

PART F

**THE DEPARTMENT OF JUSTICE'S HANDLING OF THE RTC CRIMINAL
REFERRALS AND THE CONTACTS BETWEEN THE WHITE HOUSE AND
THE DEPARTMENT OF THE TREASURY**

Chapter 1:

DOJ Handling of the RTC Referrals

I. INTRODUCTION

The potential involvement of President Clinton with matters in criminal referral C-0004 raised questions about the proper handling of the referral by the Department of Justice. The referral identified him and Mrs. Clinton as potential witnesses to the alleged criminal conduct relating to Madison Guaranty by Jim McDougal.

The delay in full consideration of the referral between September 1992 and the ultimate appointment of a regulatory independent counsel in January 1994 required investigation of whether any action during that time was intended to prevent full examination of the conduct alleged in the referral. Whether before or after the 1992 election of President Clinton, any action that had the effect of delaying or impeding the investigation could raise the question of whether anyone in the Department of Justice unlawfully obstructed the investigation in violation of 18 U.S.C. § 1505.

This investigation examined the conduct and motives of Department of Justice officials in a position to influence the handling of the referral. These officials included President Bush's U.S. Attorney in Little Rock, President Clinton's subsequent appointee as the U.S. Attorney, and officials at the Department of Justice headquarters in Washington D.C. both at the end of the Bush Administration and during the first year of the Clinton Administration.

II. FINDINGS

The Independent Counsel concluded the evidence was insufficient to prove that any Department of Justice official obstructed justice by engaging in conduct intended to delay or impede the investigation of the RTC's criminal referral C-0004. There were numerous delays in

the handling of the referral -- in part the result of attempts to consider the political sensitivity created by the presence of a named Presidential candidate (and subsequently, President) as a witness, and in part the result of the transition to a new U.S. Attorney and Department of Justice. The Independent Counsel concluded, however, the evidence surrounding the delays failed to substantiate that any of the delays were the result of corrupt intent. Accordingly, the Independent Counsel determined that no prosecutions were warranted.

III. FACTUAL SUMMARY

A. Handling of Criminal Referral No. C-0004 before Election Day, November 3, 1992.

1. Early Notification to FBI-Little Rock about C-0004.

Supervisory Special Agent Steve Irons of the FBI Little Rock field office first learned about Whitewater Development from a March 1992 New York Times article.¹ The article mentioned the McDougal-Clinton business partnership in the Whitewater Development Corporation ("Whitewater Development") and the failure of Madison Guaranty Savings & Loan.² About two weeks after the article appeared, Jean Lewis, an RTC Investigator with the RTC's Kansas City office, contacted the FBI in Little Rock and said she was traveling to Little Rock to review Madison Guaranty records and wanted to meet with the FBI agent who worked on the

¹ Irons 2/14/95 Int. at 1; Jeff Gerth, Clinton Joined S&L Operator in an Ozark Real-Estate Venture, N.Y. Times, Mar. 8, 1992, Section 1, at 1.

² Irons 2/14/95 Int. at 1; Jeff Gerth, Clinton Joined S&L Operator in an Ozark Real-Estate Venture, N.Y. Times, Mar. 8, 1992, Section 1, at 1.

Bureau's previous investigation of the thrift.³

Irons asked Lewis why Madison Guaranty was being examined a second time.⁴ She replied that she was told by her supervisor to target Madison Guaranty, and that she was pulled off other investigations.⁵

Irons called Clark Walton, Lewis's immediate supervisor in Tulsa, and asked if the RTC was looking at Madison Guaranty.⁶ Walton said they were and told Irons there would probably be a referral.⁷ Irons told Walton the reason for his question was that he was trying to allocate

³ Irons 2/14/95 Int. at 1. Irons already had focused the FBI's Arkansas investigative efforts on failed savings and loans. The two primary investigations he identified involved First Federal Savings & Loan and Savers Savings & Loan, considered priority investigations because of the amount of losses they suffered, the dates of their failures, and the fact that neither had been the subject of prior investigations. Id. at 1-2. By October 1992, the FBI in Little Rock estimated that First Federal Savings suffered a loss of \$900 million and Savers a loss of \$650 million. The loss to Madison Guaranty at that time was estimated as \$47.7 million. See Teletype from FBI Little Rock to Director FBI re: James B. McDougal, et al; unsub(s), Madison Guaranty Savings and Loan, Little Rock, Arkansas at 3 (Oct. 16, 1992) (Doc. No. JME-0000023). Madison Guaranty was not a top priority because the loss was comparatively modest, and it was previously investigated. Irons 2/14/95 Int. at 2.

⁴ Irons 2/14/95 Int. at 2.

⁵ Id. Lewis testified that Madison Guaranty was on the RTC's list of Arkansas institutions to be investigated, but an examination was not actually initiated until the Gerth piece appeared in The New York Times on March 8. "[V]irtually within th[e] week" the article appeared, Lewis was sent to Little Rock to examine Madison Guaranty records to determine whether Whitewater Development had caused a loss to the thrift or received funds it was not entitled to get. Lewis 5/18/95 GJ at 8-12.

⁶ Irons 2/14/95 Int. at 2. Irons said his conversation with Walton took place within two weeks of his discussion with Lewis. Id.

⁷ Id.

resources for other major investigations.⁸ Walton said the FBI in Little Rock should expect a referral on Madison Guaranty soon.⁹

At some point in May, June, or July 1992, Lee Walters, one of the agents on Irons's squad, told Irons that the U.S. Attorney's Office in Little Rock ("USAO-EDAR") knew about the RTC's interest in Madison Guaranty.¹⁰ Irons had not mentioned the subject to USAO-EDAR, and assumed Lewis contacted that office.¹¹ In mid-August 1992, Lewis called Irons and told him she had an August 31 deadline to finish the referral.¹²

Irons thought FBI Headquarters in Washington was first provided with background on the upcoming Madison Guaranty criminal referral in an "airtel" that Irons wrote dated August 26, 1992.¹³ Irons said FBI policy then required field offices to wait until the RTC sent the criminal referral about a failed thrift before opening a fraud investigation.¹⁴ Irons discussed then-current

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Airtel from Little Rock to FBI Headquarters (Aug. 26, 1992) (Doc. Nos. JME-00000498 through 502). Depending on the importance of a matter, communications with FBIHQ could be either by call, airtel or teletype. Pettus 6/6/95 GJ at 15. An airtel was the lowest priority. Id. at 15-16. The August 26 airtel was referenced shortly thereafter in a teletype sent from FBI-Little Rock to FBIHQ. See Teletype sent from FBI-Little Rock to FBIHQ (Oct. 7, 1992) (Doc. No. TTK 00000005).

¹⁴ Irons 2/14/95 Int. at 3.

and predicted use of resources for financial institution fraud cases.¹⁵ In doing so, Irons included what he learned from Lewis about the anticipated referral involving the Clintons.¹⁶

2. RTC Criminal Referral C-0004 Arrives in Little Rock.

Madison Guaranty Criminal Referral C-0004 ("C-0004" or the "Referral") arrived at the FBI Little Rock field office and USAO-EDAR September 2, 1992,¹⁷ sent from the RTC's Kansas City office the day before.¹⁸

C-0004 alleged various crimes at Madison Guaranty, including check kiting and self-dealing.¹⁹ The referral identified James and Susan McDougal and Lisa Aunspaugh as suspects. Witnesses listed included Governor Clinton, Hillary Rodham Clinton, Lieutenant Governor Jim

¹⁵ Airtel from Little Rock to FBI Headquarters (Aug. 26, 1992) (Doc. Nos. JME-00000500 through 01)

¹⁶ Id. (Doc. No. JME-00000499).

¹⁷ Irons 2/14/95 Int. at 3; Dodson 5/23/95 GJ at 14-15. Irons may have had general conversations with Charles A. ("Chuck") Banks, the United States Attorney for the Eastern District of Arkansas, in which Irons may have mentioned the referral was coming. Irons 2/14/95 Int. at 3. Banks said that he first learned about the referral when Mac Dodson, his First Assistant, mentioned that he had received a criminal referral from RTC Investigator Lewis, or had received a telephone call from her on that subject. Banks 2/14/95 Int. at 1. Banks testified he was "almost sure" he did not hear about the referral before its receipt in his office, because he remembered Dodson saying, "We just got a referral in here, another referral on McDougal." Banks 5/23/95 GJ at 25-26. Dodson testified that he first learned of the referral in September 1992 when it was received in the USAO-EDAR. Dodson 5/23/95 GJ at 13-14.

¹⁸ Letter from L. Richard Iorio, Field Investigation Officer, Resolution Trust Corporation, to The Honorable Charles A Banks, United States Attorney, Eastern District of Arkansas (Sept. 1, 1992) (Doc. No. 006642). In July 1992, after the time of Irons's March 1992 conversations with Lewis, the RTC's Tulsa office was closed and its personnel and records transferred to the RTC's Kansas City office. See Lewis 4/4 -5/94 Fiske Int. at 3-4; Iorio 4/12/94 Fiske Int. at 2.

Guy Tucker, Stephen A. Smith, and Greg Young.²⁰

At the FBI, Irons made a copy of the referral for Special Agent in Charge ("SAC") Don Pettus.²¹ Don Whitehead, FBI-Little Rock's Assistant Special Agent in Charge ("ASAC"), was also told about C-0004.²² Approximately 300 exhibits were included with the referral to USAO-EDAR; the FBI in Little Rock did not receive them.²³ Within a couple of days of receiving the referral Irons spoke with the U.S. Attorney, Charles Banks, who said he did not want any investigative action taken until he discussed the referral with FBI management.²⁴

Irons asked Pettus if FBIHQ should be notified.²⁵ Pettus told Irons to keep quiet about the referral, and that Pettus would handle it.²⁶ Irons knew that Pettus thought there was little merit to the referral.²⁷

Once the referral was received at FBI-Little Rock, a decision had to be made whether to open a case. Once a case was opened, it would be logged into a computer system accessible to

¹⁹ Faxed first page to RTC Crim. Ref. No. C-0004 (Oct. 6, 1992) (Doc. No. 0000643).

