302, 1/13/95, at 8; 302, 11/30/95, at 1. In December 1994, Mr. Hubbell was convicted of federal crimes relating to his billing practices as an attorney at the Rose Law Firm in Little Rock.

[245] 302, 11/30/95, at 2.

[246] 302, 4/11/95, at 2.

[247] Id.; 302, 6/6/94, at 2.

"'wavelike' detailing at the base of the grip."[248] Ms. Bowman was later shown the revolver recovered from Fort Marcy Park. She indicated that it looked like one that her father kept in the house in Hope, but she could not positively identify it.[249]

Mr. Foster's other sister, Sheila Anthony, said she had no personal knowledge about the gun found in Mr. Foster's hand at Fort Marcy Park.[250] She recalled, however, that her sister, Sharon Bowman, and her brother had removed guns from their father's house near the father's death.[251]

Mr. Foster's older son said he knew his father had an old .38 caliber revolver. He saw it being unpacked at their house in Washington when they moved there. Mr. Foster told his son that he had received this gun from his father (Vincent Foster, Sr.). The older son did not know where the gun was kept in Washington. The son was unable to conclusively identify the gun recovered on July 20, 1993, from Mr. Foster's hand as the one he had previously seen.[252]

Mr. Foster's younger son stated that he saw one or two handguns in a shoebox along with a number of loose bullets while unpacking in Washington. The younger son stated that these items

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[248] Letter from John Sloan to Captain Hume in U.S. Park Police file.

[249] 302, 4/11/95, at 2.

[250] 302, 4/28/94, at 1.

[251] Id.

[252] Older Son 302, 4/7/95, at 3.

came from his grandfather's house. He described his grandfather's guns as a small, pearl-handled gun, and one or two revolvers. He believes his father placed the guns in a closet in Washington.[253]

Mr. Foster's daughter stated she recalled someone unpacking a handgun at the house when they initially moved to Washington, although she never saw any other guns in their Washington house.[254]

To sum up, the testimony establishes that, near the time of his father's death, Mr. Foster took possession of some handguns that had belonged to his father. The testimony also establishes that guns, including (according to the older son) a .38 caliber revolver, were taken to Washington by the Foster family in 1993. Mrs. Lisa Foster said that she recalls two guns in a bedroom closet in Washington, one of which was missing when she looked in the closet after Mr. Foster's death, and that the missing gun was the one found at the scene. Ms. Bowman has said the gun found at the scene looks like a gun previously kept by her father.

In addition, forensic examinations of Mr. Foster's pants pocket and the oven mitt support the conclusion that Mr. Foster carried, and thus possessed, a gun at a time close to his death. As explained above, that evidence tends to link Mr. Foster to the gun recovered from his hand.

This combination of testimonial, circumstantial, and

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[253] Younger Son 302, 4/7/95, at 2.

[254] Daughter 302, 4/7/95, at 3.

forensic evidence supports the conclusion that the gun found in Mr. Foster's hand belonged to Mr. Foster.

B. Briefcase

There are some discrepancies in statements regarding whether a briefcase was in Mr. Foster's car at Fort Marcy Park.

Mr. Foster's black briefcase was in his office on July 22 when documents in the office were reviewed by Mr. Nussbaum in the presence of law enforcement officials. Four days later, a torn note was reportedly found in that briefcase by an Associate White House Counsel. To determine whether a briefcase (and perhaps that black briefcase) was in Mr. Foster's car at Fort Marcy Park, five related questions must be considered:

1. Did those who saw Mr. Foster leave the White House on July 20 see him with a briefcase?

2. Was a briefcase observed in Mr. Foster's car at Fort Marcy Park?

3. Did the Park Police return a briefcase to the Secret Service that evening?

4. Was a briefcase in Mr. Foster's office at the White House after his death?

5. How many briefcases did Mr. Foster use?

1. Mr. Foster's Departure from the White House

Linda Tripp, Betsy Pond, and Tom Castleton -- all of whom worked in the Counsel's suite of offices -- said they saw Mr. Foster leave the Counsel's suite on July 20. They were interviewed separately by the Park Police on July 22, 1993.

The Park Police report of the interview with Ms. Tripp states:

> Ms. Tripp makes it a habit to notice what the staff members are taking with them when they leave the office in order to determine for herself how long she may expect them to be away from the office. Ms. Tripp was absolutely certain that Mr. Foster did not carry anything in the way of a briefcase, bag, umbrella, etc. out of the office.[255]

Ms. Tripp confirmed to the OIC that this report accurately reflected her recollection.[256]

The relevant portion of the Park Police report of Ms. Pond's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. In a later interview, Ms. Pond stated that "I think I remember his jacket swung over his shoulder" and said "[n]ot that I recall" to the question whether Mr. Foster was carrying a briefcase.[257]

The Park Police report of Mr. Castleton's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. When questioned over eight months later, Mr. Castleton recalled Mr. Foster carrying a briefcase,[258] and Mr. Castleton has said that it "looked very much like the one" that was in Mr. Foster's office on July 22.[259]

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[255] USPP Report, 7/22/93, at 1 (emphasis added) (Tripp interview).

[256] Tripp OIC, 6/21/95, at 9.

[257] Pond OIC, 4/26/95, at 29.

[258] 302, 5/3/94, at 2.

[259] OIC, 4/4/95, at 77.

The testimony of Ms. Tripp, Ms. Pond, and Mr. Castleton thus conflicts as to whether Foster carried a briefcase when he left the Counsel's suite -- two saying that he did not and one saying that he did.[260]

2. **Mr. Foster's Car at Fort Marcy**

The Park Police officers who searched Mr. Foster's car at Fort Marcy Park (Braun and Rolla) stated there was no briefcase in the car.[261] The Park Police technician who inventoried the car on July 21, E.J. Smith, stated that no briefcase was found.[262] The Polaroids of the interior of Mr. Foster's car taken at Fort Marcy Park, and the photographs taken the next day at the impoundment lot, do not show a briefcase in the car. (The photos from Fort Marcy show a white canvas bag in front of the rear seat on the driver's side of the car.)

In addition, four other persons at Fort Marcy Park specifically recall looking into Mr. Foster's car but do not recall a briefcase. Officer Fornshill of the Park Police stated that he looked into the car (although not closely) but did not

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[260] An officer of the Secret Service Uniformed Division stated that he saw Mr. Foster exit the West Wing onto West Executive Drive on July 20 around lunchtime. The officer said that he does not recall Mr. Foster carrying anything. 302, 4/20/94, at 2.

[261] Braun OIC, 2/9/95, at 70 ("there is no question, there was never a briefcase in that car"); Rolla 302, 2/7/95, at 4 (report: "Rolla stated that he did not observe any briefcase in the vehicle at all"). Technician Simonello also stated that he was "certain there was no briefcase" in the car. 302, 4/17/96, at 2.

[262] 302, 2/17/95, at 2-3.

see a briefcase.[263] Wacha, Iacone, and Pisani of the FCFRD also said that they did not recall seeing a briefcase.[264]

Four other persons have varying, but imprecise, degrees of recollection of a briefcase in some car at Fort Marcy Park.

Todd Hall of the FCFRD stated in a March 18, 1994, interview[265] and in a January 5, 1995, statement to the OIC,[266] that he recalled a briefcase of uncertain color in the car with Arkansas plates. However, in a July 20, 1994, Senate deposition, he stated: "We saw a suit coat and I think his briefcase, something like that. . . . All I know for sure I saw was his suit coat. And I thought I may have seen, he may have had a briefcase or something in there."[267]

George Gonzalez of the FCFRD said in one statement that he saw a black briefcase/attache case in the car with Arkansas plates.[268] In a later statement, however, Gonzalez stated, "I can't say if I saw a briefcase or papers. I can't correctly say whether I saw it or not. . . . I think the tie was in there and the jacket was in there. That's what I remember. That's all I

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263 OIC, 1/11/95, at 147.

264 Iacone 302, 4/29/96, at 2; Iacone OIC, 1/10/95, at 35; Pisani OIC, 1/10/95, at 25; Wacha OIC, 1/10/95, at 51-52.

265 302, 3/18/94, at 3.

266 OIC, 1/5/95, at 53.

267 Senate Deposition, 7/20/94, at 17, 27.

268 302, 2/23/94, at 3.

can really remember."[269] He also said that what he recalled could have been a canvas bag that was found in Mr. Foster's car.[270] Gonzalez was not present when the Park Police entered the Honda.[271]

C5 testified that he "would just about bet" that a "brown briefcase" was in the car, although he "wouldn't bet [his] life on it."[272] C5's statements and a reenactment conducted with C5 at the scene by investigators reveal, however, that C5 was describing the car of C4, not Mr. Foster's car, when he referred to the briefcase.[273]

C2 testified that he saw a briefcase -- as well as wine coolers -- in a car with Arkansas plates that was parked in the parking lot. He stated: "I looked and I saw the briefcase and saw the jacket, saw the wine coolers, it was two of them. I remember exactly how they were laying in the back seat of the car."[274] (There is no other evidence that wine coolers were in

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[269] Senate Deposition, 7/20/94, at 95.

[270] 302, 5/15/96, at 4. That bag is clearly shown in photographs of Mr. Foster's car taken at the scene and at the impoundment lot.

[271] Senate Deposition, 7/20/94, at 94.

[272] C5 OIC, 2/23/95, at 37.

[273] OIC Investigators' Memorandum, 3/1/96, at 44; C3 302, 2/2/95, at 1 (stated that he "may have had a briefcase" in C4's car).

[274] C2 OIC, 11/1/95, at 34.

Mr. Foster's car.[275])

3. **Park Police Communications with Secret Service**

An official Secret Service report prepared at 10:01 p.m. on July 20 states in relevant part:

> SA Tom Canavit, WFO PI squad, advised that he has been in contact with US Park Police and was assured that if any materials of a sensitive nature (schedules of the POTUS, etc.) were recovered, they would immediately be turned over to the USSS. (At the time of this writing, no such materials were located).[276]

4. **Mr. Foster's Office at the White House**

White House employee Patsy Thomasson testified that she saw Mr. Foster's briefcase by the desk in Foster's office on the night of July 20 and indeed looked into the top of that briefcase for a note.[277] As noted above, the testimony of White House, Department of Justice, FBI, and Park Police personnel confirms that Mr. Foster's black briefcase was in his White House office on July 22, two days after his death, during the review of documents in Mr. Foster's office.

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[275] C3 and C4, who drove together to Fort Marcy Park, said there were wine coolers and possibly a briefcase in C4's car. C4 302, 4/7/94, at 3; C3 302, 2/2/95, at 1. Based on the estimated times provided by the witnesses, C2 would appear to have left the park before C3 and C4 arrived together.

[276] OIC Doc. No. DC-211-147 (emphasis added); see also Canavit 302, 8/3/95, at 2. Park Police Lieutenant Gavin's typewritten notes of that evening reflect that Canavit had inquired about "WH passes, classified docs in vehicle."

[277] OIC, 8/31/94, at 32.

5. **Mr. Foster's Briefcase**

The OIC is aware of only one briefcase used in Washington by Mr. Foster,[278] the black briefcase that Ms. Thomasson observed in Mr. Foster's White House office on the night of July 20 and that a number of other witnesses observed there on July 22.

