Appendix D

The White House's Non-Compliance With Subpoena Requests for Electronically Maintained Documents

As of the date of the filing of the Final Report of the Independent Counsel *In re: Madison Guaranty Savings & Loan* regarding matters commonly referred to as Madison Guaranty/Whitewater,[1] the White House had failed to produce all documents called for by the Office of the Independent Counsel ("OIC") pursuant to grand jury subpoenas. Since then, additional documents have been produced. Following the decision not to prosecute President Clinton described in the body of this Final Report, this Office informed the White House and others that document production could cease and that the OIC's e-mail investigation was concluded. This Appendix describes the final status of the White House's production of electronically maintained documents. [i]

A. The Office of the Independent Counsel Concluded Its Investigation Regarding the White House's Failure to Properly Search Electronic Records in Compliance with Lawfully Issued Subpoenas.

As noted in the Madison Guaranty/Whitewater Final Report, this Office initiated an investigation as a result of the White House's failure to notify this Office of the problems experienced with its computer system and its inability to certify that all responsive documents to lawfully issued subpoenas had been produced.[2] This Office concluded that the White House's failure to search all records within its care, custody, and control, in response to lawfully issued subpoenas, could be divided into seven categories:

1. Failure to search reconstructed e-mail for the time period of January 1993 through June 1994;
2. Failure to search incoming e-mails to 526 users for the time period of August 1996 through November 1998; [ii]
3. Failure to search incoming e-mails of approximately 200 users for the time period of November 1998 through May 1999;
4. Failure to search over 600 backup tapes of former employees' hard drives;
5. Failure to search incoming e-mail from the Office of the U.S. Trade Representative, White House Military Office, White House Access and Visitor Entry System ("WAVES"), and any user of the All-in-One system;
6. Failure to search a correspondence database system known as Quorum; and

[1] Final Report of the Independent Counsel *In re: Madison Guaranty Sav. & Loan Ass'n* (filed Mar. 2, 2001) (reporting on James B. McDougal's, President William J. Clinton's, and Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Capital Management Services, Inc., and Whitewater Development Corporation) [hereinafter "Madison Guaranty/Whitewater Final Report"].

[2] Madison Guaranty/Whitewater Final Report, *supra* note 1, Vol. III, app. 3 at iii.

7. Failure to search the internal e-mail system in the Executive residence.

As of the time of the filing of the Madison Guaranty/Whitewater Final Report, all responsive documents had not been received from the White House. By agreement with the President, this Office, on January 19, 2001, declined prosecution, with prejudice, "of all matters within the January 16, 1998 jurisdictional mandate," which remained open at that time.[3]

1. Reconstructed E-mails for January 1993 through July 1994.

As noted in the Madison Guaranty/Whitewater Final Report, the White House developed the Automated Records Management System ("ARMS") in July 1994.[4] Upon learning that reconstructed e-mails from the time period January 1993 through July 1994 had not been searched in compliance with its outstanding subpoenas, this Office insisted upon an immediate search of all e-mails prior to July 1994 and the production of records responsive to subpoenas issued in connection with the Travel Office investigation, the investigation into the removal of
[iii] documents from Deputy White House Counsel Vincent W. Foster Jr.'s ("Foster") office following his suicide; and the Madison Guaranty/Whitewater investigation.[5] Since the filing of the Madison Guaranty/Whitewater Final Report, no additional documents have been received in connection with the Travel Office investigation, 29 additional documents have been received in connection with the Foster investigation, and 80 additional documents have been received in connection with the Madison Guaranty/Whitewater investigation.[6] After conducting a review of these responsive documents, the Independent Counsel concluded there was no need to alter any previous findings or conclusions.

2. The Mail2 and User-D Problems that Prevented E-mails from Being Records Managed.

As noted in the Madison Guaranty/Whitewater Final Report, two configuration errors prevented two categories of incoming e-mails from being recorded in ARMS for a period of time.[7] The Office of the Independent Counsel and the Department of Justice Campaign Finance Task Force entered into an agreement with the Executive Office of the President that allowed investigators access to, among other things, a limited number of Executive Office of the President backup tapes containing e-mail.[8] By January 19, 2001, the joint review by the
[iv] Campaign Finance Task Force and this Office had resulted in the production of

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[3] Letter from Robert W. Ray, Independent Counsel, to David E. Kendall, Attorney for William Jefferson Clinton (Jan. 19, 2001). *See* Order, *In re: Madison Guaranty Sav. & Loan Ass'n,* No. 94–1 (D.C. Cir. [Spec. Div.], Jan. 16, 1998).