²⁰ RTC Crim. Ref. No. C-0004 (Aug. 31, 1992) (Doc. Nos. 006643 through 62).

²¹ Irons 2/14/95 Int. at 3. Pettus recalled the referral arriving at the Little Rock office, and was sure he perused it. He became knowledgeable about the case through reading the referral and/or through briefings by Irons. Pettus 5/10/95 Int. at 1.

²² Whitehead 3/1/95 Int. at 1. Whitehead believed he read the referral; he recalled Irons saying that it might have check kiting possibilities about McDougal, but additional work would have to be done to justify opening a new investigation. Id.

²³ Irons 2/14/95 Int. at 3; Banks 5/23/95 GJ at 34.

²⁴ Irons 2/14/95 Int. at 4.

²⁵ Irons 6/16/95 Int. at 1-2.

²⁶ Id. at 2.

officials at the Department of Justice.²⁸ Irons also thought the information would be accessible to Congress.²⁹ Normally the FBI automatically opened a case for an RTC referral, but because of C-0004's sensitivity, it called for special handling.³⁰

Pettus did not want to investigate C-0004 unless he had a commitment from the U.S. Attorney in Little Rock.³¹ Pettus agreed with the U.S. Attorney that no overt investigation would be conducted until after the presidential election.³²

Whitehead recalled that Pettus's view was that if a case was opened immediately, there might be leaks about it from the RTC, forcing FBI-Little Rock to respond to inquiries by "neither confirm[ing nor] deny[ing]" an ongoing investigation.³³

²⁷ Id.

²⁸ Id.

²⁹ Id. Irons recalled receiving calls from congressional staffers asking about the status of other investigations involving government fraud. Id.

³⁰ Id. Irons said there were several factors militating against opening a case when the referral was received. See Irons 5/21/96 GJ at 38-41. One was FBI policy to refrain from action before an election that might influence it. Id. at 38. Irons testified that the FBI reviewed the referral and its exhibits to make sure there was nothing requiring immediate attention before the election. Id. at 41.

³¹ Pettus 7/14/95 Int. at 1.

³² Id.

³³ Whitehead 3/1/95 Int. at 1-2.

3. USAO-EDAR's Early Handling.

Banks had served as U.S. Attorney for the Eastern District of Arkansas since February 1988.³⁴ He unsuccessfully ran for Congress as a Republican in November 1992.³⁵ Banks knew President Clinton; he first met him when Clinton ran for Arkansas Attorney General.³⁶ Banks was not a friend of Clinton's and considered himself opposed to most of Clinton's political positions.³⁷ In August 1992, President Bush nominated Banks to be a federal judge, which was pending when C-0004 arrived.³⁸

Banks said he first heard about the referral from his First Assistant, Floyd "Mac" Dodson.³⁹ The referral listed a second set of allegations against McDougal from Madison Guaranty's failure.⁴⁰ The previous allegations had led to McDougal's prosecution in mid-1990 for other crimes related to the thrift.⁴¹

³⁴ Banks 2/14/95 Int. at 1.

³⁵ Banks 5/23/95 GJ at 5-6.

³⁶ Id. at 7.

³⁷ Id. at 9.

³⁸ Id. at 68, 71.

³⁹ Banks 2/14/95 Int. at 1.

⁴⁰ Id.

⁴¹ The 1990 McDougal trial was the first savings and loan matter Banks's office tried. Banks 5/23/95 GJ at 21. McDougal, a prominent Democrat, claimed the prosecution was political. McDougal had said the only reason he was indicted was because in 1982, he ran for a congressional seat against a Republican incumbent in the Western District of Arkansas. McDougal lost, and claimed the reason for his 1990 prosecution was the incumbent told Banks to get even with McDougal. Banks 5/23/95 GJ at 23-24; Irons 5/21/96 GJ at 35. Banks denied the allegation. Banks 5/23/95 GJ at 24. Banks, a Republican, did not participate in McDougal's

Dodson said if he was certain sufficient evidence was present to support allegations in a criminal referral, he usually assigned it to an Assistant U.S. Attorney fairly quickly.⁴² If more information was needed, Dodson would ask the appropriate FBI agent to find it before assigning it.⁴³ Matters involving FBI investigations normally came through Dodson.⁴⁴ If a matter was particularly sensitive, he might delay its assignment so that he could determine what information he had, what needed to be done, and the degree of difficulty presented by the case.⁴⁵

If Dodson thought an RTC referral was routine, he assigned it.⁴⁶ If the matter was not routine, he consulted with Banks.⁴⁷ Once assigned, the referral was logged into the office's computer system.⁴⁸ In some cases Dodson assigned matters to himself so that his name was in the system as the contact person.⁴⁹ Dodson did not assign C-0004 to an Assistant.⁵⁰ Dodson said he left that to Banks, though he would have some input.⁵¹ Dodson said he did not get direction

trial, instead assigning it to two assistants and taking a hands-off approach to avoid compromising the merits. Banks 2/14/95 Int. at 1; Banks 5/23/95 GJ at 22.

⁴² Dodson 2/15/95 Int. at 2.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Dodson 5/23/95 GJ at 9.

⁴⁷ Id.

⁴⁸ Id. at 9 -10.

⁴⁹ Id. at 10.

⁵⁰ Id. at 17.

⁵¹ Id.

from Banks about what to do with C-0004.⁵² Linda Ann Newgent, Secretary to the U. S. Attorney, Eastern District of Arkansas, testified that the referral file was never entered into the USAO-EDAR computer system.⁵³

Dodson told Banks the referral mentioned the Clintons and Jim Guy Tucker.⁵⁴ Banks was curious why the RTC was sending his office material that should have been submitted with the first McDougal prosecution.⁵⁵ Banks was troubled by the names of the witnesses and realized the referral was sensitive for that reason.⁵⁶ Banks asked Dodson to check with the assistant who had prosecuted the first McDougal trial to find out if C-0004 was new or simply redundant.⁵⁷ Dodson asked Sandra Cherry, an assistant in USAO-EDAR, to perform that review because she had been involved in the first McDougal case.⁵⁸ Dodson said Cherry quickly responded that C-0004 had new information, but Dodson asked her to take more time to be certain.⁵⁹ Dodson said one or two weeks later, Cherry again told Dodson the referral had new information.⁶⁰ Cherry disputes

⁵² Id.

⁵³ Newgent 2/16/95 Int. at 2; Dodson 2/15/95 Int. at 2.

⁵⁴ Banks 2/14/95 Int. at 1; Banks 5/23/95 GJ at 26.

⁵⁵ Banks 5/23/95 GJ at 27-28.

⁵⁶ Id.

⁵⁷ Id. at 28-29. Banks testified that he either told Dodson to follow that course, or Dodson told Banks he was going to do so. Id. at 28.

⁵⁸ Dodson 2/15/95 Int. at 2.

⁵⁹ Id.

⁶⁰ Id. at 3.

that she ever saw C-0004 or that she was ever asked to review it.⁶¹

Lewis called Dodson a number of times to ask what the office was doing with the case.⁶² Although Banks never spoke with Lewis directly, Dodson related the substance of his conversations with Lewis to Banks, and Banks thought Lewis wanted the investigation moved quickly.⁶³ Banks said his office never handled a referral in that manner.⁶⁴ Banks thought the reason for the push was the high-profile witnesses named -- the Clintons in particular -- and that the RTC was angling for an overt investigation before the imminent presidential election because the inquiry would become public.⁶⁵ Banks told Dodson that if Lewis wanted to know how the USAO-EDAR was going to handle the case, she should call Banks.⁶⁶ Banks said he "never got a call from anybody."⁶⁷

⁶¹ Cherry 5/9/95 Int. at 2.

⁶² Dodson 5/23/95 GJ at 20; Banks 5/23/95 GJ at 29.

⁶³ Banks 5/23/95 GJ at 29. Banks agreed it was common for investigators to try to sell their own cases. Id. at 33. Because the presidential election was so soon, he thought pushing C-0004 was unwise. Id. at 34. Lewis testified the timing was driven by the March 8, 1992 New York Times article, and delay caused when the RTC shifted her office from Tulsa to Kansas City. Lewis 5/18/95 GJ at 77-80.

⁶⁴ Banks 5/23/95 GJ at 29.

⁶⁵ Id. at 29-31. Banks said it would soon become public knowledge if his office started issuing grand jury subpoenas in furtherance of an investigation into the referral's allegations. Id. at 31. He testified that at the relevant time there were two newspapers in the area, with a war between them going on. One was defunct by the time of his testimony. He said there were two full-time court reporters on the "federal beat," which worked his hall, as a consequence of which there was no grand jury secrecy. Banks testified that "you could just bet" on word of grand jury subpoenas getting out. Id.

⁶⁶ Id. at 29

⁶⁷ Id.

Banks first read the referral "probably in the third week in September [1992] -- probably . . . after about the third or fourth call."⁶⁸ He read the document twice but not the exhibits.⁶⁹ Banks thought the allegations were against the McDougals and Aunspaugh,⁷⁰ and wished he had had the benefit of those facts in 1989.⁷¹ Banks thought "the referral had merit," but was concerned about his office's "limited resources."⁷² He saw "innuendo," "accusation," and perhaps "ethical . . . violations or poor judgment"□ about the witnesses named in the referral.⁷³

Banks was concerned about proceeding a second time against McDougal.⁷⁴ Banks felt that "another shot at the same person needs to be much stronger and quicker."⁷⁵ Banks did not feel there would be any recovery of taxpayers' money associated with the losses at Madison Guaranty, and Banks viewed McDougal as a "fairly miserable figure,"⁷⁶ not worth "pil[ing] it on a man who's finished without expecting to get anything but jail time."⁷⁷ Banks considered the matter a waste of resources and a "potential embarrassment to the Department of Justice that was

⁶⁸ Id. at 34.