6. **Summary: Briefcase**

Based on careful consideration of all of the evidence, the conclusions significantly supported are: (a) Mr. Foster's black briefcase remained in his office when he left on July 20; and (b) neither it nor another briefcase was in his car at Fort Marcy Park.

C. **Notification**

According to Secret Service records, the Secret Service was notified of Mr. Foster's death at about 8:30 p.m. Eastern time on July 20.[279] The records reflect that various White House officials were then contacted.[280]

An Arkansas Trooper has stated that, while on duty at the Arkansas Governor's Mansion, he was notified of Mr. Foster's death by Helen Dickey, at the time a 22-year-old personal assistant of the Clintons who lived on the third floor of the

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[278] See Gorham 302, 3/16/95, at 7; Lisa Foster 302, 4/7/95, at 6; Older Foster Son 302, 4/7/95, at 4. Mr. Foster also possessed a large brown litigation bag that was seen in his office on July 22 during the review of documents.

[279] OIC Doc. No. DC-211-147.

[280] Id. The Secret Service records reveal that David Watkins and Craig Livingstone were the first two White House officials notified (they were notified by different Secret Service personnel). Id.

White House Residence.[281] The trooper described Dickey as "hysterical" and "very upset" when she called.[282] The trooper, who was working a shift until 10:30 p.m. Arkansas time that night,[283] stated that Dickey called him before 7:30 p.m. Arkansas time (8:30 p.m. Eastern time); according to the interview report, he said "he could possibly be mistaken about the time the call from Dickey was received. The call could have been as late as 8:30 PM, Arkansas time. However, he still felt his best recollection was that the call was received sometime between 4:30 PM and 7:30 PM [Arkansas time]."[284]

Helen Dickey stated that she was first notified of Mr. Foster's death by an employee of the White House Usher's Office at about 10:00 p.m. and that she became very upset.[285] (The Dickeys had lived next door to the Fosters in Little Rock when

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[281] 302, 11/9/95, at 2. The trooper said that Dickey's conversation was "very disjointed," id., and that, although he could not recall her precise words, Dickey told him that Mr. Foster had committed suicide in his car at the White House. 302, 6/2/95, at 1. The trooper said that he learned later that Mr. Foster committed suicide at Fort Marcy Park. Id. In addition to the other evidence, the evidence regarding Mr. Foster's car (photographs of its interior and statements about the search of it) clearly demonstrates that Mr. Foster did not commit suicide there.

[282] 302, 6/2/95, at 1; 302, 11/9/95, at 2.

[283] 302, 11/9/95, at 1.

[284] Id. at 3. Another Arkansas trooper stated that the first trooper called him soon after the Dickey call. This second trooper "placed the time of this telephone call at approximately 6:00 PM" Arkansas time. 302, 11/9/95, at 1.

[285] 302, 2/7/96, at 1.

Helen was younger.[286]) She then contacted her mother in Virginia and her father in Georgia from a phone on the second floor of the White House Residence.[287] Dickey stated that she later called (from a different phone) the Arkansas Governor's Mansion and talked to the trooper at approximately 10:30 p.m. Eastern time.[288]

There are two other pieces of relevant evidence with respect to Ms. Dickey's statement. First, Ms. Dickey's diary entry for July 20 (written within a few days of the event) states in relevant part:

> I watched [Larry King Live] and about 10:30 [the Usher's Office employee] came up and told me they had found Vince Foster's body and that he'd killed himself. I waited for the punchline and lost it. I called Mom and Dad . . . . We went to Lisa's, and everyone was there . . . .[289]

Second, the Usher's Office employee confirmed that he notified Ms. Dickey of Mr. Foster's death shortly after 10:00 p.m. and said that Ms. Dickey immediately became hysterical,

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[286] Dickey 302, 10/31/94, at 1.

[287] Dickey 302, 2/7/96, at 2.

[288] Id. at 3. White House Residence phone records indicate that a call was placed to the number of Dickey's father at 10:06 p.m. OIC Doc. No. DC-95-7; Dickey 302, 2/7/96, at 2. A call to the Arkansas Governor's Mansion is not reflected on these records. As indicated, the call may have been made from a phone in the White House not on the floors of the White House Residence: The Usher's Office employee who notified Dickey recalls Dickey making a call, but not in the Residence, soon after he had notified her. 302, 5/21/96, at 2. Complete records for such calls are not available.

[289] OIC Doc. No. DC-348-8.

started screaming and crying, and ran downstairs.[290] The Usher's Office employee "firmly believes he was the first to inform Dickey of the news of Foster's death because of her extreme reaction to the news."[291]

The totality of the evidence -- including the diary entry, the testimony of the Usher's Office employee, and the lack of any other evidence that White House or Secret Service personnel had knowledge of Mr. Foster's death at a time earlier than when the Park Police first notified the Secret Service -- does not support a conclusion that Ms. Dickey knew about Mr. Foster's death at some earlier time.[292]

D. Search for Bullet

During the Park Police, Fiske, and OIC investigations, searches were conducted of Fort Marcy Park for the bullet that caused Mr. Foster's death.

On July 22, 1993, four Park Police personnel (Hill, Johnson, Rule, and Morrissette) searched with a metal detector the immediate area where the body was found. Their search for the bullet was unsuccessful.

Investigators in Mr. Fiske's Office conducted a search in

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[290] 302, 5/21/96, at 2.

[291] Id.

[292] Precise recollections of time, if not tied to a specific event that can be documented as having occurred at an exact time, can, of course, be imprecise or inaccurate. Here, the recollection is tied neither to a specific event nor to an exact time. The recollection instead is of a general three-hour period of time in which the call might have been received. The recollection is not reflected in a contemporaneous document.

the area where Mr. Foster's body was found. Their search for the bullet fired from Mr. Foster's gun was unsuccessful.[293]

With the assistance of Dr. Lee, the National Park Service, and a large number of investigators, the OIC organized a broader search of Fort Marcy Park for the fatal bullet. The search was led by Richard K. Graham, an expert in crime scene metal detection. The search plan was devised utilizing information obtained through ballistics tests performed by the Army Research Laboratory, Aberdeen Proving Grounds, Maryland.

The search did not locate a bullet fired from the gun recovered from Mr. Foster's hand. That the search did not uncover the fatal bullet does not affect the conclusion that Mr. Foster committed suicide in Fort Marcy Park. Because a search covering the maximum range estimates "would have included a vast area . . . , a search which was limited in scope to the highest probability areas, closer to the minimum range estimates, was undertaken."[294] In other words, while the OIC search covered a broader area than previous searches, "the maximum range estimates" predicted the possibility that "the bullet could have cleared the tree tops in Ft. Marcy and landed well outside the park."[295] Moreover, although lines ultimately were laid out within the park along the outer limits of a 90 degree arc to a

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[293] Fiske Report at 47.

[294] 302, 9/12-10/31/95, at 4 (Investigators' Report of Search).

[295] Id.

distance of 175 meters,[296] which represented the "highest probability areas,"[297] a full search of even the 90 degree-175 meter range would have included areas outside the park that were not searched.[298] In addition, because "dense foliage and trees surround the area where Foster's body was discovered, and since there is a . . . cannon approximately 12.5 feet directly behind the location where the body lay, there is a distinct possibility the bullet's trajectory was altered due to its striking or ricocheting off a natural or man-made obstruction."[299] Another variable is that "Foster's head could have been turned to one side or the other when the shot was fired."[300]

IX. STATE OF MIND

In a death investigation, state-of-mind evidence can buttress the forensic and other evidence and, in that respect, is an issue within the scope of the investigation. For that reason, the OIC intensively examined Mr. Foster's state of mind and activities before his death. The OIC reconstructed and examined previously unreviewed documents from Mr. Foster's White House office. The OIC sought relevant documents from other sources. The OIC interviewed Mr. Foster's wife, sisters, mother, children, and other relatives; numerous friends in Arkansas and Washington;

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[296] Id. at 7.

[297] Id. at 4.

[298] Id. at 7-8.

[299] Id. at 4.

[300] Id. at 5.

many colleagues who worked closely with him at the Rose Law Firm or the White House; and various other persons with potentially important information. During this effort, the OIC gathered extensive evidence relating to Mr. Foster's state of mind and activities.

The OIC is grateful to the Foster family members -- including Alice Mae Foster, Lisa Foster, Sharon Bowman, Sheila Anthony, Beryl Anthony, and the Foster children, among others -- for cooperating with this and prior investigations under painful and difficult circumstances. Lisa Foster and Mr. Foster's mother, Alice Mae Foster, not only spoke with OIC investigators at some length, but also provided additional information and assistance at their homes in Arkansas.

A. Dr. Berman's Analysis

Suicide, perhaps contrary to popular understanding, is a common manner of death in the United States. According to the Centers for Disease Control (CDC), suicide was the ninth leading cause of death among Americans in the period from 1980 through 1992. The CDC's statistics reveal that more individuals in the United States died by suicide than by homicide in every year since 1981.[301] In the United States in 1993, 31,102 individuals committed suicide, and 18,940 of them committed suicide with a

[301] Centers for Disease Control and Prevention, Suicide in the United States, 1980-1992 2 (1995).

firearm.[302] During 1993, therefore, there were approximately 85 suicides per day, and 52 suicides by firearm per day, in the United States.

The OIC retained Dr. Alan Berman to review and analyze state-of-mind evidence gathered by the OIC in the course of its investigation. Dr. Berman, as noted above, has extensive experience and expertise in the study of suicide. He examined the evidence and reported his findings to the OIC.

In his report, Dr. Berman first noted that "[d]escriptors used by interviewees with regard to Vincent Foster's basic personality were extraordinarily consistent in describing a controlled, private, perfectionistic character whose public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance."[303]

Mr. Foster's life, after "arriving in Washington, was filled with long, intense and demanding hours of work."[304] Dr. Berman noted that Mr. Foster's May 8 commencement address to the University of Arkansas School of Law was "replete with reflections upon and regret regarding the changes wrought by his

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[302] These figures were provided by the Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention.

[303] Berman Report at 3. Dr. Berman noted that "[r]ecent studies . . . have documented a significant relationship between perfectionism and both depression and suicidality, particularly when mediated by stress." Id. at 13.

[304] Id. at 3.

experiences in Washington."[305] Mr. Foster had "uncharacteristically . . . talked of quitting,"[306] but considered a return to Little Rock to be a "humiliation."[307]

Dr. Berman reported that "[m]istakes, real or perceived, posed a profound threat to his self-esteem/self-worth and represented evidence for a lack of control over his environment. Feelings of unworthiness, inferiority, and guilt followed and were difficult for him to tolerate. There are signs of an intense and profound anguish, harsh self-evaluation, shame, and chronic fear. All these on top of an evident clinical depression and his separation from the comforts and security of Little Rock. He, furthermore, faced a feared humiliation should he resign and return to Little Rock."[308] The torn note "highlights his preoccupation with themes of guilt, anger, and his need to protect others."[309]

Dr. Berman noted that Mr. Foster's admission to his sister on the Friday before his death that he was depressed was a "profound expression of his depression."[310] Dr. Berman also noted Mr. Foster's July 19 call to Dr. Larry Watkins in Little Rock, during which Mr. Foster referred to symptoms of a mild

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[305] Id. at 5.

[306] Id. at 13.

[307] Id. at 7.

[308] Id. at 14.

[309] Id. at 4.