[4] Madison Guaranty/Whitewater Final Report, *supra* note 1, Vol. III, app. 3 at iii–iv.

[5] *Id.* at iv–vi.

[6] *See id.*

[7] *Id.* at vi.

[8] *Id.* at xiv. Upon application of the Executive Office of the President on January 19, 2001, the Honorable Royce C. Lamberth, United States District Judge for the District of Columbia, authorized the
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956 responsive documents. The White House also began a search of the remaining restored backup tapes using limited search terms provided on December 14, 2000.[9] At the conclusion of the investigation, the Executive Office of the President had provided 6,971 documents responsive to these search terms.

3. The Searches of Hard Drives of Former Employees.

The Madison Guaranty/Whitewater Final Report detailed that hard drives of former employees were not routinely searched in response to subpoenas. The Independent Counsel requested, and ultimately received on November 15, 2000, all databases showing when the hard drives of former employees were backed up and then reallocated to other employees.[10] The Office of the Independent Counsel requested and received reallocation tapes of Monica Lewinsky on December 27, 2000.[11] The Independent Counsel declined prosecution of President Clinton prior to review of the Lewinsky reallocation tapes.

4. E-mail from the Quorum System and the Executive Residence.

The Office of the Independent Counsel provided limited search terms to the Executive Office of the President to be used in searching the restored backup tapes of the Quorum System and the Executive residence.[12] These terms were limited to those relevant to the Lewinsky investigation.[13] A search of these databases revealed 248 responsive documents; none of these documents had significant probative value. [v]

EOP to release custody of certain backup tapes to the National Archives. These tapes included all backup tapes of e-mails, departed employee hard drives, and Quorum tapes of interest to the OIC. Order, *Cara Leslie Alexander v. Federal Bureau of Investigation*, Nos. 96–2123, 97–1288 (D.D.C. Jan. 19, 2001).

[9] Letter from Julie F. Thomas, Chief Associate Independent Counsel, to Gregory S. Smith, Associate Counsel to the President (Dec. 14, 2000).

[10] Letter from Michael K. Bartosz, General Counsel Office of Administration, Executive Office of the President, to Julie F. Thomas, Chief Associate Independent Counsel (Nov. 15, 2000).

[11] Letter from Gregory S. Smith, Associate Counsel to the President, to Julie F. Thomas, Chief Associate Independent Counsel (Dec. 27, 2000).

[12] Letter from Julie F. Thomas, Chief Associate Independent Counsel, to Gregory S. Smith, Associate White House Counsel (Dec. 14, 2000); Letter from Gregory S. Smith, Associate White House Counsel, to Julie F. Thomas, Chief Associate Independent Counsel (Dec. 27, 2000).

[13] Letter from Julie F. Thomas, Chief Associate Independent Counsel, to Gregory S. Smith, Associate White House Counsel (Dec. 14, 2000); Letter from Gregory S. Smith, Associate White House Counsel, to Julie F. Thomas, Chief Associate Independent Counsel (Dec. 27, 2000).

B. The Independent Counsel Declined to Prosecute Allegations of Threats Made to Northrop Grumman Employees to Conceal the E-mail Problem.

This Office considered allegations that threats were made to Northrop Grumman Corporation employees to prevent public disclosure of the failure to search thousands of e-mails. The Independent Counsel found insufficient evidence upon which to support any charge within its jurisdiction.

1. Witnesses Differed on the Nature of the Alleged Threats.

As detailed in the Madison Guaranty/Whitewater Final Report, the witnesses disagreed as to the nature and tone of the conversations they had with Laura L. Crabtree (later married and referred to as Laura Callahan), Branch Chief for Desktop Systems, and Mark Lindsay, General Counsel for the White House Office of Administration, General Counsel.[14] No witness reported that they were told to lie to investigators or felt they were prevented from reporting matters to the appropriate law enforcement officials.[15]

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2. There Was No Substantial Evidence that Senior White House Officials Unlawfully Prevented Northrop Grumman Employees from Providing Information to Investigators.