⁶⁹ Id. at 34-35.

⁷⁰ Id. at 35.

⁷¹ Id. In Banks's words, this time around, "there's more meat in the coconut." Id.

⁷² Id. at 35-36.

⁷³ Id. at 36.

⁷⁴ Id. at 37-38.

⁷⁵ Id. at 37.

⁷⁶ Id. at 38.

⁷⁷ Id. at 38-39.

unnecessary."⁷⁸ Banks thought there were "other fish to fry," though he did not rule out the case entirely.⁷⁹

Banks decided that he would open a case on C-0004 after the election on November 3, 1992 limited to Jim McDougal.⁸⁰ Banks wanted to "see more substance behind the referral" before going after Susan McDougal and Lisa Aunspaugh,⁸¹ the only other people Banks saw as having any criminal exposure in the referral.⁸² Dodson concurred with his boss's assessment of the referral.⁸³

4. The September 23, 1992 Meeting in Little Rock.

On September 23, 1992, Banks and Dodson from USAO-EDAR, and Whitehead, Pettus, and Irons from FBI-Little Rock met on the referral.⁸⁴ Banks thought the check-kiting allegations were of interest, with Aunspaugh as a possible target.⁸⁵ Banks felt the referral gave him no basis

⁷⁸ Id. at 39.

⁷⁹ Id.

⁸⁰ Id. at 39-40.

⁸¹ Id. at 40-41.

⁸² Id. at 37-38, 40-41.

⁸³ Dodson 5/23/95 GJ at 24-27.

⁸⁴ Teletype from FBI-Little Rock to FBIHQ at 10 (Oct. 7, 1992) (Doc. No. TTK-00000014) (mentioning September 23, 1992 meeting among "SAC, Little Rock, and Supervisory Staff" with the United States Attorney); see also Banks 2/14/95 Int. at 4 (placing meeting in late September 1992); Banks 5/23/95 GJ at 43 (acknowledging meeting probably took place on September 23, 1992); Whitehead 3/1/95 Int. at 2; Irons 2/14/95 Int. at 4.

⁸⁵ Banks 5/23/95 GJ at 43-44.

to suspect the Clintons of criminal conduct,⁸⁶ and was not inclined to investigate them.⁸⁷ Banks made clear he did not want to do anything until after the November 3, 1992 election, except for legal research and a review of the referral's exhibits.⁸⁸ His impression was that the FBI officials concurred.⁸⁹ Dodson similarly recalled that Banks decided not to do anything until after the election.⁹⁰

Pettus agreed with Banks that the referral had to be approached fairly, and concurred there was no reason to move on it immediately; he also did not want to conduct an overt investigation before the presidential election.⁹¹ Pettus believed there was a consensus that C-0004 would be examined after election day.⁹²

⁸⁶ Id. at 44.

⁸⁷ Id.

⁸⁸ Id. at 45-46.

⁸⁹ Id. at 45.

⁹⁰ Dodson 5/23/95 GJ at 29. Dodson may have followed up with some legal research by speaking with Fletcher Jackson, an Assistant United States Attorney in EDAR, about the statute of limitations. Id.

⁹¹ Pettus 5/10/95 Int. at 2, 4.

⁹² Id. at 4. Irons recalled that at the September 23 meeting, it was decided the FBI would take no additional investigative action pending additional review by the USAO-EDAR. Irons 2/14/95 Int. at 4. The participants also discussed the upcoming presidential election and the importance of keeping the referral on a "need to know" basis. Id. To the best of Irons's recollection, the FBI in Little Rock first learned at this meeting that Banks's office had additional exhibits about the referral. Id. Whitehead had the same recollection. Whitehead 3/1/95 Int. at 2. He also recalled that Banks's office said they had to be careful not to go off "half cocked" and that legal issues such as double jeopardy and the statute of limitations had to be examined because they could preclude future prosecution. Irons 2/14/95 Int. at 4.

5. Early Action by Officials at Main Justice.

Not long after the referral arrived in Little Rock -- and some weeks before USAO-EDAR officially notified officials at Main Justice of its existence -- high-level Bush Administration officials heard rumors about the referral from other sources. Former Attorney General William P. Barr learned about the possible existence of the referral on September 17, 1992.⁹³ He had a conversation with Edie Holiday, then serving as Secretary to the Cabinet.⁹⁴ Holiday said she wanted to ask Barr something, but she was not sure if it would be appropriate.⁹⁵ Barr said she could ask, with the understanding that he would not tell her anything if it was not appropriate.⁹⁶ Holiday asked if Barr would be aware of a pending matter in Justice (she may have said it was a criminal referral) about a presidential candidate or a family member of a presidential candidate.⁹⁷ Barr said he would if it was pending in the Department of Justice.⁹⁸ Holiday said she was talking about a savings and loan matter, and it became clear to Barr she was referring to Governor Clinton.⁹⁹ Holiday did not say where she heard the rumor, and Barr did not ask.¹⁰⁰

⁹³ Barr 6/2/95 Int. at 1.

⁹⁴ Id.; Holiday 7/28/95 Int. at 1.

⁹⁵ Barr 6/2/95 Int. at 1.

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id. at 2.

¹⁰⁰ Id. Holiday did not remember knowing about an RTC criminal referral involving the Clintons. Holiday 7/27/95 Int. at 1. Holiday did not remember seeking Barr out to ask him

6. A Discreet Search is Conducted by Officials at Main Justice.¹⁰¹

Barr was concerned there might be a matter pending in the Justice Department that he was not aware of. He believed it would be damaging to Justice if an attorney at Main Justice or in one of the U.S. Attorney's offices was "hotdogging" a sensitive investigation without his knowledge.¹⁰²

Barr told Ira Raphaelson, the Justice Department's Special Counsel for Financial Institution Fraud, about the rumor.¹⁰³ Barr told Raphaelson to try to find out whether the referral existed.¹⁰⁴ Barr did not want anyone in the Justice Department to know he was inquiring about the matter, to avoid the perception that he was trying to interfere with a sensitive case.¹⁰⁵ Barr and Raphaelson agreed to check DOJ's system of Urgent Reports and also to check with FBI

questions about the referral; she claimed that she did not know of C-0004 when it came out, nor did she know of anyone else who did. Id. at 3.

¹⁰¹ There is some evidence that at some point, C. Boyden Gray, the White House Counsel, tried to find out about the referral. Albert Casey, Chairman of the RTC, recalled receiving a call from Gray about the referral's status. Casey 7/26/95 Int. at 1. Casey went to William Roelle, Executive Vice President of the RTC, and asked about the status. Id. Roelle told Casey the Clintons were not named as targets, but simply as potential witnesses. Id.; Roelle 2/24/95 Int. at 1-2. Gray called Casey back, and told him to forget about his earlier inquiry. Casey 7/26/95 Int. at 1. Gray did not remember a telephone conversation with Casey, along the lines discussed above. Gray 7/25/95 Int. at 2. He believed he first learned about the referral from Casey, but he thought it may have been at a dinner party. Id. at 1. Gray might also have heard about the referral from a journalist. Id. Gray recalled his impression was that the Clintons were named as witnesses, not targets. Id.

¹⁰² Barr 6/2/95 Int. at 2.

¹⁰³ Id.; Raphaelson 3/28/95 Int. at 2-3.

¹⁰⁴ Raphaelson 3/28/95 Int. at 3.

¹⁰⁵ Barr 6/2/95 Int. at 3; Raphaelson 3/28/95 Int. at 3.

Headquarters ("FBIHQ") because the FBI maintained its own bank fraud investigation tracking system.¹⁰⁶

Raphaelson contacted FBIHQ in Washington.¹⁰⁷ He likely spoke with Fred Verinder, Deputy Assistant Director of the Criminal Investigative Division.¹⁰⁸ Raphaelson was told that FBIHQ had no information about such a referral.¹⁰⁹ Raphaelson told Barr he found nothing.¹¹⁰ He asked if Barr had any more details, and Barr said no.¹¹¹

Barr then called Holiday (about one week after their conversation) and told her that her information was wrong.¹¹² Barr said she replied she was fairly certain there was such a referral.¹¹³

¹⁰⁶ Barr 6/2/95 Int. at 3; Raphaelson 3/28/95 Int. at 3.

¹⁰⁷ Raphaelson 3/28/95 Int. at 3.

¹⁰⁸ Verinder 3/14/95 Int. at 1. Raphaelson said he contacted either Verinder or Larry Potts, Assistant Director of the Criminal Investigative Division (see Potts 2/9/95 Int. at 1) or Thomas Kubic, Section Chief, Financial Crimes Section, Criminal Investigative Division. See Kubic 3/8/95 Int. at 1. Verinder recalled hearing from someone that the RTC had a case that had not yet been given to the FBI. Verinder 3/14/95 Int. at 1. He said he could have received that information from Raphaelson, but he did not specifically remember. Id. at 1-2. Kubic recalled that in mid-September 1992, Verinder mentioned that he (Verinder) had had a conversation with Raphaelson; the latter said he was hearing rumors that the RTC was making a criminal referral that mentioned Governor Clinton. Kubic 3/8/95 Int. at 1.

¹⁰⁹ Raphaelson 3/28/95 Int. at 3.

¹¹⁰ Id.

¹¹¹ Id. Barr recalled that Raphaelson got back to him fairly quickly, with negative results. Barr 6/2/95 Int. at 3.

¹¹² Id.

¹¹³ Id. Barr recalled that he then felt that Holiday had better information than he had. Id. This second telephone call was the last time Barr spoke with Holiday about the referral. Id. at 4.