[310] Id. at 7.

depression and to stress, criticism, and long hours.[311]

Dr. Berman stated that Mr. Foster was "not a help-seeker"[312] and was "reluctant to seek help" although he was "[a]ware he was in trouble psychologically."[313] Dr. Berman stated that "[t]his difficulty accepting the vulnerable position is common to successful executives."[314] Dr. Berman stated that "[b]y the Friday before his death he was desperate; calling for names of psychiatrists was a clear . . . admission of his failure. He was ambivalent and fearful about this help-seeking."[315] He ultimately "preferred the safety of his family physician . . . to the immediacy and presence of other, unknown professionals in the DC area."[316]

Dr. Berman said that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability."[317] Dr. Berman concluded, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, sub-clinically even before this."[318] Dr. Berman noted

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[311] Id. at 6.

[312] Id. at 13.

[313] Id. at 14.

[314] Id.

[315] Id.

[316] Id. at 13.

[317] Id. at 10.

[318] Id. at 9.

that there was some history of depression in the family.[319]

Dr. Berman explained that for certain executives facing difficult circumstances, "[i]n essence, death is preferred to preserve one's identity. The suicide has an inability to tolerate an altered view of himself; suicide maintains a self-view and escapes having to incorporate discordant implications about the self. These types of suicides are typically complete surprises to others in the available support system."[320]

As to why Mr. Foster was overwhelmed at that particular time, Dr. Berman explained that Mr. Foster was "under an increasing burden of intense external stress, a loss of security, a painful scanning of his environment for negative judgments regarding his performance, a rigid hold of perfectionistic self-demands, a breakdown in and the absence of his usual ability to handle that stress primarily due to the impact of a mental disorder which was undertreated."[321]

Mr. Foster apparently did not leave a note that specifically refers to or contemplates suicide. Dr. Berman indicated that the great majority of persons committing suicide do not leave a note.[322] Dr. Berman also stated, with respect to the lack of a note in this case, that Mr. Foster was "intensely self-focused at

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[319] Id. at 6.

[320] Id. at 14.

[321] Id. at 15.

[322] Id.

this point; overwhelmed and out of control."[323]

As to the Fort Marcy Park location, Dr. Berman stated that Mr. Foster "was ambivalent to the end" and may have driven for a while before going to Fort Marcy Park.[324] He may have "simply and inadvertently happened upon the park or he may have purposely picked it off the area map found in his car."[325] Dr. Berman stated that Mr. Foster's suicide in Fort Marcy Park is "[s]imilar to the typical male physician who suicides by seeking the guaranteed privacy of a hotel room, and a 'do not disturb' sign."[326]

In sum, Dr. Berman, based on his evaluation of the evidence, concluded: "In my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."[327]

B. Evidence

The OIC, like other investigations before, is not aware of a single, obvious triggering event that might have motivated Mr. Foster to commit suicide. Therefore, the following is simply a

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[323] Id. With respect to Mr. Foster's eating lunch on July 20, Dr. Berman stated that "[t]here is no study in the professional literature that has examined eating behavior prior to suicides" and that "even death row inmates, knowing they are to die within a short time, eat a last meal." Id. at 14.

[324] Id.

[325] Id.

[326] Id.

[327] Id.

brief outline of some of the evidence relevant to the ultimate determination that Mr. Foster's state of mind was consistent with suicide. This outline is not designed to set forth or to suggest some particular reason or set of reasons why Mr. Foster committed suicide. Rather, the issue for purposes of the death investigation is whether Mr. Foster committed suicide, and this outline is designed to show that, as Dr. Berman concluded, compelling evidence exists that Mr. Foster was distressed or depressed in a manner consistent with suicide.[328]

To begin with, in his six months in the White House, Mr. Foster was involved in work related to a number of important and difficult issues. The issues included, for example, the appointments and vetting of an Attorney General, a Supreme Court Justice, as well as many others (some of which developed into difficult situations abounding with unfavorable public comment); legal issues related to health care, such as medical malpractice reform; litigation related to the Health Care Task Force; the dismissal of White House Travel Office employees and the ensuing fallout from that incident; the Clintons' tax returns (which involved an issue regarding treatment of the Clintons' 1992 sale of their interest in Whitewater); the Clintons' blind trust; liaison with the White House Usher's Office over issues related

[328] The OIC has been mindful of and sought to comply with the requirement of restraint imposed by the Independent Counsel Reauthorization Act of 1994: The reporting requirement is not "intended in any way to authorize independent counsels to make public findings or conclusions that violate normal standards of due process, privacy or simple fairness." H.R. Conf Rep. No. 103-511, at 19 (1994).

to the White House Residence; and issues related to the Freedom of Information Act.[329]

The work proved to be difficult and stressful. In a letter to a friend in Arkansas on March 4, 1993, for example, Mr. Foster wrote: "I have never worked so hard for so long in my life. The legal issues are mind boggling and the time pressures are immense. . . . The pressure, financial sacrifice and family disruption are the price of public service at this level. As they say, 'The wind blows hardest at the top of the mountain.'"[330]

During that six-month period, certain other aspects of Mr. Foster's life also came under some scrutiny. For example, in May 1993, a controversy arose over membership of Administration officials in the Country Club of Little Rock, which had had no black members. Mr. Foster was a member of that club and resigned from it that month. On a copy of a May 11, 1993, newspaper article in Mr. Foster's office that mentioned the controversy, Mr. Foster wrote, "I wish I had done more."[331]

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[329] This summary report is not an appropriate forum for an exposition of substantive events under investigation by the OIC -- including Whitewater, Madison, and Travel Office issues -- and Mr. Foster's possible relationship to those events. Those investigations have not concluded, and it thus would be inappropriate to publicly disclose evidence on such matters. In any event, much information on those subjects is publicly accessible in reports of congressional committees and federal agencies, in several books, and in numerous media articles and reports.

[330] OIC Doc. No. DC-210-5573.

[331] OIC Doc. No. DC-210-3907.

At the same time, the White House staff generally was subject to media criticism during the first six months of the Administration. Some public criticism suggested incompetence, if not malfeasance, by staff members. Mr. Foster himself was mentioned in some of the critical editorial commentary.[332] Numerous witnesses said that Mr. Foster was concerned and/or upset over the press criticism.[333] According to Mr. Foster's brother-in-law, former Congressman Beryl Anthony, Mr. Foster said words to the effect that he had "spent a lifetime building [his] reputation" and was "in the process of having it tarnished."[334]

As Dr. Berman noted, reputation was clearly important to Mr. Foster. Indeed, in the May 8, 1993, commencement address, Mr. Foster said that "[d]ents to the reputation in the legal profession are irreparable" and that "no victory, no advantage, no fee, no favor . . . is worth even a blemish on your reputation for intellect and integrity." He emphasized that the "reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy."

In that commencement address, Mr. Foster also noted that

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[332] See Who Is Vincent Foster?, Wall St. J., June 17, 1993, at A10; Vincent Foster's Victory, Wall St. J., June 24, 1993, at A12.

[333] See, e.g., Beryl Anthony 302, 4/11/95, at 2; Sheila Anthony 302, 4/28/94, at 4; Alice Mae Foster 302, 5/2/95, at 2; Lisa Foster 302, 4/7/95, at 8; Hockersmith 302, 8/31/95, at 3; Kennedy 302, 5/6/94, at 4-5; Lindsey 302, 6/22/94, at 2; Lyons OIC, 7/25/95, at 19-21; Scott 302, 6/9/94, at 3; Thomases OIC, 7/7/95, at 36-37; Tripp 302, 3/27/95-3/28/95, at 2-3.

[334] USPP Report, 7/27/93, at 1 (Beryl Anthony interview).

there will be "failures, and criticisms and bad press and lies, stormy days and cloudy days." He advised to "[t]ake time out for yourself. Have some fun, go fishing, every once in a while take a walk in the woods by yourself." He suggested that "[i]f you find yourself getting burned out or unfulfilled, unappreciated[,] . . . have the courage to make a change."

The Travel Office matter, in particular, was the subject of public controversy beginning in May 1993 and continuing through Mr. Foster's death. Criticism focused on the White House's handling of the matter before and after the May 19 firings. Legislation enacted on July 2, 1993, required the General Accounting Office (GAO) to investigate the Travel Office firings. There was a possibility of some form of congressional review, or perhaps special counsel investigation, as well as the GAO investigation.[335] During the week of July 12, Mr. Foster contacted private attorneys seeking advice in connection with the Travel Office incident.[336]

At some point in the last weeks of his life, Mr. Foster wrote a note[337] that he had "made mistakes from ignorance,

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[335] See, e.g., Appoint Special Counsel, USA Today, July 19, 1993, at 10A; The Travel Office Controversy Isn't Over, Wash. Times, July 12, 1993, at F2; A Stealthy, Evasive Confession, N.Y. Times, July 11, 1993, at § 4, p. 18.

[336] See Beryl Anthony 302, 4/11/95, at 2; Beryl Anthony OIC, 6/25/96, at 5-6; Lyons 302, 5/12/94, at 3; Lyons OIC, 7/25/95, at 32-33.

[337] This note is not dated. Because it refers to the Travel Office incident, Mr. Foster must have written it at some point in the last several weeks of his life. The FBI Laboratory found one latent print on the note and later determined that the print

inexperience and overwork" and that he "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport."[338]

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belonged to Bernard Nussbaum. FBI Lab Report, 7/5/95, at 1. (Mr. Nussbaum handled the note after its discovery and before its production to the Park Police.) The note already was torn into pieces when produced to the Park Police; as received by Mr. Fiske's Office and the OIC, there was one missing piece to the note. The missing piece is from the bottom portion of the page, which appears to be blank.

[338] At the request of the OIC, the FBI Laboratory compared the original note to four original pages of known writing of Mr. Foster that the OIC had obtained from the documents that were in Mr. Foster's office at the time of his death. The Laboratory determined that the note and these four sheets were written by the same person (Vincent Foster). FBI Lab Report, 11/9/95, at 1.

The OIC also retained an independent handwriting expert, Gus R. Lesnevich. Mr. Lesnevich served in the Questioned Document Section of the U.S. Army Criminal Investigation Laboratory in Vietnam. In 1974, he joined the United States Secret Service and in 1976 became Senior Document Examiner at the Secret Service Identification Branch. In 1981, he entered private practice and has worked as an expert for federal and state law enforcement agencies, Legal Aid, and public defenders. He has qualified and testified as an expert witness in numerous state and federal courts throughout the United States. He was retained as a government expert in six cases in the Iran-Contra matter, and he has been retained in numerous other high-profile federal criminal cases.

In this matter, Mr. Lesnevich compared the original note to four original pages of known writing of Mr. Foster that were in his office at the time of his death; to one other original page of paper that was known to have been written by Mr. Foster; and to 18 original checks bearing the known writing of Mr. Foster. Mr. Lesnevich concluded that the written text on the note "contained normal, natural and spontaneous writing variations. These normal, natural and spontaneous writing variations could be found in the letter formations, beginning strokes, ending strokes, connecting strokes, etc." Lesnevich Report at 2. He further concluded that "examination and comparison of the questioned written text appearing on the note with the known writing on the [known] documents has revealed that the author of the known documents wrote the note." Id. (reference numbers omitted). Mr. Lesnevich prepared a thorough 51-page comparison chart "that points out and illustrates a number of the normal,

During that same period, according to Mr. Foster's immediate superior, Counsel Bernard Nussbaum, Mr. Foster's work effort decreased noticeably.[339] According to William Kennedy, Sheila Anthony, and Lisa Foster, Mr. Foster said he was considering resigning.[340]

Mr. Foster's sister Sheila Anthony said that Mr. Foster told her on Friday, July 16 that he was depressed. She furnished him

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natural and spontaneous writing habits that were found common between the written text appearing on the questioned note and the known handwriting of Vincent Foster found on the [submitted known] documents." Id. at 3.