The Independent Counsel found no substantial evidence that senior White House officials unlawfully prevented Northrop Grumman employees from providing information in any criminal investigation. Stephen O. Hawkins, formerly a supervisor with LOGICON, a division of Northrop Grumman, was supervising the Northrop Grumman contract at the White House in June 1998.[16] He stated he first became aware of the Mail2 problem and the requests for confidentiality being made of his employees when he received a complaint from James Wright, the Contracting Officer's Technical Representative, that Northrop Grumman employees might have been working outside the scope of their contract.[17] Hawkins quickly determined that his employees were indeed working on a project about which he had no knowledge and within a day met with Mark Lindsay.[18] Hawkins described his meeting with Lindsay as intimidating but not threatening.[19] Hawkins explained to Lindsay that Northrop Grumman employees, as subcontractors, could only perform work that had been approved by the Contracting Officer's Technical Representative or the Contracting Officer.[20] While

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[14] Madison Guaranty/Whitewater Final Report, *supra* note 1, Vol. III, app. 3 at xx–xxv.
[15] *Id.*
[16] Hawkins 4/19/00 Int. at 1–2.
[17] *Id.*
[18] *Id.* at 2–3.
[19] *Id.* at 3.
[20] *Id.*

Lindsay was angered by these restrictions, Hawkins said Lindsay never threatened him.[21] Shortly after this confrontation, Hawkins told his employees to stop their efforts on work outside the scope of the contract.[22] There was no substantial evidence that any employee was prevented from speaking with criminal investigators. There also was no substantial evidence that any employee was asked to tamper with or destroy e-mails in the course of the restoration project or otherwise to obstruct justice. [vii]

C. The White House's Failure to Produce All Relevant Documents Concerning Foster.

As noted in the Madison Guaranty/Whitewater Final Report, this Office delivered reallocation tape #554, listed as a backup tape of Foster's hard drive, to the FBI's Computer Analysis Recovery Team ("FBI CART") on November 16, 2000.[23] Forensic analysis of the tape by the FBI CART team revealed no evidence of tampering with the tape and that the tape contained 80 separate backup volumes of computer media.[24] The review of the contents of both this backup tape and the Pinnacle Optical Disk[25] resulted in the production of responsive documents. None of the documents caused the Independent Counsel to alter any previous findings regarding Foster's death or the handling of documents from Foster's office after his death.

The White House explained the reappearance of the tape as follows:

> On the morning of November 15, Sharon Whitt, the Contracting Officer's Technical Representative for the EOP's Tape Restoration Project ("TRP"), notified [Michael Bartosz] that she might have located Tape 554. Ms. Whitt had recently undertaken a search for Tape 554 following a conversation with Greg Smith regarding the EOP's previous unsuccessful efforts to locate the tape. In conducting her search, Ms. Whitt identified an entry in the Tape Restoration project Media Inventory which appeared to describe Tape 554.[26] [viii]

Specifically, Whitt located an entry and ultimately the tape which had been mislabeled as Item 6276 "bearing the front label 'WHO 9/3/97 554.'"[27] The Executive Office of the President was unable to track the chain of custody of the tape between August 7, 1995 and its discovery on July 17, 2000.[28] The Independent Counsel was unable to develop any additional information about the handling of the tape.

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[21] *Id.*

[22] *Id.* at 4.

[23] Madison Guaranty/Whitewater Final Report, *supra* note 1, Vol. III, app. 3 at xxxvii.

[24] Federal Bureau of Investigation Laboratory Report at 1–2, CART attachment at 1 (Jan. 23, 2001).

[25] *See* Madison Guaranty/Whitewater Final Report, *supra* note 1, Vol. III, app. 3 at xvii–xviii, xxxvi–xxxvii.

[26] Letter from Michael K. Bartosz, General Counsel Office of Administration, Executive Office of the President, to Julie F. Thomas, Chief Associate Independent Counsel (Jan. 19, 2001).

[27] *Id.*

[28] *See id.* at 2; *see also* Madison Guaranty/Whitewater Final Report, *supra* note 1, Vol. III, app. 3 at xxxiii.

Conclusion

The Independent Counsel concluded that there was no substantial evidentiary basis to support criminal charges against any persons involved in the White House's failure to produce electronically maintained documents in response to grand jury subpoenas issued during the course of this Office's various investigations. The allegations that witnesses were threatened to prevent disclosure to this or other investigations were unsubstantiated. Furthermore, given that there was no substantial evidence that electronic records had been intentionally withheld and that this Office's review to date of electronic records that had previously not been produced had provided no evidence that would alter any previous conclusion in any other matters, the Independent Counsel concluded that the discovery of further probative evidence was unlikely and that further investigation was, therefore, unwarranted. The matter is now closed. [ix]