Holiday did not remember this second conversation with Barr.¹¹⁴

Barr spoke with Raphaelson again.¹¹⁵ He told Raphaelson the referral may have come from the RTC.¹¹⁶ Barr told Raphaelson he did not mention the RTC in their first conversation because he was handling the matter delicately.¹¹⁷ Barr was concerned because the referral had not been entered into DOJ's system.¹¹⁸ Barr said that if the referral was found, he did not want action on it artificially sped up or slowed down -- it was to be dealt with on its merits and in the normal course.¹¹⁹ Barr stressed the matter had to be handled discreetly.¹²⁰ Barr said he prohibited calls to the U.S. Attorney's Office in Little Rock¹²¹ to avoid the impression the Bush Administration was attempting to influence the election.¹²²

Raphaelson recalled that after he first reported no findings to Barr,¹²³ Barr asked if he was sure there was no case involving the Clintons.¹²⁴ Raphaelson said he would contact the FBI again

¹¹⁴ Holiday 7/27/95 Int. at 2.

¹¹⁵ Barr 6/2/95 Int. at 4.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Id.

¹²² Id.

¹²³ Raphaelson estimated the time as approximately three weeks later. Raphaelson 3/28/95 Int. at 4.

¹²⁴ Id.

and also have the Executive Office for U.S. Attorneys ("EOUSA") check.¹²⁵ Barr agreed, but said there should be no hint that higher levels at Justice were interested.¹²⁶

Raphaelson believed that he contacted Wayne Rich in the EOUSA.¹²⁷ He said it is possible he spoke with Doug Frazier, then Associate Deputy Attorney General.¹²⁸ Raphaelson trusted both Rich and Frazier to be discreet.¹²⁹ He did not give Rich much information, and believed that he may have told Rich that he wanted to know about bank cases in Arkansas. Raphaelson said Rich turned up nothing.¹³⁰ At some point Raphaelson told Rich what he was after, but that may have been after he got Rich's answer.¹³¹

Raphaelson contacted FBIHQ again.¹³² He believed he spoke with Verinder, although it could have been Kubic or Potts.¹³³ Raphaelson may have told Verinder the EOUSA had come up empty.¹³⁴

¹²⁵ When a United States Attorney had a specific case or issue that he or she felt merited the attention of top officials at DOJ, policy dictated that a report on the matter be prepared and forwarded to EOUSA, which would then put a cover Memorandum on it, and forward it to appropriate DOJ officials. Marcovici 1/18/95 Int. at 1.

¹²⁶ Raphaelson 3/28/95 Int. at 4.

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ Id.

7. FBIHQ's Efforts to Track Down the Referral.

Verinder asked Kubic to find out if FBI-Little Rock had a criminal referral mentioning Governor Clinton.¹³⁵ Either on that day or the next, Kubic asked Ronald Dick, Unit Chief of the Financial Institutions Fraud Unit, if Dick knew of an RTC referral which mentioned Governor Clinton.¹³⁶ Dick told Kubic he did not, and Kubic asked Dick to find out if the FBI in Little Rock did.¹³⁷

Kevin Kendrick, a Supervisory Special Agent assigned to the Financial Institutions Fraud Unit at FBIHQ, was responsible for the Little Rock FBI office, so he was told to contact Little Rock.¹³⁸ Kendrick thought he called Little Rock on October 6, 1992 and spoke with Irons.¹³⁹ FBI-Little Rock faxed Kendrick a copy of C-0004.¹⁴⁰ Kendrick thought that FBI-Little Rock office pointed out it already had told FBIHQ about the referral by Little Rock airtel dated August 26, 1992.¹⁴¹ Kendrick recalled that once Dick reviewed the referral he remarked, "We're going to

¹³⁵ Kubic 3/8/95 Int. at 1.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Kendrick 3/13/95 Int. at 1; the date of the call is corroborated by an October 7, 1992 teletype, sent from FBI-Little Rock to FBIHQ. See Teletype from FBI-Little Rock to FBIHQ (Oct. 7, 1992) (Doc. Nos. TTK-00000005 through 015).

¹⁴⁰ Kendrick 3/13/95 Int. at 1.

¹⁴¹ Id. Kendrick specifically remembered trying to find the August 26 airtel at FBIHQ. He did not. Id. Irons said FBIHQ was first provided with background information about the then-anticipated Referral by airtel dated August 26, 1992. Irons 2/14/95 Int. at 3. Irons also recalled speaking with Kendrick on October 6, and faxing a copy of the referral to FBIHQ. Irons

have to do something with this."¹⁴²

Dick recalled that he called FBI-Little Rock and spoke either with Irons or Whitehead.¹⁴³ FBI-Little Rock's initial response was it did not have an ongoing investigation on any RTC criminal referral.¹⁴⁴ Dick recalled that after the initial call to the FBI in Little Rock, he received more information about the RTC Referral, perhaps from Justice.¹⁴⁵ Whatever the new information was (Dick could not remember the details), it prompted him to call Little Rock again to make sure there was no pending investigation out of that office.¹⁴⁶ During this second call, either Irons or Whitehead said FBI-Little Rock had received an RTC referral about Madison

2/14/95 Int. at 5. Irons said Kendrick said he had just come from a Justice meeting where Justice officials said Little Rock was "just sitting on" a significant savings and loan referral. Id.

¹⁴² Kendrick 3/13/95 Int. at 1-2.

¹⁴³ Dick 5/31/95 Int. at 1.

¹⁴⁴ Id. Whitehead recalled that some time in early September to mid-October 1992, he received a phone call from FBIHQ asking whether FBI-Little Rock had an ongoing investigation about the Clintons. Whitehead 3/1/95 Int. at 3. Whitehead replied there was no such ongoing investigation. Whitehead 3/1/95 Int. at 3. He believed that this call was received before FBI-Little Rock officially told FBIHQ by teletype about C-0004. Id. Whitehead either checked or had someone else check his office's indices for references to criminal investigations involving Governor Clinton, with negative results. Whitehead 7/13/95 Int. at 1. He also remembered, from a contemporaneous conversation he had with Pettus, that Verinder had called Pettus and asked whether Little Rock had opened an investigation. Whitehead 3/1/95 Int. at 3. Whitehead's impression was that Verinder was making inquiries because FBIHQ was picking up reports that something was going on in Little Rock about the Clintons. Whitehead 3/1/95 Int. at 3. Whitehead recalled Pettus was against opening an investigation and was going to "take it up" to FBIHQ. Id.

¹⁴⁵ Dick 5/31/95 Int. at 1.

¹⁴⁶ Id.

Guaranty mentioning the Clintons.¹⁴⁷ Dick also was told that FBI-Little Rock had sent an airtel to FBIHQ dated August 26, 1992 about the referral, that the Clintons were mentioned, and that FBI-Little Rock was waiting to get the referral from the RTC.¹⁴⁸

Kubic said FBI-Little Rock told him that it did not have the RTC referral, but was expecting something from the agency.¹⁴⁹ It was possible the Little Rock office may have been asked if it had a pending investigation on a referral, in which case the answer was, "No."¹⁵⁰ Kubic said within a week of the inquiry about the referral, Dick told Kubic the FBI in Phoenix had heard that senior RTC officials might be sitting on a criminal referral mentioning Governor Clinton.¹⁵¹ FBI Special Agents in Phoenix had received that information from RTC personnel in Phoenix.¹⁵² Kubic believed the FBI in Phoenix sent a teletype to FBIHQ about the information; he also recalled the information appeared to be speculation.¹⁵³ Kubic called Whitehead in Little Rock and learned that Little Rock had a copy of an RTC criminal referral.¹⁵⁴ Whitehead told Kubic the referral did not appear very credible; he said it alleged an elaborate check-kiting

¹⁴⁷ Id.

¹⁴⁸ Id. at 1-2.

¹⁴⁹ Kubic 3/8/95 Int. at 1.

¹⁵⁰ Id.

¹⁵¹ Id. at 2.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Id.

scheme, and that its principal subject was Jim McDougal.¹⁵⁵ Whitehead reported that McDougal had been tried and acquitted once before, and was not a particularly good target.¹⁵⁶ Kubic recalled being told the FBI-Little Rock did not receive the supporting documents with the referral.¹⁵⁷ Kubic asked Whitehead to fax a copy of the referral to FBIHQ.¹⁵⁸

According to Pettus, when an FBI field office receives a sensitive referral it is required to notify Headquarters in Washington, D.C.¹⁵⁹ He recalled notifying Headquarters, but he did not remember when he did so; he did remember receiving a call from Verinder, who "was a little upset."¹⁶⁰ Verinder wanted to know what FBI-Little Rock had told Headquarters about the referral.¹⁶¹ Pettus said he gave Verinder a detailed background on the first McDougal matter, and said Little Rock had to be careful the second time around because the first trial ended in an acquittal.¹⁶² Pettus said Verinder seemed "generally satisfied" and "basically" in agreement that Little Rock was "proceeding in the right manner."¹⁶³

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ Pettus 6/6/95 GJ at 15.

¹⁶⁰ Id. at 16-17.

¹⁶¹ Id. at 16.

¹⁶² Id.

¹⁶³ Id. at 16-17. Pettus said he did not purposely avoid notifying FBIHQ about the referral because he had a desirable transfer pending in October 1992, and he said he would never have done anything to jeopardize his move. Pettus 7/14/95 Int. at 1. Whitehead did not know why Pettus did not promptly advise FBIHQ about Little Rock's receipt of C-0004. Whitehead

8. The October 7, 1992 Teletype to FBIHQ from FBI-Little Rock.

FBI-Little Rock sent a teletype to FBIHQ, on October 7, 1992, about C-0004.¹⁶⁴ The teletype summarized the referral.¹⁶⁵ It said the RTC's Kansas City Office had sent Referral C-0004 simultaneously to the FBI and the U.S. Attorney's Office in Little Rock.¹⁶⁶ The referral had documentary exhibits sent to the USAO-EDAR but not the FBI.¹⁶⁷ The October 7 teletype referenced FBI-Little Rock's August 26, 1992 airtel, and said that in that airtel Little Rock had told FBIHQ of the anticipated receipt of C-0004 "INCLUDING GENERAL DETAILS OF THE CRIMINAL ACTIVITY ALLEGED AND EXPECTED REFERENCES TO BILL AND HILLARY CLINTON AND JAMES AND SUSAN MCDOUGAL."¹⁶⁸ The teletype noted McDougal's previous November 1989 indictment on bank fraud charges for his activities at Madison Guaranty.¹⁶⁹ It also pointed out that McDougal was acquitted.¹⁷⁰ The teletype characterized the referral as describing "PROBABLE CHECK KITING ACTIVITY" for the

7/13/95 Int. at 1. Pettus generally maintained contact with Headquarters about significant matters and usually told FBIHQ by phone, carefully following the appropriate chain of command. Whitehead 7/13/95 Int. at 2.