Previous investigations also commissioned handwriting analyses of the note. At the request of Mr. Fiske's Office, the FBI Laboratory performed a handwriting analysis of the original note, comparing it to a "[h]andwriting sample bearing the purported known writing of Vincent Foster" and determined that the note was written by the same person who wrote the known sample. FBI Lab Report, 6/17/94, at 1-2. At the request of the Park Police, the United States Capitol Police performed a handwriting analysis of the note, comparing it to a copy of a handwritten letter of Mr. Foster that had been provided by Mrs. Foster. The U.S. Capitol Police concluded that "[b]oth the Known and Questioned Documents were completed by the same writer/author and that writer/author is known as Vincent W. Foster." Report of United States Capitol Police, Identification Section, 7/29/93, at 2.

The number of examinations, the experience and expertise of the many different examiners, the variety and quantity of known-sample documents, the fact that the examinations commissioned by the OIC and Mr. Fiske's Office were conducted with original documents (as opposed to photocopies), and the unanimity of the examiners in their conclusions together lead clearly to the conclusion that Mr. Foster wrote the note.

[339] Nussbaum 302, 6/8/95, at 6. Another witness said that he was told by Mr. Nussbaum that Mr. Foster's work product had deteriorated and that Mr. Foster had seemed distracted. 302, 10/23/95, at 14.

[340] Lisa Foster 302, 5/9/94, at 15; Kennedy OIC, 3/2/95, at 66-67; Sheila Anthony 302, 4/28/94, at 9.

the names of three psychiatrists.[341] Mr. Foster did not speak to any of the three psychiatrists,[342] although phone records show that Mr. Foster attempted to contact one of them on July 16.[343] When Mr. Foster was found at Fort Marcy Park, a list of the three psychiatrists was in his wallet.[344]

Lisa Foster said that her husband cried while talking to her on Friday night, July 16 and that Mr. Foster mentioned resigning during the weekend of July 16-18.[345]

Meanwhile, Mr. Foster's mother, Alice Mae Foster, said that she talked to her son a day or two before his death and that he said he was unhappy because of his job and that it was "such a grind."[346]

On Monday, July 19, Mr. Foster contacted Dr. Larry Watkins, his physician in Little Rock, and was prescribed an antidepressant. Watkins' typed notes of July 21 say the following:

> I talked to Vince on 7/19/93, at which time he complained of anorexia and insomnia. He had no GI [gastrointestinal] symptoms. We discussed the possibility of taking Axid or Zantac to help with any ulcer symptoms as he was under a lot of stress. He was

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[341] Sheila Anthony 302, 4/28/94, at 7-8; <u>see also</u> USPP Report, 7/27/93, at 1 (Beryl Anthony interview); USPP Report, 7/29/93, at 2 (Lisa Foster interview).

[342] USPP Report (Rolla), 7/27/93, at 1.

[343] OIC Doc. No. DC-39-6.

[344] USPP Report (Rolla), 7/27/93, at 1.

[345] 302, 4/7/95, at 3, 5.

[346] Alice Mae Foster 302, 5/2/95, at 3.

> concerned about the criticism they were getting and the long hours he was working at the White House. He did feel that he had some mild depression. I started him on Desyrel, 50 mg. He was to start with one at bedtime and move up to three. . . . I received word at 10:20 p.m. on 7/20/93 that he had committed suicide.[347]

Dr. Watkins said that it was unusual, even unprecedented, for Mr. Foster to call him directly.[348] Lisa Foster said that Mr. Foster took one tablet of the antidepressant medication on the night of the 19th.[349]

In short, the OIC cannot set forth a particular reason or set of reasons <u>why</u> Mr. Foster committed suicide. The important issue, from the standpoint of the death investigation, is whether Mr. Foster committed suicide. On that issue, the state-of-mind evidence is compelling, and it demonstrates that Mr. Foster was, in fact, distressed or depressed in a manner consistent with suicide. Indeed, the evidence was sufficient for Dr. Berman to conclude that "to a 100% degree of medical certainty, the death of Vincent Foster was a suicide."[350]

X. SUMMARY OF CONCLUSIONS

To sum up, the OIC has investigated the cause and manner of Mr. Foster's death. To ensure that all relevant issues were fully considered, carefully analyzed, and properly assessed, the OIC retained a number of experienced experts and criminal

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[347] OIC Doc. No. DC-41-2.

[348] 302, 5/16/94, at 2.

[349] 302, 5/9/94, at 13.

[350] Berman Report at 15.

investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman. The investigators included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington, D.C.; an investigator who also had extensive homicide experience as a detective with the Metropolitan Police Department in Washington, D.C., for over 20 years; and two other OIC investigators who had experience as FBI agents investigating the murders of federal officials and other homicides. The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, examining the analyses and conclusions of the OIC experts and investigators, and preparing this report.

The autopsy report and the reports of the pathologists retained by the OIC and Mr. Fiske's Office demonstrate that the cause of death was a gunshot wound through the back of Mr. Foster's mouth and out the back of his head. The autopsy photographs depict the wound in the back of the head, and the photographs show the trajectory rod through the wound. The evidence, including the photographic evidence, reveals no other trauma or wounds on Mr. Foster's body.

The available evidence points clearly to suicide as the manner of death. That conclusion is based on the evidence gathered and the analyses performed during previous investigations, and the additional evidence gathered and analyses performed during the OIC investigation, including the evaluations of Dr. Lee, Dr. Blackbourne, Dr. Berman, and the various OIC

investigators.

When police and rescue personnel arrived at the scene, they found Mr. Foster dead with a gun in his right hand. That gun, the evidence tends to show, belonged to Mr. Foster. Gunshot residue-like material was observed on Mr. Foster's right hand in a manner consistent both with test firings of the gun and with the gun's cylinder gap. Gunshot residue was found in his mouth. DNA consistent with that of Mr. Foster was found on the gun. Blood was detected on the paper initially used to package the gun. Blood spatters were detected on the lifts from the gun. In addition, lead residue was found on the clothes worn by Mr. Foster when found at the scene. This evidence, taken together, leads to the conclusion that Mr. Foster fired this gun into his mouth. This evidence also leads to the conclusion that this shot was fired while he was wearing the clothes in which he was found. Mr. Foster's thumb was trapped in the trigger guard, and the trigger caused a noticeable indentation on the thumb, demonstrating that the gun remained in his hand after firing.

The police detected no signs of a struggle at the scene, and examination of Mr. Foster's clothes by Dr. Lee revealed no evidence of a struggle or of dragging. Nor does the evidence reveal that Mr. Foster was intoxicated or drugged.

Dr. Lee found gunshot residue in a sample of the soil from the place where Mr. Foster was found. He also found a bone chip containing DNA consistent with that of Mr. Foster in debris from the clothing. Dr. Lee observed blood-like spatter on vegetation

in the photographs of the scene. Investigators found a quantity of blood under Mr. Foster's back and head when the body was turned, and Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag. In addition, the blood spatters on Mr. Foster's face had not been altered or smudged, contrary to what likely would have occurred had the body been moved and the head wrapped or cleaned. Fort Marcy Park is publicly accessible and traveled; Mr. Foster was discovered in that park in broad daylight; and no one saw Mr. Foster being carried into the park. All of this evidence, taken together, leads to the conclusion that the shot was fired by Mr. Foster where he was found in Fort Marcy Park.

The evidence with respect to state of mind points as well to suicide. Mr. Foster told his sister four days before his death that he was depressed; he cried at dinner with his wife four days before his death; he told his mother a day or two before his death that he was unhappy because work was "a grind"; he was consulting attorneys for legal advice the week before his death; he told several people he was considering resignation; he wrote a note that he "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport." The day before his death, he contacted a physician and indicated that he was under stress. He was prescribed antidepressant medication and took one tablet that evening.

Dr. Berman concluded that Mr. Foster's "last 96 hours show

clear signs of crisis and uncharacteristic vulnerability."[351] Dr. Berman stated, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, sub-clinically even before this."[352] Dr. Berman concluded that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."[353]

In sum, based on all of the available evidence, which is considerable, the OIC agrees with the conclusion reached by every official entity that has examined the issue: Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993.

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[351] Berman Report at 10.

[352] Id. at 9.

[353] Id. at 15.

S. HRG. 104-869, VOL. V

INVESTIGATION OF WHITEWATER DEVELOPMENT CORPORATION AND RELATED MATTERS

DEPOSITIONS

BEFORE THE

SPECIAL COMMITTEE TO INVESTIGATE WHITEWATER DEVELOPMENT CORPORATION AND RELATED MATTERS

ADMINISTERED BY THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

VOLUME V

ON

THE INQUIRY INTO WHETHER IMPROPER CONDUCT OCCURRED REGARDING THE WAY IN WHICH WHITE HOUSE OFFICIALS HANDLED DOCUMENTS IN THE OFFICE OF WHITE HOUSE DEPUTY COUNSEL VINCENT W. FOSTER, JR., FOLLOWING HIS DEATH

JULY 10, 11, 12, 13, 14, 17, 21, 24, 31, 1995; AND FEBRUARY 13, 1996

Printed for the use of the Committee on Banking, Housing, and Urban Affairs

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DEPOSITION OF LOUIS GALE HUPP IN RE: S. RES. 120

FRIDAY, JULY 14, 1995

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
SPECIAL COMMITTEE TO INVESTIGATE WHITEWATER
DEVELOPMENT CORPORATION AND RELATED MATTERS,
Washington, DC.

Deposition of LOUIS GALE HUPP, called for examination pursuant to notice of deposition, at 9:55 a.m. in Room 640–A of the Hart Senate Office Building, before JULIE BAKER, a Notary Public within and for the District of Columbia, when were present:

JAMES B. COMEY, ESQ.
Majority Deputy Special Counsel
RICHARD BEN-VENISTE, ESQ.
Minority Special Counsel
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ALSO PRESENT: NGUYEN-HONG HOANG
TIMOTHY P. MITCHELL

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Louis Gale Hupp

DEPOSITION NUMBER	IDENTIFIED
Hupp Exhibit 1	27, 4352

1 P R O C E E D I N G S
2 Whereupon,
3 LOUIS GALE HUPP
4 was called as a witness and, having first been duly
5 sworn, was examined and testified as follows:
6 EXAMINATION
7 BY MR. BEN-VENISTE:
8 Q Will you state and spell your full name?
9 A My name is Louis Gale Hupp. Last name is
10 spelled H-u-p-p.
11 Q Mr. Hupp, my name is Richard Ben-Veniste.
12 I am minority counsel to the Special Committee of the
13 Senate investigating Whitewater and other matters,
14 and you have been asked to testify here this morning,
15 to give evidence with respect to aspects of the first
16 area of our hearings, which is the handling of
17 Vincent Foster's papers subsequent to his death on
18 July 20, 1993. You are represented here by counsel?
19 A Yes.
20 Q Would counsel please identify herself for
21 the record?
22 MS. SIMONTON: Andrea Simonton. I'm deputy

1 general counsel of the FBI and I'm here on behalf of
2 the FBI.
3 MR. SGRO: I'm Charles Sgro, special
4 assistant to the Deputy Attorney General, on behalf
5 of the Department of Justice.
6 MR. BEN-VENISTE: And we have a special
7 guest this morning, as far as -- unprecedented to
8 this point in connection with our inquiry, Mr. Brett
9 Kavanaugh, and Mr. Kavanaugh, would you spell your
10 name for the record and provide us with an
11 explanation of your appearance here today.
12 MR. KAVANAUGH: First name is Brett,
13 B-r-e-t-t. Last name is Kavanaugh,
14 K-a-v-a-n-a-u-g-h. I am associate Independent
15 Counsel in the Office of Independent Counsel of
16 Kenneth Starr, and I am here on behalf of the Office
17 of Independent Counsel to ensure that the questioning
18 concerns only activities in July and August of 1993
19 and does not go beyond that.
20 MR. BEN-VENISTE: Frankly, if the witness
21 has no objection to your appearance here today, I
22 have no objection to it. I don't think that this

1 would constitute any agreement or disagreement with
2 the notion that you, as a representative of the
3 Independent Counsel's office, have any right to be
4 here before us in the deposition process, which is a
5 confidential process. I would request that, at your
6 earliest convenience today, you execute a
7 confidentiality form with respect to the matters that
8 occur here today so that we are assured that there
9 will be no dissemination of this information beyond
10 conversations with Judge Starr or other officials of
11 the Independent Counsel's office.
12 Is that acceptable to you?
13 MR. KAVANAUGH: That's fine with me.
14 MR. BEN-VENISTE: Mr. Comey, do you have
15 any objection to Mr. Kavanaugh's appearance here
16 today?
17 MR. COMEY: No, I don't think so.
18 MR. BEN-VENISTE: Rather than get a ruling
19 from Senators D'Amato and Sarbanes about your
20 presence here, and in view of the lateness of getting
21 started this morning, and our other schedule today,
22 it would be my recommendation, under these very

1 limited circumstances, to Senator Sarbanes, if he
2 were to ask for one, that you be permitted to stay.
3 So with that, let me begin with the questioning.
4 BY MR. BEN-VENISTE:
5 Q Mr. Hupp, how are you employed?
6 A I'm employed as a fingerprint specialist
7 with the Federal Bureau of Investigation, laboratory
8 division, here in Washington, D.C.
9 Q And as such, are you a special agent of the
10 FBI?
11 A No, I'm not.
12 Q And how long have you worked for the FBI?
13 A A little more than 30 years.
14 Q And would you give us a summary of your
15 educational background and experience in connection
16 with fingerprint analysis?
17 A I entered on duty in 1965 after graduating
18 from high school in New Matamoras, Ohio, and I was
19 assigned to the 10-fingerprint files as a student
20 fingerprint classifier. In that capacity, I learned
21 to classify fingerprints which enabled me to locate
22 them in our files, also learned how to file the

1 prints and how to retrieve the prints from file.
2 This required approximately six months of classroom
3 training and then approximately six months of
4 extensive close supervision through a supervisor
5 before we were really -- I guess what we would call a
6 benefit to the Bureau. Then I progressed through
7 various schools in services with the Bureau to reach
8 the position of assistant supervisor in the 10
9 fingerprint files.
10 In 1975 I took a competitive test and was
11 afforded an opportunity to go into the latent
12 fingerprint sections where I'm employed now. At that
13 time we went through extensive training through
14 senior examiners of the FBI and a lot of on-the-job
15 training also. There again, we attend various
16 in-services for new procedures and the like. And
17 that's pretty much where I am today.
18 Q Is the Washington office the main
19 fingerprint center for the FBI?
20 A It's the only center.
21 Q And about how many fingerprint specialists
22 are employed by the FBI, if you know?

1 A We have about 79 now on file doing the
2 latent print work.
3 Q Do you have any experience in teaching?
4 A Yes, I do.
5 Q Could you explain that for the record,
6 please.
7 A Over the course of about the last 15 years,
8 I've taught probably 60, 65, what we call fingerprint
9 schools throughout the United States. I've also
10 taught in Quantico, Virginia, instructed the National
11 Academy as well as other police officers. I have
12 lectured and instructed in Athens, Greece, as well as
13 Mexico City, and I'm presently training our field
14 offices in evidence recovery and processing for
15 fingerprints.
16 Q And who is your immediate supervisor?
17 A My immediate supervisor is Leroy Walton.
18 Q And what is his title?
19 A Fingerprint -- supervisory fingerprint
20 specialist.
21 Q Up through the chain in the fingerprint
22 section, who would Mr. Walton report to?

1 A He would report to Mr. Eugene Mulhollan.
2 Q How do you spell that?
3 A M-u-l-h-o-l-l-a-n.
4 Q And what is his title?
5 A He is a supervisory fingerprint specialist
6 in the fingerprint section.
7 Q And who does Mr. Mulhollan report to?
8 A He reports to Special Agent Danny
9 Greathouse.
10 Q And what is Mr. Greathouse's title?
11 A He is a section chief of the latent
12 fingerprint section.
13 Q And who does Mr. Greathouse report to?
14 A Mr. Milt Alherich.
15 Q What is Mr. Alherich's title?
16 A He is the assistant director in charge of
17 the laboratory division.
18 Q Is that the top of the food chain as far as
19 the fingerprints?
20 A That's as far as it goes, yes.
21 Q Thank you. Did there come a time, sir,
22 when you were asked to analyze a number of scraps of

1 yellow paper for the purposes of determining whether
2 a latent fingerprint was present on those scraps of
3 paper?
4 A Yes.
5 Q And approximately when was that?
6 A It was late in the afternoon on the day of
7 July 30, 1993.
8 Q I see you are referring to notes, and that
9 is perfectly acceptable for you to refresh your
10 recollection to the extent that you're able to do so
11 from your written reports and notes, sir.
12 What were the circumstances under which you
13 were requested to do so?
14 A They were brought to me by another
15 laboratory personnel, and I was just instructed to
16 attempt to develop latent prints, and I was given a
17 list of names to compare.
18 Q Now, can you explain what a latent
19 fingerprint is, please?
20 A The undersides of the fingers, as well as
21 the palms of the hands, are covered with raised
22 portions of skin, which we call friction ridges.

1 These friction ridges are lined with small openings,
2 sweat pores, and they are usually moist or damp. And
3 when your finger comes in contact with a surface such
4 as the tabletop here, these outlines or designs are
5 transferred to that. And they require some form of
6 processing, either through the use of fingerprint
7 powders or chemicals, in order to make them visible
8 to the naked eye, and they're usually a mere chance
9 impression, in that they weren't meant to be left.
10 Q And what are the procedures that you
11 employed with respect to the material provided to
12 you -- was it by Special Agent Scott Salter on July
13 30?
14 A No, I believe Mr. Salter brought that in
15 and provided it to the laboratory personnel and then
16 the laboratory personnel that did the initial
17 handwriting examination was the one that brought it
18 to me.
19 Q And in what form was the material brought
20 to you?
21 A When it was brought to me, it had been
22 reassembled or it had been pieced together back. It

1 wasn't 28 pieces -- it was 28 pieces but they were
2 assembled as best they could so they could determine
3 the writings or the statement that was on it.
4 Q Was it in an envelope or enclosure of some
5 sort?
6 A It was in a -- they have a piece of plastic
7 that has a light sticky substance on it. They place
8 it on there, and they place the piece on top of it so
9 it didn't move, and it was easily removed.
10 Q What were you told about this paper when it
11 was given to you?
12 A I really wasn't given any details, other
13 than what it involved, where it came from.
14 Q So to the best of your recollection, tell
15 us what you were told and by whom.
16 A I was told at the time, as best I
17 recollect, where it had came from, what it was -- it
18 was an apparent suicide note.
19 Q Instead of using conclusory language, such
20 as where it came from, to the best of your
21 recollection, would you relate the conversation.
22 A The gentleman that brought it to me merely

1 stated that this was a note in regards to Mr. Foster,
2 and that they wanted as urgent a reply as possible
3 and could we take care of it.
4 Q Were you provided any information -- did
5 you know who Mr. Foster was at that time?
6 A I had heard the name, and had read in the
7 papers, but other than that, no.
8 Q Were you provided with any information
9 about who might have handled this material?
10 A I was merely given a list of names at the
11 time and requested to compare any fingerprints or
12 prints that I developed on the note with this list of
13 names, and it was not -- there was no mention of they
14 may have handled it. It was just a list of names
15 which were provided to me.
16 Q And by the list of names provided to you,
17 you took it to mean that these were people who might
18 have had some contact with this material, physical
19 contact?
20 A I guess that would be a fair assessment,
21 yes.
22 Q Can you identify for the record who those

15

1 individuals were?
2 A The individuals that were named were, of
3 course, Mr. Foster, Stephen R. Neuwirth, Bernard
4 William Nussbaum, Charles William Burton, and
5 Clifford Sloan.
6 Q The record should reflect that the witness
7 is reading from what has previously been designated
8 as FBI 81, provided to us by the Department of
9 Justice.
10 Now, at the top of that document it says
11 named suspects. Did that mean to you that these
12 persons were individuals who it was believed might
13 have handled the material?
14 A The mere term "named suspects," they
15 weren't given to me as an elimination type. They
16 didn't say they were elimination. They said these
17 people should be compared and that's a statement we
18 put on our report.
19 Q It's not that they're suspected of doing
20 anything wrong?
21 A No.
22 Q So the "suspect" means simply an idea for

16

1 you to get started in checking what prints you may
2 have on file with respect to those named individuals
3 as against anything you might find on the material
4 which you were about to examine?
5 A That is correct.
6 Q And at the FBI lab, do you give a
7 designation to a questioned document?
8 A Yes.
9 Q And in this case, was the questioned
10 document as assembled given one identifying number?
11 A Yes, it was.
12 Q And what was that?
13 A Q1.
14 Q As in questioned document number 1?
15 A Questioned document number 1, that's
16 correct.
17 Q With respect to the material that was
18 forwarded to you, was there some paperwork involved?
19 A Yes, there was.
20 Q And at the top of what has been designated
21 FBI 80, is this the document that would be prepared
22 normally for you to start your work to invoice in the

1 material that you would be examining?
2 A Yes.
3 Q It says at the top recorded 8/2/93,
4 received 7/30/93. What do those two dates mean?
5 A The fact that I received it on the evening
6 of the 30th after normal business had ceased. At
7 that time I was working the late shift, as we call
8 it, until about 10:30. I received it late.
9 Therefore, there was nobody there to record it. So I
10 went ahead and made my notes -- or went ahead and did
11 my examination and had it reported on Monday.
12 Q Who was responsible for preparing Exhibit
13 FBI 80?
14 A The initial typing is done by -- we have
15 people assigned that we give them the paperwork, and
16 they generate what we call note sheets or work
17 sheets. It could be any one of a number of people.
18 Q So you don't know exactly who it is. But
19 who provides the information to the people who type
20 it up?
21 A This is the information that's provided by
22 the investigator.