¹⁶⁴ Teletype from FBI-Little Rock to FBIHQ (Oct. 7, 1992) (Doc. Nos. TTK-00000005 through 15).

¹⁶⁵ Id.; see also Whitehead 3/1/95 Int. at 2 ("FBIHQ had been provided a summary of the MGSL referral as well as a copy of it").

¹⁶⁶ Teletype from FBI-Little Rock to FBIHQ at 2 (Oct. 7, 1992) (Doc. No. TTK-00000006).

¹⁶⁷ Id.

¹⁶⁸ Id.

¹⁶⁹ Id.

benefit of the McDougals.¹⁷¹ The teletype said the referral's "SUPPOSITION" that others benefited from the alleged kiting scheme did "NOT APPEAR TO BE FACTUALLY SUPPORTED BY THE DETAILS THAT FOLLOW WITHIN THE REFERRAL."¹⁷²

The teletype noted the referral did not allege the Clintons made or endorsed any checks, and alleged McDougal's signature was "FORGED OR SIGNED" by Lisa Aunspaugh or Susan McDougal. The teletype said the referral noted a "PROBABILITY" that certain of McDougals' business partners (meaning the Clintons) knew about relevant checking account activity, but that there was insufficient evidence to prove they had the required criminal knowledge.¹⁷³ The Clintons were categorized as witnesses.¹⁷⁴ The teletype concluded with the following two paragraphs:

ON SEPTEMBER 23, 1992, SAC, LITTLE ROCK, AND SUPERVISORY STAFF MET WITH USA [U.S. ATTORNEY CHARLES BANKS] TO DISCUSS THIS MATTER. IT WAS THE OPINION OF USA, EDAR, THE INFORMATION CONCERNING THE CHECK KITE WAS OF POSSIBLE INTEREST, WITH A[U]NSPAUGH AS A POSSIBLE TARGET. IT WAS ALSO THE OPINION OF USA THE ALLEGED INVOLVEMENT OF THE CLINTONS IN WRONGDOING WAS IMPLAUSIBLE, AND HE WAS NOT INCLINED TO AUTHORIZE AN INVESTIGATION OR RENDER A POSITIVE PROSECUTION OPINION. IT WAS ALSO NOTED A COMPLETE AND FACTUAL DETERMINATION OF WHAT TRANSPIRED IN ANY FACET OF THE REFERRAL WOULD TAKE SOME TIME. USA, EDAR, OPINED THE CORRECT COURSE OF ACTION WAS FOR HIM TO HAVE

¹⁷⁰ Id.

¹⁷¹ Id. at 5-6.

¹⁷² Id. at 6.

¹⁷³ Id. at 3-11.

¹⁷⁴ Id. at 7.

LEGAL RESEARCH CONDUCTED ON THE STATUTE OF LIMITATIONS ON THE VARIOUS APPLICABLE BANK FRAUD STATUTES AND TO COMPLETE AN IN-DEPTH ANALYSIS OF THE VOLUMINOUS EXHIBITS ANCILLARY TO THE REFERRAL. ALTHOUGH HE STATED AN INTENTION TO PROVIDE LITTLE ROCK WITH COPIES OF THE EXHIBITS, NONE HAVE BEEN RECEIVED AS OF INSTANT DATE.

ACCORDINGLY, LITTLE ROCK HAS TAKEN NO INVESTIGATIVE ACTION ON THIS MATTER PENDING A PROSECUTIVE OPINION FROM USA, EDAR. ON OCTOBER 7, 1992, THE FIRST ASSISTANT U.S. ATTORNEY ADVISED THE LITTLE ROCK SQUAD SUPERVISOR THE USA INTENDED TO ADVISE THE DEPARTMENT OF JUSTICE OF THIS MATTER DUE TO ITS SENSITIVE NATURE.¹⁷⁵

9. FBIHQ Told Officials at Main Justice of C-0004.

Verinder contacted Raphaelson and told him the referral existed, the FBI in Little Rock had it, and that FBIHQ was obtaining a copy.¹⁷⁶ Raphaelson told the Attorney General.¹⁷⁷ Barr was critical of the way Banks handled the referral, and felt it undercut the Attorney General's responsibility to ensure referrals were appropriately handled, and not delayed or pushed for political reasons.¹⁷⁸

¹⁷⁵ Id. at 10-11.

¹⁷⁶ Raphaelson 3/28/95 Int. at 4. Raphaelson testified that he was pretty certain the response from FBIHQ came from Potts. See Raphaelson 6/6/95 GJ at 22. Raphaelson recalled his FBIHQ contact was unhappy with the field office for its delay in notifying Washington about the referral. See Raphaelson 3/28/95 Int. at 4 (Verinder was "'hot' and unhappy"); Raphaelson 6/6/95 GJ at 22 (Potts expressed a "general sense of chagrin and displeasure that the referral had not been disclosed from Arkansas to the FBI Headquarters in a timely fashion").

¹⁷⁷ Raphaelson 6/6/95 GJ at 22-23.

¹⁷⁸ Barr 6/2/95 Int. at 5. In Barr's view, Banks had already affected the referral by holding it. Id. Barr also said in appropriate cases, he had responsibilities relating to the appointment of independent counsels and Banks's conduct undermined the Attorney General's statutory duties in

10. USAO-EDAR Officially Notifies Officials at Main Justice about C-0004.

When the RTC sent C-0004 to Little Rock, the U.S. Attorneys' Manual required U.S. Attorneys' offices to notify the EOUSA in Washington about high-profile or sensitive cases so that it could notify the Attorney General, Deputy Attorney General, and appropriate Assistant Attorney General.¹⁷⁹ On receipt of such a notification, the EOUSA would prepare a DOJ "Urgent Report"¹⁸⁰ to give senior Justice officials information about high-publicity matters in case they received questions.¹⁸¹ At the time of C-0004, the EOUSA was preparing about five to ten urgent reports per month.¹⁸²

Banks knew about the notification procedure for sensitive cases.¹⁸³ He did not send the referral to Main Justice before October 6, 1992 because he "needed to do [his] duty and [his] responsibility; that [he] didn't feel the necessity to just jump up and send [the referral] up there until [he] thought there was merit to the accusations or there was something where [he] needed help."¹⁸⁴

that area. Id. Raphaelson shared the sentiment that Banks's conduct precluded Raphaelson from carrying out his statutory responsibility. See Raphaelson 6/6/95 GJ at 33.

¹⁷⁹ The types of cases subject to the reporting rule included, "[a]llegations of improper conduct by . . . a public official, or a public figure," and "[i]ssues or events that may be of major interest to the press." United States Attorneys' Manual, Title 1 § 1-10.230 (Oct. 1, 1990).

¹⁸⁰ United States Attorneys' Manual, Title 1 § 1-10.231 (Oct. 1, 1990).

¹⁸¹ Henneman 5/25/95 GJ at 5-6.

¹⁸² Id.

¹⁸³ Banks 5/23/95 GJ at 52-53.

¹⁸⁴ Id. at 53.

Dodson caused referral C-0004 to be faxed to the EOUSA on October 6, 1992.¹⁸⁵ During his grand jury appearance, when Dodson was asked why the USAO-EDAR waited for several weeks to send the referral on to Washington, he said he "[didn't] really have a reason for it."¹⁸⁶ He said he probably just did not remember to do it for some time.¹⁸⁷ Dodson added that he "wanted to make sure that it was not going to be just automatically declined through -- you know, if it was old information."¹⁸⁸

Raphaelson recalled that about the same time that Verinder told Raphaelson about the referral, the EOUSA received a phone call from USAO-EDAR.¹⁸⁹ The EOUSA was told something to the effect that the USAO-EDAR had a case EOUSA might be interested in, but the USAO did not know why.¹⁹⁰ The representative of the USAO told the Executive Office there might be a requirement that USAO contact EOUSA, but the caller did not know.¹⁹¹ Raphaelson

¹⁸⁵ Dodson 2/15/95 Int. at 3-4; Dodson 5/23/95 GJ at 30-34; Henneman 7/25/94 Fiske Int. at 1; Henneman 5/25/95 GJ at 4-5. Cover Letter from L. Richard Iorio, RTC Field Investigations Officer, to Charles A. Banks, U.S. Attorney for the Eastern District of Arkansas, (Sept. 1, 1992) (Doc. No. 007084) and RTC Crim Ref. No. C-0004 (Aug. 31, 1992) (Doc. Nos 007090 through 7108); Letter from Mac Dodson, First Assistant U.S. Attorney, to Donna Henneman, Ethics Program Manager, EOUSA (Oct. 6, 1992); Fax cover sheet from Mac Dodson, First Assistant U.S. Attorney to Donna Henneman, Ethics Program Manager, EOUSA (Oct. 6, 1992) (Doc. No. 007087).

¹⁸⁶ Dodson 5/23/95 GJ at 32.

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ Raphaelson 3/28/95 Int. at 5.

¹⁹⁰ Id.