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1 Q And who would that be?
2 A At this time, I don't know who the
3 investigator was. In regards to the note, I see a
4 Scott Salter, so I assume he was the one who provided
5 the initial paperwork.
6 Q But it is not a report, referring to FBI
7 80, that is signed by anyone?
8 A No.
9 Q And there's a handwritten notation on the
10 bottom left-hand corner that has the date 7/30/93?
11 A That is correct.
12 Q "Laser exam, no lats" or lats?
13 A Lats.
14 Q What does that mean?
15 A Those were notes that were placed by me,
16 explaining the actions that I took on that given day.
17 Q Does that mean that you wrote this on July
18 30?
19 A No. There were no notes placed until
20 actually August 2nd when I received the note sheet.
21 Q So you recorded as the date that you
22 performed your initial work on the questioned

1 document, reflected as 7/30/93 on a document which
2 was prepared on August 2, 1993?
3 A That is correct.
4 Q What is a laser exam?
5 A That is an examination through an argon ion
6 laser. We actually put the item under a diffused
7 beam and in some instances, certain properties as
8 perspiration will fluoresce on their own under the
9 laser. That's the purpose of this examination. In
10 this instance, nothing transpired.
11 Q Nothing fluoresced?
12 A Nothing fluoresced.
13 Q Under that process, it says "processed
14 DFO"?
15 A It means it was processed with a chemical
16 called -- and I'll -- so we get it right, I did copy
17 it down 1,8-diazofluorene-9-one.
18 Q I have the expectation that you may be
19 asked to spell that, so if you would do so.
20 A Actually to write it out it is 1,8 -- the
21 spelling is d-i-a-z-o-f-l-u-o-r-e-n-e-numerical 9-one
22 spelled out.

1 Q That's a chemical identification of the
2 material that is applied to the paper?
3 A That is correct.
4 Q Then it says "Q1 to photo"?
5 A It was at this point after processing with
6 it and reviewing it, I determined it was a
7 fingerprint that needed to be photographed, and I
8 did, in fact, have that fingerprint photographed
9 before I proceeded to the next step of the
10 processing.
11 Q So the argon ion laser test, if I
12 understand your testimony, did not produce any
13 results, but the chemical testing did, in fact,
14 produce a latent fingerprint or a latent print?
15 A That is correct.
16 Q As it turned out, it was not a fingerprint;
17 is that correct?
18 A That is correct.
19 Q What was it?
20 A It was a partial palm print.
21 Q Let me go back for a moment and explore
22 with you something that you raised when I asked you

1 to describe what fingerprints are. You indicated
2 that fingerprints are made by ridges which are
3 usually moist?
4 A That is correct.
5 Q Does that mean that every time an
6 individual touches an object, he or she will leave a
7 fingerprint?
8 A Not necessarily.
9 Q What are the circumstances under which an
10 individual might not leave a fingerprint?
11 A First off, many people have very dry sk'n.
12 I personally have that, and I don't leave very good
13 latent prints.
14 Q So you're hard to work on, your own stuff.
15 Is that what you're saying?
16 A That's true.
17 Q So if we came into this room later after
18 you had left it and with the exception possibly of
19 this glass top table, other things that you touched
20 might very well not reveal any identifiable print of
21 yours?
22 A That is correct.

1 Q So dry skin is one?
2 A Dry skin is one. Somebody who has recently
3 washed their hands and dried their hands. Anyway you
4 can remove the perspiration or the substance on the
5 fingers, then that would be a chance you probably
6 wouldn't leave very good prints.
7 Q And how long would it take, if you can
8 answer that question, for the body processes to
9 establish themselves to the point after washing one's
10 hands, where fingerprints would be left again?
11 A I don't think I could really establish a
12 time frame there. It would vary from person to
13 person.
14 Q And that would again, vary on the basis of
15 dry skin, moisture in the skin?
16 A That's right.
17 Q Would the conditions of the location in
18 which the object was handled play any role in whether
19 fingerprints are more likely or less likely to be
20 latent fingerprints or more or less likely to be
21 revealed?
22 A Well, I think basing the fact that the

1 latent prints are generally left in perspiration,
2 what we're dealing with, or sebaceous glands,
3 sebaceous material, temperature could have an effect
4 on it, but then you're getting into a degree that
5 nobody can say what degree somebody was sweating and
6 what degree would somebody else not sweat.
7 Q So the room temperature would be another
8 variable?
9 A It could be a variable, yes.
10 Q And what about the level of humidity?
11 A There again, it's based on perspiration, so
12 the higher humidity, it's possible it would have an
13 effect.
14 Q These would all be variables but probably
15 the most important one being the personal
16 characteristics of the individual himself or
17 herself. Is that fair?
18 A That's right.
19 Q Now, what about the material which an
20 individual touches. Is that a variable as well in
21 terms of whether a latent print can be discovered? I
22 used the example of this glass top table. Would that

1 be a relatively good surface for the purpose of
2 developing a latent fingerprint?
3 A Well, it would be a good surface to develop
4 a print in that you can see it right away. It's
5 also, by the same fact that it's a good surface, by
6 going like that, you can also remove them. It's what
7 we call a fragile surface.
8 Q When you say "by going like that" --
9 A Moving or brushing it. Whereas, if you
10 understand the types of evidence, you either have
11 evidence that's nonporous such as this glass top and
12 the latent print lays on it or you have porous where
13 the -- paper falls in the porous category -- where
14 it's absorbed into it. They're a little easier to
15 maintain. They're harder to destroy because you
16 cannot wipe them away. They're actually in the paper
17 fibers themselves.
18 Q When you say you cannot wipe them away, and
19 you demonstrated that by brushing the back of your
20 hand across the document in front of you, what about
21 if you rubbed really hard?
22 A It wouldn't make any difference. The only

1 problem that you might have is you might leave
2 another print on top of it with the back of your
3 hand.
4 Q Suppose you used some other object, like a
5 scouring pad?
6 A No, would have no effect whatsoever. It's
7 actually absorbed into the paper and it's embedded in
8 the paper.
9 Q So there's no way you could get it out.
10 What if you used an eraser or something?
11 A No. It's absorbed into the fibers
12 themselves, short of removing those fibers.
13 Q What you're saying is the extent of your
14 technology and capability is such that no one could
15 remove -- successfully remove fingerprints from a
16 piece of paper once it was put on that paper, absent
17 actually destroying the paper itself?
18 A That would be correct.
19 Q And if you were to destroy the paper, I
20 take it in this case, you would be obliged to destroy
21 the writing on it as well?
22 A Yes.

1 Q Now, you mentioned that you photographed
2 the document that you were working on or the material
3 that you were working on. Have you brought those
4 photographs with you?
5 A Yes, I have.
6 MR. SGRO: Could I state for the record,
7 before we turn it over, the photograph of this print
8 is part of the records of the Independent Counsel.
9 We checked with them before turning it over, and they
10 gave the go ahead.
11 BY MR. BEN-VENISTE:
12 Q Are these identical copies?
13 A They are identical copies, except one of
14 them has a red line with PP under it, denoting palm
15 print, and the other one doesn't.
16 Q Let me ask you what for you is a very basic
17 question. What makes this a palm print?
18 A It's just the large area, the expand -- the
19 straight ridges.
20 Q No one has fingers that large, I take it?
21 A No.
22 Q Is this a true to scale photograph?

1 A Yes, it is.
2 Q Now, I have here marked as 68 a photocopy,
3 which I believe is the material that you worked
4 with. I'd like you to look at it and see whether you
5 can confirm that assertion.
6 A That appears to be the same -- what I
7 examined.
8 Q On Exhibit 68, could you identify the
9 portion of that exhibit which corresponds to -- let
10 me mark this, if I may.
11 MS. SIMONTON: Excuse me, counsel. We'll
12 provide it formally in accordance with the procedures
13 that have been worked out, but for now, you can refer
14 to it anyway you want.
15 MR. BEN-VENISTE: Let's mark it as Hupp
16 Exhibit 1.
17 (Hupp Exhibit 1 identified.)
18 BY MR. BEN-VENISTE:
19 Q I show you Hupp Exhibit 1 and ask again
20 whether you would be kind enough to identify in
21 Exhibit 68 which piece of paper corresponds to the
22 palm print in Exhibit Hupp 1?

1 A Without sitting down -- and since the
2 portion of the print that this is on, where this
3 print is at, it does not show up in the Xerox copy.
4 I'm not sure that I could, by looking at this, tell
5 exactly where it did come from.
6 Q It's correct, is it not, that the palm
7 print was on a portion of the paper that contains no
8 writing?
9 A That is correct, yes. The extreme edge of
10 the paper.
11 Q And from your recollection, given the fact
12 that writing seems to cover most of the top of that
13 document, do you recall whether it was from the
14 bottom segment?
15 A I think what we're going to find is that
16 this was out on the left edge of the paper, to the
17 left of the writing. As we see, in the picture,
18 there's a hole punched in the paper and also there is
19 a line running down. If memory serves me correct,
20 this was a sheet of paper that could be put into a
21 notebook and flipped, and it has a line running down
22 the left edge of the paper.

1 Q So it is yellow three-hole punched paper?
2 A To the best of my recollection, yes, it
3 was.
4 Q And it had a vertical line running down the
5 left side?
6 A That is correct.
7 Q And was it lined or unlined, other than the
8 vertical line?
9 A It was lined. You can see the lines
10 appearing in the photograph. They appear white as
11 opposed to dark.
12 Q Did you make any effort to determine, or
13 could you determine whether that palm print extended
14 to any other portion of the writing?
15 A To the best of my recollection, it was
16 merely on that piece of paper. There was no other
17 ridge detail developed on any other portion of the
18 paper.
19 Q Normally, if you were dealing with one
20 integrated piece of paper rather than a number of
21 scraps of paper, would you expect, given the size of
22 Hupp Exhibit 1, that a palm print would extend beyond

1 the borders of the fragment that you photographed?
2 A That would be mere speculation, because
3 bearing in mind, the palm print merely touches. You
4 don't have to have a great deal of area touched.
5 Just by touching, as I'm touching the table here,
6 there's a very small portion of my palm touching that
7 piece of paper.
8 Q Couldn't you tell from the nature of the
9 print that was left whether this indicated a flat
10 palm or the side of a palm as one would use in making
11 a chopping motion?
12 A This is actually the base of a left palm in
13 this area in here.
14 Q So this is the meaty area of the left palm,
15 you're indicating, closest to the thumb?
16 A No, the area under the little finger down
17 at the base of the palm. Generally in this area
18 right here is where it's going to be found.
19 Q Is that given a technical name?
20 A Well, we call it the edge of the palm.
21 There's several terminologies out there, but I just
22 call it the heel of the palm, the base of the heel of

1 the palm.
2 Q I didn't learn a lot of anatomy. I mostly
3 heard about the back of a hand when I was growing
4 up.
5 MR. SGRO: You experienced the anatomy.
6 MR. COMEY: Prints all over your head.
7 MR. BEN-VENISTE: Some may still be there.
8 BY MR. BEN-VENISTE:
9 Q In answer to my initial question, this
10 would have been made consistent with a hand being
11 placed in a palm down position on the paper?
12 A It would be more of an area something like
13 this, not a flat palm down, but -- I don't know what
14 you want to call it, 45 degree angle or something
15 like that.
16 Q In talking with anyone about the assignment
17 that you received, did you learn the circumstances of
18 how the material was provided to the FBI?
19 A No.
20 Q Had you been told that, in the presence of
21 an official of the Department of Justice, an
22 individual had assembled the various pieces of paper

1 that you were called upon to analyze without using
2 any gloves, would that have given you some possible
3 indication of at least a possible source of
4 comparison?
5 A Yes, it would.
6 Q And I take it from what you have told us,
7 that nobody advised you that Bernard Nussbaum, had in
8 the presence of Department of Justice officials,
9 assembled the pieces of paper into a unified document
10 similar to what we see now in 68?
11 A To the best of my recollection, no, I was
12 not informed of that.
13 Q What did you do next in your analysis?
14 A After I processed it and had it
15 photographed, of course, I went back and examined the
16 photograph with the actual latent print of the item
17 itself to make sure what was attached accurately
18 depicted what was there.
19 Then I moved on to the next process, which
20 was an inhydrin process. There again, I didn't
21 develop any latent prints.
22 Q What does inhydrin means?

1 A An inhydrin is a chemical like DFO,
2 1,diazofluorene 9 which we used to process for
3 fingerprints. It actually reacts with the amino
4 acids present in sweat.
5 Q And that proved negative?
6 A That proved negative.
7 Q Once you raised the print with the first
8 chemical testing, does that mean that other chemical
9 testings of the same area of the questioned document
10 would not be undertaken?
11 A No. We process -- we have sort of a set
12 procedure that we go through to develop latent
13 prints, which enables us to develop all of the latent
14 prints we possibly can.
15 Q So in other words, you're using -- you're
16 starting with the least potentially disruptive method
17 of analysis?
18 A That is correct.
19 Q And going to other methods that might
20 conceivably interact with the questioned material and
21 change it in some way?
22 A Yes, that's correct.

---

1 Q And what did you do next?
2 A At that point, I ceased my examination. I
3 attempted to locate palm prints, which were on file
4 for the individuals who had been named and found that
5 there were none in our files at that time, and I
6 informed our Washington field office of the results
7 by telephone and sent a typewritten report out to
8 them.
9 Q I call your attention again to FBI 80 where
10 it says "specimen received hand-delivered by Special
11 Agent Scott Salter"?
12 A That's correct.
13 Q July 30, 1993?
14 A That's correct.
15 Q It says specimens and then Q1, which you've
16 identified as the material you were provided. It
17 says "28 pieces of torn paper bearing original
18 handwriting"?
19 A That's correct.
20 Q Well, actually, it is incorrect, isn't it?
21 A It may very well -- that's what I took --
22 this was what was provided to me by the laboratory

1 division and I think we did come up with a
2 discrepancy in the count, if memory serves me, and I
3 don't recollect now what it was.
4 Q Who advised you that there was a
5 discrepancy?
6 A Well, I had talked to the examiner in the
7 laboratory who examined it and said that I had a
8 different count. And for the life of me, I don't
9 remember exactly what the count was.
10 Q I'm not sure I understand the process now.
11 I didn't think, when you first described this, that
12 someone else performed any analysis or test on the
13 material. Who in the laboratory are you referring
14 to?
15 A That was a document examiner. We have a
16 set procedure. When anything comes into the
17 laboratory that requests another examination in
18 addition to fingerprints, it always goes to that
19 examination first because we have a potential to
20 destroy it.
21 Q I'm sorry, what was that test?
22 A That was just a -- all he did was

1 photograph it and examine it to make sure it was
2 actually original pen strokes, or whatever a document
3 examiner -- whatever he does.
4 Q When you say the "original pen strokes,"
5 you mean really a handwriting analyst --
6 A That's correct.
7 Q -- to determine whether this was a studied
8 copy of someone else's handwriting?
9 A Or whatever their examinations are. He
10 would photograph it and make his initial examinations
11 before I process it because mine is destructive to
12 his examination.
13 Q And who was that?
14 A Let me think. Henry -- it's right on the
15 tip of my tongue -- I don't know right offhand. I
16 can't think of his last name.
17 Q But he is in the questioned document
18 division?
19 A That's correct.
20 Q And he's a handwriting analyst?
21 A He's a handwriting analyst, yes.
22 Q How long did he have the material, as far

1 as you know, before you got it?
2 A It couldn't have been very long because it
3 was brought in the same day, and I got it that
4 afternoon, so I don't know exactly what time his
5 initial receipt was.
6 Q So his transmission to you was that there
7 were 28 pieces of torn paper?
8 A That's correct.
9 Q And when you made your report, you counted
10 how many pieces?
11 A That escapes me, and I think we went back
12 and agreed 28 was the number and left it at that. I
13 really -- I remember that the discussion --
14 Q Let me call your attention to the third
15 page.
16 A My copy I can't read. You've got my good
17 copy.
18 Q Let me read it over your shoulder.
19 Actually, it's the fourth page of what you've got.
20 Yours is somewhat easier to read than mine. This is
21 designated FBI 82 what does it say? Would you read
22 that into the record?

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1 A The whole thing?
2 Q Yes.
3 A "One latent palm print of value. Developed
4 on one piece of yellow paper, part of Q1. No palm
5 prints here for Neuwirth, Nussbaum, Burton, Foster or
6 Sloan. WMFO advised of results by telephone. Specs
7 enclosed. Enclosure 28."
8 Q What does enclosure 28 mean?
9 A That means that we returned 28 pieces of
10 paper.
11 Q Is that your handwriting, sir?
12 A That is my handwriting.
13 Q When you say "no palm prints here for
14 Neuwirth, Nussbaum, Burton, Foster or Sloan," by
15 that, you meant on file --
16 A Yes.
17 Q -- at the FBI?
18 A That is correct.
19 Q And then what happened next in your
20 analysis?
21 A That was the conclusion of my analysis. I
22 dictated a written report and returned it to the

1 investigating agent.
2 Q And what written report is that?
3 A That is FBI 67, the very first page.
4 Q May I see what it is you're referring to?
5 A It's this right here, that right there.
6 Q And this is the report that you made on --
7 is this your report?
8 A That is correct.
9 Q And that is dated 8/2/93?
10 A That is correct.
11 Q And you indicate that the specimens were
12 received on July the 30th, 1993?
13 A Yes.
14 Q And that the specimens are identified as
15 "Q1, 28 pieces of torn paper bearing original
16 handwriting"?
17 A That is correct.
18 Q The conclusion is that the specimens were
19 examined and one latent palm print of value was
20 developed on one piece of paper, part of Q1?
21 A That's correct.
22 Q What does "of value" mean?

1 A It means that upon examining it, I found
2 enough of the identifying characteristics that I felt
3 I could identify it, given I had the proper known
4 exemplars to work with.
5 Q And you indicate that you are transmitting
6 the specimens. The specimens are enclosed. How were
7 they being enclosed?
8 A They would be put into a plastic envelope,
9 placed into an envelope very much like this and the
10 report would be attached to it and it would be
11 transmitted by mail.
12 Q The "this," you're showing a letter size --
13 A Class envelope, yes.
14 Q And it says underneath "the specimens are
15 enclosed. Enclosed (28)."
16 A Yes.
17 Q And then what happened to the envelope that
18 you had developed -- to whom did you transmit?
19 A I transmitted it back to the special agent
20 in charge of the Washington metropolitan field
21 office.
22 Q And who is that?

1 A At that time I don't really -- I don't know
2 who it was.
3 MR. BEN-VENISTE: Counsel, can you provide
4 that information simply from your knowledge?
5 MS. SIMONTON: I believe at that time that
6 was Bob Bryant, but just for clarification, the fact
7 that something is transmitted to SAC doesn't mean it
8 was him.
9 MR. BEN-VENISTE: Thank you for that
10 clarification.
11 MS. SIMONTON: I think Louis Hupp would be
12 a better person to explain.
13 MR. BEN-VENISTE: I direct the question to
14 him. You're off the hook. Step down, no further
15 questions at this time.
16 THE WITNESS: Under normal procedures, when
17 we receive evidence from a field office or for that
18 matter, from a chief of police, we send it back to
19 particularly the field office. We send it back to
20 the SAC, and it's taken back and their file numbers
21 and various things determines who gives it back. But
22 in any instance, it would go to file. It's not to

1 him personally. It's just merely an address that we
2 would use. Many times, we don't know who the
3 investigating agent is in the case, unless we have
4 telephone conversations with him.
5 BY MR. BEN-VENISTE:
6 Q Did there come a time when you heard
7 something further about the material that you had
8 examined in early August, on July 30th, and then
9 through early August?
10 A Nothing other than -- of course, I received
11 the communication itself with the letter and then a
12 telephone call stating what people were to be
13 compared. After I sent my report back, it was
14 literally out of my hands. I didn't have any further
15 thing to do with it at that point in time.
16 MS. SIMONTON: Just a point of
17 clarification. This deposition is all limited to the
18 period of time July and August of 1993 and does not
19 reflect anything beyond that period of time.
20 BY MR. BEN-VENISTE:
21 Q Did there come a time that you learned that
22 the count which Henry of the questioned documents

1 division did and your count of 28 pieces did not
2 reflect the number of pieces that the FBI had in its
3 possession at some later time?
4 A No, I don't remember hearing any more about
5 it. And I vaguely remember the fact that we had a
6 discrepancy, and I thought at the time -- or now,
7 that it could have been higher, in that one piece
8 came apart while I was processing. I really don't
9 recollect, but there was no further conversation with
10 me about the count, no.
11 Q Well, when you heard that there was a
12 discrepancy, from whom did you hear?
13 A I think what it was was when the
14 examination was concluded on the evening of the 30th,
15 I think it was at that time, when I was reassembling
16 or putting the pieces back initially that something
17 came up -- like I say, I don't recollect what the
18 count was -- and at that time I contacted the
19 document examiner on a Monday morning and that was --
20 I just contacted him, if that's what was there.
21 Q I'm sorry, you contacted Henry?
22 A Yes.

1 Q And you said to him what?
2 A Like I say, that's something that would go
3 back two years. I really can't recollect exactly
4 what I said. I'm sure we discussed, like I said, the
5 totals and whatever was resolved, was determined that
6 28 would be proper and correct at that time, and
7 that's what I returned.
8 Q That 28 was proper and correct?
9 A That is correct. Mathis is his last name,
10 M-a-t-h-i-s.
11 Q Henry Mathis?
12 A Mathis, yes.
13 Q Thank you. Do you have with you a
14 photograph of the entire document?
15 A No, sir.
16 Q Can you tell from Exhibit 68, which I have
17 shown you previously and which you have identified as
18 being a photocopy of the questioned writing, how many
19 pieces there are?
20 A It appears to be about 24 but then again, I
21 have a photograph of one piece that doesn't show up
22 so I'm not sure, to the left, what's out there. And

1 that's a very rough guess because I'm counting and
2 trying to count where the words separate and see
3 where the lines are.
4 Q Now, when you assembled the pieces, were
5 there any pieces that appeared to be missing?
6 A Actually, when I received it, it was
7 assembled very much like that document appears there.
8 Q Referring to 68?
9 A Yes. All I did was remove it from the
10 protective cover and process it and there was a
11 spot -- open spot in it as it shows there.
12 Q Did you make any note of that in your
13 report?
14 A No, because that was for the document
15 examiner to do that.
16 Q Let me ask you to look at what has been
17 marked as FBI 85. Do you see under description of
18 evidence -- is this your handwriting, sir?
19 A No, sir.
20 Q Do you know whose handwriting it is?
21 A No, sir. I can only assume that it was
22 Scott Salter.