¹⁹¹ Id.

believed that Rich of the EOUSA confirmed there was a reporting requirement.¹⁹² Raphaelson thought he saw a copy of the referral before the telephone call from the USAO-EDAR.¹⁹³

11. The October 7, 1992 "Urgent Report".

After getting the referral, the EOUSA prepared an "Urgent Report."¹⁹⁴ The document was written by Donna Henneman, the Ethics Program Manager in the EOUSA's Legal Counsel's office.¹⁹⁵ The report attached a copy of C-0004, and was sent from Laurence McWhorter, Director of the EOUSA, to Attorney General William P. Barr, Deputy Attorney General George S. Terwilliger III, and Associate Attorney General Wayne A. Budd.¹⁹⁶ Copies went to Assistant Attorney General (Criminal Division) Robert S. Mueller III, and to Paul McNulty, Director of DOJ's Office of Policy and Communications.¹⁹⁷ Dodson was listed as the follow-up contact in

¹⁹² Id.

¹⁹³ Id.

¹⁹⁴ Urgent Report, United States Attorney Eastern District of Arkansas (Oct. 7, 1992) (Doc. No. 006641). However, there was evidence that it was created on October 6, 1992, but dated the next day because it was delivered following the close of business on October 6. Westbrook 1/20/95 Int. at 3.

¹⁹⁵ Henneman 7/25/94 Fiske Int. at 1.

¹⁹⁶ Urgent Report, United States Attorney Eastern District of Arkansas (Oct. 7, 1992) (Doc. No. 006641).

¹⁹⁷ Id. Raphaelson was not certain if McNulty knew about the referral; it is possible that his copy of the Urgent Report was retrieved. Raphaelson 3/28/95 Int. at 8. Raphaelson also did not think that Wayne Budd knew about the referral. Id. Budd said he did not remember seeing the referral but may have been at staff meetings where it was discussed. Budd 7/26/95 Int. at 2. Terwilliger, Mueller, and Dan Levin were all aware of the referral at this time. See Terwilliger 6/7/95 Int. at 1-2 (first learned of C-0004 some time after its submission and before the 1992 presidential election; not sure that he ever saw the October 7 Urgent Report); Mueller 3/27/95 Int. at 1, 3 (first learned of potential criminal problems with Madison Guaranty and the possible

the USAO-EDAR.¹⁹⁸

The Urgent Report said: "It is the belief of the U.S. Attorney's office that further investigation into this matter is warranted."¹⁹⁹ Banks did remember saying that to the EOUSA.²⁰⁰ Dodson did not remember making any such statement to anyone in the EOUSA.²⁰¹ Banks said that he did not disagree to the extent it applied to the McDougals and Aunspaugh.²⁰²

involvement of the Clintons in the Fall of 1992; saw the October 7, 1992 Urgent Report); Levin 6/2/95 Int. at 1 (fairly certain that he learned of C-0004 from Raphaelson, some time before the 1992 election, and he saw a copy of the referral at some point, probably after he learned of it).

¹⁹⁸ Urgent Report, United States Attorney Eastern District of Arkansas (Oct. 7, 1992) (Doc. No. 006641).

¹⁹⁹ Id. Henneman typed the Urgent Report, but did not know who told her to put the quoted statement in the document. Henneman 5/25/95 GJ at 7. Normally, the relevant United States Attorney's Office would send the EOUSA a case synopsis, but in the case of C-0004, that was not done; the USAO-EDAR simply sent a copy of the referral. Id. at 8.

²⁰⁰ Banks's best recollection is that he told Dodson to call Rich at the EOUSA about the referral. Banks 2/14/95 Int. at 4. Even so, he admitted that he then felt the allegations against the McDougals and Aunspaugh merited additional investigation "in due time." Banks 5/23/95 GJ at 79. He testified that he did not think the allegations against the witnesses merited issuing grand jury subpoenas at that point. Id.

²⁰¹ Dodson 5/23/95 GJ at 35-37.

²⁰² Banks 5/23/95 GJ at 79-80. E-mail from Laurence McWhorter, the Director of the EOUSA, to Ira Raphaelson, Special Counsel for Financial Institution, Fraud (Oct. 8, 1992) (Doc. No. 007214) stating in part: "Mac Do[d]son . . . called my folks on the 6th to say that he'd been sitting on the 'referral' for six weeks and wondered if he should let us know something. . . . He said that he thought some further investigation was needed"); see also Dodson 5/23/95 GJ at 37-38 (when shown the October 8, 1992 McWhorter e-mail, Dodson still could not remember saying that further investigation was warranted but assumed the allegations against McDougal would take more investigation).

12. The October 8, 1992 Meeting at Main Justice.

On October 8, 1992, a meeting about the referral was held in the office of Bob Mueller, the Assistant Attorney General for the Criminal Division. Raphaelson, Potts, Kubic, Verinder, Kendrick, and Dick attended.²⁰³

Mueller's best recollection was the USAO-EDAR had not proceeded on C-0004, and the FBI was concerned not enough was being done.²⁰⁴ He also got the sense the FBI in Little Rock was not happy with the USAO's pace.²⁰⁵ Mueller said the referral should be given appropriate and timely -- not extraordinary -- attention.²⁰⁶ Mueller thought someone had spoken with the attorney assigned to the matter in USAO-EDAR and determined the AUSA thought it was being properly handled.²⁰⁷ He vaguely recalled the AUSA mentioned that McDougal was previously

²⁰³ See Mueller 3/27/95 Int. at 2 (recalled a meeting in his office with Potts and others from DOJ and the FBI, whose names he could not recall); Potts 2/9/95 Int. at 1 (recalled an early October 1992 meeting at DOJ with other FBI personnel, and with Mueller, Raphaelson, "and others from the DOJ"); Kubic 3/8/95 Int. at 3 (recalled an October 8, 1992 meeting at DOJ attended by Mueller, Raphaelson, Kendrick, Verinder); Verinder 3/14/95 Int. at 2 (did not specifically remember the meeting, but was sure that if there was a meeting at DOJ about C-0004, he was there; he went to DOJ frequently and had frequent meetings with Raphaelson); Kendrick 3/13/95 Int. at 2 (recalled meeting at the DOJ about C-0004 along with Mueller, Raphaelson, Verinder and Dick); Dick 5/31/95 Int. at 2 (recalled that in the time frame he learned that the FBI in Little Rock had received a referral about Madison Guaranty and the Clintons, he attended a meeting in Mueller's office about the referral); Raphaelson 3/28/95 Int. at 8 (did not specifically remember meeting about C-0004 on October 8, 1992, but he was then spending a great deal of time with Mueller).

²⁰⁴ Mueller 3/27/95 Int. at 2.

²⁰⁵ Id.

²⁰⁶ Id.

²⁰⁷ Id.

tried and acquitted, and that many records had to be reviewed on C-0004.²⁰⁸ He also recalled the upcoming election was not to be an excuse to stall or push the referral's handling.²⁰⁹

Raphaelson did not specifically remember the October 8 meeting, but did remember telling the FBI -- either Kubic or Verinder -- that C-0004 was to be handled according to normal procedures.²¹⁰ He also remembered telling the FBI to make sure it agreed with USAO-EDAR's position on the referral.²¹¹

Potts remembered Mueller said the referral should be handled normally.²¹² He also recalled that Justice officials at the meeting felt that more information was needed to decide what should be done.²¹³ They wanted to know what the FBI knew or what it could find out to help make a decision.²¹⁴

Kubic recalled that during the meeting, the FBI passed on the information it had about the referral, that the Clintons were mentioned as witnesses, and the Bureau had none of the supporting documents.²¹⁵ The FBI decided the case should be handled like any other; the Little Rock Division would review the relevant supporting documents, obtain the opinion of the U.S.

²⁰⁸ Id.

²⁰⁹ Id. at 2-3.

²¹⁰ Raphaelson 3/28/95 Int. at 8.

²¹¹ Id.

²¹² Potts 3/2/95 Int. at 1.

²¹³ Id.

²¹⁴ Id.

²¹⁵ Kubic 3/8/95 Int. at 3.

Attorney, and then advise FBIHQ of the results.²¹⁶ Mueller and Raphaelson both agreed.²¹⁷ The meeting lasted for thirty minutes or less, and Kubic did not think that Justice officials put pressure on the FBI.²¹⁸

Kendrick recalled that Verinder and the Justice officials present at the meeting talked about the timing of the referral, and Mueller said C-0004 should be treated like any other case.²¹⁹ Verinder told the Justice officials the FBI was not going to do anything until FBI-Little Rock had a chance to go through the exhibits.²²⁰ Verinder did not think the Justice people present were trying to pressure the FBI into opening a case right away.²²¹ He had the opposite impression.²²² The Justice representatives emphasized the matter should be handled in the regular course like any other RTC criminal referral.²²³ The conclusion reached was that the FBI should conduct a limited investigation and guard against leaks in light of the election.²²⁴

Dick recalled that during the October 8 meeting Mueller said that C-0004 was to be treated like any other RTC criminal referral.²²⁵ He said no one from the Justice Department tried

²¹⁶ Id.

²¹⁷ Id. at 3-4.

²¹⁸ Id. at 4.

²¹⁹ Kendrick 3/13/95 Int. at 2.

²²⁰ Id.

²²¹ Id.

²²² Id.

²²³ Id.

²²⁴ Id.

²²⁵ Dick 5/31/95 Int. at 2.

to tell the FBI what to do, beyond requesting a review of the referral to determine whether it had any substance.²²⁶

13. Mueller Sent a Copy of the Referral to Keeney.

On October 9, 1992, Mueller sent a buck slip to Jack Keeney, a career official in the Department of Justice who was the Deputy Assistant Attorney General for the Criminal Division.²²⁷ Mueller wrote : "Let's discuss after you have read."²²⁸ Mueller said copies of the referral and the October 7 Urgent Report were probably attached.²²⁹ Mueller wanted to let Keeney know what had happened in the meeting with the FBI officials.²³⁰ At his grand jury appearance, Mueller agreed the referral "was not necessarily in Mr. Keeney's bailiwick" because financial institution fraud was not part of Keeney's responsibilities.²³¹ But Keeney was in charge of the Public Integrity Section, and he had been in the Department for decades with experience on matters that could cause scandals.²³² Mueller considered him wise, and would seek him out even on matters not part of Keeney's responsibilities.²³³ Mueller did not remember discussing the

²²⁶ Id.