1 Q Then it says delivered by Scott Salter?
2 A Right.
3 Q Here it says "description of evidence: 27
4 pieces of paper which comprise one sheet of yellow
5 paper upon which is handwriting in ink."
6 A That is correct.
7 Q This is dated 7/30/93?
8 A That is correct.
9 Q Is this something which would have been
10 attached to the paperwork that you would have been
11 provided?
12 A Yes, and this may very well have been the
13 discrepancy that we discussed, the 27 versus 28.
14 Q So Mr. Salter counted 27 and you counted
15 28?
16 A That's very possible, yes. We did come up
17 with 28 in any event.
18 Q I take it at the time you started counting
19 these, you were either using latex gloves or some
20 other protective --
21 A Actually, it was in a protective cover when
22 it was done so I was looking -- using tips would

1 drive me crazy.
2 Q At the point you have left us here in this
3 narrative, you have identified a usable palm print,
4 that is one which you could match if you had a
5 comparable known palm print of an individual?
6 A That is correct. That is correct.
7 Q You looked for palm prints of the five
8 individuals whose names were provided to you,
9 Mr. Neuwirth, Mr. Nussbaum, Mr. Burton, Mr. Foster
10 and Mr. Sloan, and you learned that the FBI did not
11 have palm prints for any of those individuals?
12 A That is correct.
13 Q So you could rule out at that point none of
14 them?
15 A That's correct.
16 Q We have had testimony before this hearing
17 that Bernard William Nussbaum, one of the individuals
18 listed, was advised that, after providing palm prints
19 to the FBI, that indeed his palm print matched the
20 latent palm print that you had been able to discover
21 in your analysis. Can you confirm that?
22 MS. SIMONTON: At this point, I think that

1 goes -- he can answer the question as long as it's
2 limited to July and August of 1993. Could you
3 confirm that, as of your knowledge on July and August
4 of 1993? I think those are the ground rules we've
5 been operating under at this point.
6 MR. BEN-VENISTE: I'm not asking for
7 anything other than this witness's analytical work.
8 I'm not asking for any testimony that he gave to the
9 grand jury. We have had testimony and it's important
10 for us to confirm it. Are you directing him not to
11 answer?
12 MS. SIMONTON: That's our agreement with
13 the Independent Counsel. I'll defer to him since
14 this witness does work for the Independent Counsel in
15 part and since he performs the examinations for the
16 Independent Counsel, Mr. Starr as well as Mr. Fiske,
17 his predecessor, our understanding of the ground
18 rules that have been established is that he is only
19 allowed to answer questions relating to the work he
20 performed for the FBI prior to the appointment of
21 Mr. Fiske.
22 BY MR. BEN-VENISTE:

1 Q Were you employed by the FBI in 1994?
2 A Yes.
3 Q And you continue to be employed by the FBI;
4 is that correct?
5 A That is correct.
6 Q Are you employed by the Independent
7 Counsel?
8 A No, sir.
9 Q When you received later assignments in this
10 case, were the assignments given to you by the
11 Independent Counsel, or were they given to you by
12 your supervisors at the FBI?
13 MR. KAVANAUGH: That question goes beyond
14 the scope of what we had agreed upon would be the
15 questions.
16 MR. BEN-VENISTE: Are you directing him not
17 to answer that question?
18 MR. KAVANAUGH: I'm not directing him.
19 MR. SGRO: I think part of the ground rules
20 that we established for the deposition, pursuant to
21 the request of the Independent Counsel, questioning
22 would be limited to Mr. Hupp's work in July and

1 August of 1993. Because of our --
2 MR. BEN-VENISTE: Who did you make those --
3 MR. SGRO: In a letter dated --
4 MS. SIMONTON: Would you like us to fax you
5 a copy of the letter?
6 MR. SGRO: The letter is dated July 12 to
7 Messrs. Giuffra and Cole, the last paragraph.
8 MR. BEN-VENISTE: I would ask at this time
9 that Mr. Kavanaugh, who is present here, consult with
10 a senior official or with Judge Starr to determine
11 whether, under the circumstances that I have
12 outlined, he will not allow Mr. Hupp to answer that
13 one question so that we may have closure on this
14 issue.
15 MR. KAVANAUGH: The one question, can you
16 state it again?
17 MR. BEN-VENISTE: Can you confirm that
18 following the receipt of palm prints known to be
19 those of Mr. Nussbaum and others, that you concluded
20 that the questioned palm print on the Foster writing
21 matched the known palm print of Bernard Nussbaum.
22 MS. SIMONTON: Just for the record, the FBI

1 has no objection to answering questions, other than
2 we don't want to violate an agreement between the
3 Office of the Independent Counsel and the Senate.
4 MR. BEN-VENISTE: If I understand that
5 completely -- and perhaps we can have some closure
6 without any waiver on the part of Independent Counsel
7 of other rights that they may wish to protect. But
8 under the specific circumstances here presented, I
9 would request, and I believe Mr. Comey joins me in
10 that request, that this information be provided.
11 MR. KAVANAUGH: That's the exact question
12 that we are not going to answer and that's already
13 been confirmed by Judge Starr. I'll call him again
14 and get the same answer, but if you want to take a
15 break --
16 MR. BEN-VENISTE: You can tell him that
17 counsel join in making this request. You can explain
18 to him the circumstances. Perhaps Independent
19 Counsel Starr was unaware of the fact that we had
20 developed testimony in this hearing that Mr. Nussbaum
21 was advised that the print was his.
22 MR. KAVANAUGH: He's aware of that?

1 MR. BEN-VENISTE: I request that we have
2 the courtesy of closure so we can present the
3 Independent Counsel's position to our client.
4 MR. KAVANAUGH: Take a break.
5 (Recess.)
6 MR. BEN-VENISTE: Mr. Kavanaugh, you have
7 had an opportunity to consult with your colleagues at
8 the Independent Counsel's office. Could you provide,
9 for the record, the decision by Independent Counsel
10 and such rationale as you feel you could provide for
11 that decision.
12 MR. KAVANAUGH: I consulted with Deputy
13 Independent Counsel Mark Touhey, T-o-u-h-e-y, and he
14 said we're not prepared to change the ground rules
15 that have been set prior to this deposition. And
16 that members of the Independent Counsel team and
17 people who have done work for the Independent Counsel
18 are instructed not to divulge information to the
19 Senate and work they have done for the Independent
20 Counsel.
21 MR. BEN-VENISTE: And you made it known in
22 the intervening time between when the ground rules

1 for this deposition were set that testimony before
2 this committee had revealed the information that I
3 have provided you concerning what Mr. Nussbaum had
4 been advised; is that correct?
5 MR. KAVANAUGH: We have been informed, not
6 by members of this staff or any members from this
7 committee, but by counsel of a witness of what that
8 attorney had informed the committee with respect to
9 the palm print.
10 MR. BEN-VENISTE: In taking into
11 consideration the intervening circumstance of further
12 information developed in the course of the Senate
13 inquiry, Independent Counsel adheres to the position
14 that they will direct the Department of Justice to
15 direct the witness not to answer the question which
16 Mr. Comey and I have joined in putting to this
17 witness.
18 MR. KAVANAUGH: That's correct.
19 BY MR. BEN-VENISTE:
20 Q And just to complete the record, Mr. Hupp,
21 will you answer the question?
22 A No.

1 Q And that is on the direction of counsel?
2 A That is on the direction of counsel.
3 MR. BEN-VENISTE: Thank you very much,
4 sir. We may wish to get back in touch with you. Or
5 the record.
6 (Discussion off the record.)
7 EXAMINATION
8 BY MR. COMEY:
9 Q I just wanted to ask you really two
10 questions in two small areas. Mr. Ben-Veniste had
11 asked you about circumstances and the factors that
12 might influence whether or not someone left a print
13 and I think the two of you got close to it in another
14 area when you talked about latent prints of value. I
15 take it that a person can leave a print on a piece of
16 paper, for example, that is not of value. Is that
17 fair?
18 A That is correct, yes.
19 Q So you, as an examiner, can actually see
20 that someone -- or some portion of a person's hand
21 has touched a piece of paper but yet you're not able
22 to develop a print that is useful in making

1 identification?
2 A That is correct.
3 Q How many identifying characteristics do
4 you, in your work, like to have before you consider a
5 palm print like the one in this case to be of value?
6 A I have no set number of points that I feel
7 I need to make an identification. Each latent is
8 based on its own merit. Rather than get into
9 numbers, I can tell you that the least number of
10 points I have identified a fingerprint or a print on
11 is seven. The least number of points that I have
12 testified to has been eight. But the only reason I
13 didn't testify to seven is because I wasn't requested
14 to. Whatever I feel comfortable with is just that
15 number of points.
16 Q On Q1, the lab exhibit made up of the
17 individual pieces of lined paper, were there prints
18 not of value that you were able to see?
19 A Not that I recollect. There again, we only
20 photograph latent prints of value, and the ones that
21 are mere -- a few tracings or a few outlines we don't
22 pay any attention to. We don't photograph, so I

1 would really have no recollection conclusively on
2 that.
3 Q And you wouldn't have made notes of such a
4 thing?
5 A No.
6 Q So the fact that you identified and
7 photographed this addition -- whatever we called it,
8 the little heel of the left hand -- doesn't mean that
9 there were no other marks on the paper indicating
10 human contact?
11 A That is correct.
12 Q It simply means that this was the one piece
13 of human contact that you were confident you could
14 make an identification from?
15 A That is correct, yes, sir.
16 Q And just to clarify, you and
17 Mr. Ben-Veniste in your questions and answers were
18 talking about the 28 pieces of paper with handwriting
19 on them, the way the report reads?
20 A That's correct.
21 Q I take it, just to make the record
22 accurate, not all 28 pieces have handwriting on them?

1 A That's correct.
2 Q For example, the one you found the latent
3 print on has no writing at all?
4 A That is correct.
5 MR. COMEY: I think that's it. Thanks.
6 THE WITNESS: If I might add one thing, in
7 looking at the notes now, the discrepancy in the
8 count, the reason it was not resolved outside of
9 internally in the lab, was if we have more than what
10 they say, we don't have a problem. If we have less,
11 then we might clarify that issue, so that is one
12 explanation. As I said, I thought that there turned
13 out to be more than we anticipated and we did clarify
14 there was 28, not 27, and merely sent the report back
15 with that.
16 MR. BEN-VENISTE: Thank you very much, sir.
17 THE WITNESS: Thank you.
18 (Whereupon, at 11:13 a.m., the deposition
19 was concluded.)
20
21 ------------------------------------
22 LOUIS GALE HUPP

CERTIFICATE OF NOTARY PUBLIC & REPORTER

I, JULIE BAKER, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the testimony of said witness was taken in shorthand and thereafter reduced to typewriting by me or under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Julie Baker

Notary Public in and for the
District of Columbia

My Commission Expires SEPTEMBER 30, 1997

DEPONENT Louis Gale Hupp

ERRATA

PAGE	LINE	CHANGE FROM	CHANGE TO	REASON
7	7	laboratory	Laboratory	
7	8	division	Division	
7	12	sections	section	spelling
10	1	mulhallan	mulholland	spelling
17	11	reported	recorded	spelling
32	20	inhydrin	ninhydrin	spelling