²²⁷ Copy of buck slip from Robert Mueller, Assistant Attorney General or the Criminal Division to Jack Keeny, Deputy Assistant Attorney General for the Criminal Division Ref. Discuss C-0004 after Mueller read (Oct. 9, 1992) (Doc. No. 007157).

²²⁸ Id.

²²⁹ Mueller 5/25/95 GJ at 26.

²³⁰ Mueller 3/27/95 Int. at 5.

²³¹ Mueller 5/25/95 GJ at 26.

²³² Id. at 27.

²³³ Id.

matter with Keeney in response to his October 9 note, but he guessed that "in all probability" he did.²³⁴

Keeney did not remember the October 9 note from Mueller, but he had no reason to doubt he got it.²³⁵ Keeney recalled hearing about the case at about that time.²³⁶ He assumed he heard about it because he discussed it with Mueller within a day or so of the note.²³⁷

14. The October 9, 1992 Teletype to FBI-Little Rock from FBIHQ.

After the October 8 meeting, Potts ordered that FBI-Little Rock be told to review the referral and discuss it with USAO-EDAR.²³⁸ Unit Chief Dick told Kendrick what instructions should be sent to the FBI in Little Rock.²³⁹ Kendrick drafted a teletype that was sent to Little Rock on October 9, 1992.²⁴⁰

AS DISCUSSED . . . , AN FIF [FINANCIAL INSTITUTION FRAUD] INVESTIGATION IS WARRANTED IN CAPTIONED MATTER. THEREFORE, LITTLE ROCK SHOULD INITIATE A LIMITED INVESTIGATION AIMED AT DETERMINING THE EXTENT OF VIOLATIONS AS ALLEGED IN THE [RTC'S] CRIMINAL REFERRAL FORM, DATED 9/1/92.

²³⁴ Id.

²³⁵ Keeney 4/7/95 Int. at 2.

²³⁶ Keeney 7/6/95 GJ at 4.

²³⁷ Id. at 4-5.

²³⁸ Potts 2/9/95 Int. at 2.

²³⁹ Kendrick 3/13/95 Int. at 2-3.

²⁴⁰ Teletype drafted by Kendrick sent to Little Rock (Oct. 9, 1992) (Doc. Nos. KBK 0000040 through 41); see also Administrative Note/Tickler Count from Kendrick sent to Little Rock attachment to teletype (Oct. 9, 1992) (Doc. No. KBK 0000039).

LITTLE ROCK SHOULD OBTAIN FROM THE U.S. ATTORNEY AND REVIEW THE DOCUMENTS REFERENCED IN THE CRIMINAL REFERRAL. IN ORDER TO PROTECT THE IDENTITIES OF PASSIVE INVESTORS AND/OR WITNESSES, LITTLE ROCK SHOULD NOT CONDUCT ANY OVERT INVESTIGATION SUCH AS WITNESS INTERVIEWS OR SERVING OF GRAND JURY SUBPOENAS AT THIS TIME. IN ADDITION, THE DOCUMENTS SHOULD BE AFFORDED APPROPRIATE SECURITY SO AS TO MAINTAIN THE PRIVACY OF THE WITNESSES.

LITTLE ROCK IS REQUESTED TO SUBMIT RESULTS OF THIS LIMITED INVESTIGATION AND ANTICIPATED INVESTIGATIVE AND PROSECUTIVE PLANS BY COB, 10/16/92, TO FBIHQ . . . ATTENTION: SSA KEVIN B. KENDRICK.²⁴¹

²⁴¹ Cover sheet and page 2 of Teletype drafted by Kendrick sent to Little Rock (Oct. 9, 1992) (Doc. Nos. KBK 0000040 through 41) (upper case in original). The substance of the October 9, 1992 teletype was set out in its first two pages. A third page (Doc. No. KBK 0000039) bears the heading "Administrative Note/Tickler Count." This note provides additional corroboration for the October 8, 1992 meeting and the substance of the discussion that took place then. It reads, in pertinent part, as follows: "ON 10/8/92, BUREAU OFFICIALS MET WITH ASSISTANT AG ROBERT MUELLER AND SPECIAL COUNSEL IRA RAPHAELSON, OF THE DOJ. AAG MUELLER ADVISED THAT DOJ DID NOT HAVE ENOUGH INFORMATION AT THIS TIME TO RENDER ANY KIND OF OPINION AND THAT FBIHQ SHOULD MAKE A DETERMINATION REGARDING AN INVESTIGATIVE COURSE OF ACTION. AAG MUELLER ADDED THAT THIS MATTER SHOULD NOT BE TREATED ANY DIFFERENTLY THAN ANY OTHER SIMILAR FIF INVESTIGATION ADDRESSED BY THE FBI AND DOJ." Mueller said this text reflects what he recalled about the October 8 meeting. Mueller 3/27/95 Int. at 4. He had no intent to have the FBI exert any pressure about a Madison Guaranty investigation. *Id.* The statement up front in the October 9 teletype, to the effect that an "investigation is warranted," was not a part of his instructions about the handling of the referral. Mueller 3/27/95 Int. at 5. He did not remember using the terminology "limited investigation," which also was part of the teletype. *Id.* He also said the teletype was generally consistent with his memory of the October 8 meeting. *Id.* at 5. The FBIHQ's instructions to the FBI in Little Rock to review the referral's supporting documents was an acceptable procedure to Mueller so long as such a review was standard practice. *Id.* Potts supported that point, and said a review of the referral's supporting documentation was part of normal procedure. Potts 2/23/95 Int. at 1. Raphaelson said the administrative notes to the teletype were not inconsistent with his impression at the time that the FBI wanted to know from Mueller and Raphaelson whether, as prosecutors, they felt C-0004 had merit. Raphaelson 3/28/95 Int. at 9. The FBI would have been

After he gave his directions, Potts spoke to Don Pettus, the FBI Special Agent in Charge in Little Rock.²⁴² Potts believed this followed Pettus's receipt of a teletype containing instructions on C-0004.²⁴³ According to Potts, Pettus was unsure that the FBI should do anything with the referral, and that it might not be significant enough to justify the opening of any investigation.²⁴⁴ Potts told Pettus to have someone look at the referral's facts, review the exhibits, inform the U.S. Attorney of the findings, and then get the USA's decision, as in any case.²⁴⁵ Potts recalled concern about the presidential election, so Potts directed that no overt action be taken.²⁴⁶ Pettus was reluctant to take any action then, but wanted the work done.²⁴⁷ Pettus agreed to proceed.²⁴⁸

told that more information was needed before such a decision could be made. Id. He opined the information in the October 9 teletype and the administrative notes following it easily could have been paraphrased from statements made by Mueller or Raphaelson. Id. He also believed the message would have been conveyed that no one in the higher-ups of Justice would make a determination on the referral until after the presidential election in November. Id. at 10. Raphaelson recalled there was about three weeks until the election, and he then believed the referral could be dealt with after the election if Governor Clinton lost. Id. If he won, then the responsibility for the referral could be shifted to the new Administration's appointees at DOJ. Id.

²⁴² Potts 2/9/95 Int. at 2. Potts could not remember if he phoned Pettus or vice versa. Id. The phone call took place either on the same day that Potts issued his instruction that Little Rock was to review the referral, or shortly thereafter. Id.

²⁴³ Id.

²⁴⁴ Id.

²⁴⁵ Id.

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ Id.

Verinder recalled a conference call with Pettus.²⁴⁹ Potts, Verinder, and another FBI official who Verinder could not remember were present.²⁵⁰ Verinder said the conversation became heated.²⁵¹ Pettus was troubled by FBIHQ's instructions about C-0004, but Verinder could not remember why.²⁵² Verinder recalled that Potts asked Verinder and the other official to leave the room so that he could speak to Pettus.²⁵³ Verinder did not learn about the details of the private conversation between Potts and Pettus.²⁵⁴

15. Little Rock Reacted to the October 9, 1992 Teletype.

Pettus had a telephone conversation with Verinder about the first McDougal prosecution.²⁵⁵ Pettus also recalled another conversation with Potts.²⁵⁶ Pettus believed Potts wanted to be certain he had all the facts, so Pettus discussed the first McDougal matter.²⁵⁷ There had been a full investigation, and a full trial ending in McDougal's acquittal.²⁵⁸ Pettus said his office was "coordinating fully with [Mr. Banks's] office" and that fairness was their concern.²⁵⁹

²⁴⁹ Verinder 3/14/95 Int. at 2.

²⁵⁰ Id.

²⁵¹ Id.

²⁵² Id.

²⁵³ Id.

²⁵⁴ Id.

²⁵⁵ Pettus 6/6/95 GJ at 16.

²⁵⁶ Id. at 26.

²⁵⁷ Id.

²⁵⁸ Id.

²⁵⁹ Id. at 26-27.

He testified that as a result, FBIHQ sent the October 9 teletype, requesting a "limited" or "preliminary" inquiry, basically a determination that the referral alleged criminal violations.²⁶⁰ In Pettus's view, FBIHQ may have been upset because it thought Little Rock was doing nothing.²⁶¹ Once Pettus explained the background of the matter, that the USAO had everything, and the presidential election was coming up, he thought Headquarters was more sympathetic and agreed that only a limited investigation should be done.²⁶²

16. The Irons/Hall Review of the Referral and its Exhibits.

Following receipt of the instructions from FBIHQ to conduct a limited review of the referral, Irons and Gretchen Hall, a financial analyst assigned to the FBI's Little Rock office, went to the USAO-EDAR to examine the referral's exhibits.²⁶³ Banks had the exhibits brought to a conference room, along with several Whitewater newspaper articles.²⁶⁴ Irons and Hall spent two days going over the material, documenting their review.²⁶⁵

Their conclusion was there appeared to be a case worthy of additional investigation against the McDougals.²⁶⁶ Although the Clintons were mentioned in the referral, there was no

²⁶⁰ Id. at 27.

²⁶¹ Id. at 27-28.

²⁶² Id. at 27-31.

²⁶³ Irons 2/14/95 Int. at 5; Hall 2/16/95 Int. at 1.

²⁶⁴ Hall 2/16/95 Int. at 1.

²⁶⁵ Id.

²⁶⁶ Id.

evidence they were involved in any crimes.²⁶⁷ The Clintons did not sign any checks and did not have signatory authority on a number of relevant Whitewater accounts.²⁶⁸ Irons and Hall concluded that an additional investigation was needed.²⁶⁹

Hall recalled that Banks did not participate in the review and it was her impression that no one, other than Banks, had reviewed the exhibits yet.²⁷⁰ After Irons and Hall completed their review, they met with Banks, who said the timing of the referral made him suspect a political agenda.²⁷¹ Banks did not say who he suspected.²⁷² Irons said to Banks that he felt that additional documents were needed and he wanted to initiate a discreet follow-up investigation.²⁷³

The exhibits remained in Banks's office, and the FBI did not make copies.²⁷⁴ Hall prepared a memorandum summarizing their conclusions.²⁷⁵

²⁶⁷ Id.

²⁶⁸ Id.

²⁶⁹ Id. at 1-2.

²⁷⁰ Id. at 2.

²⁷¹ Id.

²⁷² Id.

²⁷³ Id.

²⁷⁴ Id.

²⁷⁵ Id. The Memorandum, dated October 15, 1992, was directed to Irons, and its stated purpose was to "assess the merits" of C-0004. Her conclusion, in part, was there was a relationship between Bill and Hillary Clinton, Jim Guy Tucker, and the McDougals but that "the [R]eferral and exhibits are weak in pointing out whether this relationship is of a criminal nature warranting further investigation. It is apparent, however, there exists a strong case against Jim and Susan McDougal for their misconduct and misuse of position with regard to the institution, for who better than they could have controlled the situation?" White Water Development Corporation Transaction Statement attachment to Memo from Gretchen Hall, Financial Analyst,

17. The October 14, 1992 Follow-Up Meeting with Banks.

Because of the October 9, 1992 teletype, there was a follow-up meeting with Banks some time before October 16, 1992.²⁷⁶ The participants included Banks, Dodson, Pettus, Whitehead, and Irons.²⁷⁷

Banks recalled another meeting with FBI-Little Rock -- though not when -- where Pettus demonstrated a "sense of urgency."²⁷⁸ Banks characterized Pettus normally would not get personally involved unless he "had an extreme interest."²⁷⁹ Banks said "all of sudden, we had this FBI pressure that something had to be done by October 16th."²⁸⁰ Banks thought it was the witnesses rather than McDougal who were creating the interest.²⁸¹ He assumed there had been contact between the FBI and Main Justice, though no one told him this.²⁸² Banks sensed that an "investigation, analysis, or decision" was being done on a time frame set by FBIHQ, and it would

FBI to Steven Irons, Special Agent FBI (Oct. 15, 1992) (Doc. No. JME-00000068). Hall said after she wrote the Memorandum, any decisions about what was to be done with C-0004 rested with the Department of Justice, the United States Attorney's Office in Little Rock, and FBIHQ. From her perspective, the matter simply died as far as any follow-up work by the FBI. She did not do any additional Madison Guaranty or McDougal-related work until several months later (possibly April 1993) when an auxiliary lead came in from FBI-Newark. Hall 2/16/95 Int. at 2.

²⁷⁶ Irons placed the meeting "on or about" October 14, 1992. Irons 2/14/95 Int. at 5.

²⁷⁷ Id. Whitehead recalled there was a follow-up meeting involving Banks and Pettus, but he could not remember attending it. Whitehead 3/1/95 Int. at 2.

²⁷⁸ Banks 5/23/95 GJ at 82.

²⁷⁹ Id. at 83.

²⁸⁰ Id.

²⁸¹ Id.

²⁸² Id.

lead to "doing something right now with the grand jury."²⁸³

Banks recalled that sometime between October 9 and 16, Irons and Hall came to the USAO and reviewed the exhibits.²⁸⁴ He thought he reviewed the referral again as well.²⁸⁵ Banks thought from speaking with Pettus that "people [were] trying to get me to issue . . . subpoenas before this election," and he testified that he would have resigned before doing that.²⁸⁶ Banks agreed the only one who "seemed" to be asking him to issue subpoenas was Lewis.²⁸⁷ He did not remember Pettus or Irons asking him to do so.²⁸⁸

Dodson recalled a meeting with Pettus and Irons at some point between October 6 and 16, 1992, and thought Whitehead was also present.²⁸⁹ Dodson was present for only part of the meeting, but he recalled FBI-Little Rock indicating that it had been asked to go forward with an investigation on the referral.²⁹⁰ There was a general discussion of concern that the case might be jeopardized if subpoenas were issued at that time.²⁹¹ Dodson said that FBI-Little Rock did not think the eve of the election was the right time to start moving the investigation.²⁹² Dodson

²⁸³ Id. at 83-84.

²⁸⁴ Id. at 84.

²⁸⁵ Id. at 85.

²⁸⁶ Id. at 87-88.

²⁸⁷ Id. at 88.

²⁸⁸ Id.

²⁸⁹ Dodson 5/23/95 GJ at 39-40.

²⁹⁰ Hall 5/23/95 GJ at 40.

²⁹¹ Dodson 5/23/95 GJ at 40.

²⁹² Id. at 40-41.

thought that FBI-Little Rock wanted the USAO to say, "Don't do it" if FBIHQ ordered them to go forward.²⁹³

Dodson said the referral had been in Little Rock for some time, and there had been no criticism of the way it was being handled.²⁹⁴ The tone of this meeting, however, indicated that FBI-Little Rock wanted to report immediately.²⁹⁵ Dodson felt the local FBI agents would not have behaved that way unless "somebody above them" was pressuring them.²⁹⁶

Pettus remembered speaking with Banks about communications received from FBIHQ.²⁹⁷ Pettus believed that Banks was concerned with the timing of the referral.²⁹⁸ Pettus was "talking to our people [i.e., FBIHQ]" and Pettus "assumed that [Banks] was probably talking to his . . . counterparts."²⁹⁹ Pettus agreed that before the election, Little Rock should not issue subpoenas and conduct witness interviews.³⁰⁰ He was fairly sure a consensus existed that C-0004 would be examined again following the election.³⁰¹

Irons told the others he thought the referral warranted additional investigation of the

²⁹³ Id. at 41.

²⁹⁴ Id.

²⁹⁵ Id.

²⁹⁶ Id.

²⁹⁷ Pettus 6/6/95 GJ at 32.

²⁹⁸ Id.

²⁹⁹ Id.

³⁰⁰ Pettus 5/10/95 Int. at 4.

³⁰¹ Id.

McDougals and Aunspaugh.³⁰² Irons agreed with Banks and Pettus that investigation should wait until after the November 1992 election.³⁰³ Irons noted that Madison Guaranty had failed some five or six years before, so there was no need to open an investigation immediately.³⁰⁴

18. The October 16, 1992 Teletype from FBI-Little Rock to FBIHQ.

On October 16, 1992, FBI-Little Rock sent a teletype to FBIHQ.³⁰⁵ The teletype referred to Headquarters' October 9, 1992 teletype to Little Rock and to a telephone call on October 9 from the "SAC, Little Rock" (i.e., Pettus) with FBIHQ.³⁰⁶ The teletype read as follows:

AS DISCUSSED IN REFERENCED TEL[EPHONE] CAL[L], LITTLE ROCK WILL NOT INITIATE AN INVESTIGATION OF CAPTIONED MATTER [I.E., MADISON GUARANTY AND JAMES MCDUGAL].

DURING THE PERIOD OCTOBER 9-16, 1992, U.S. ATTORNEY (USA), EASTERN DISTRICT OF ARKANSAS . . . AND WHITE-COLLAR CRIME SUPERVISOR AND FINANCIAL ANALYST, FBI, LITTLE ROCK, CONDUCTED AN EXTENSIVE REVIEW OF THE REFERRAL AND ALL OF THE APPROXIMATELY 300 EXHIBITS FURNISHED TO USA BY RESOLUTION TRUST CORPORATION (RTC). USA CONCURS THERE IS ABSOLUTELY NO FACTUAL BASIS TO SUGGEST CRIMINAL ACTIVITY ON THE PART OF ANY OF THE INDIVIDUALS LISTED AS WITNESSES IN THE REFERRAL. USA FEELS THE LIMITED DATA FURNISHED MAY INDICATE CRIMINAL ACTIVITY ON THE PART OF CAPTIONED SUBJECTS, JAMES AND SUSAN MCDUGAL, AND LISA A[U]NSPAUGH. HOWEVER, USA IS HOLDING PROVISION OF A PROSECUTIVE OPINION

³⁰² Irons 2/14/95 Int. at 5.

³⁰³ Id.

³⁰⁴ Id.

³⁰⁵ Teletype from FBI-Little Rock to Director of FBI, Referencing Teletype from FBI-Little Rock to Director of FBI, October 9, 1992 (Oct. 16, 1992) (Doc. Nos. JME-0000021 through 24).

³⁰⁶ Id. at 1 (Doc. No. JME-0000021).

REGARDING THOSE SUBJECTS IN ABEYANCE.³⁰⁷

The teletype summarized prior communications about the prior indictment, trial, and acquittal of McDougal, and said he had no assets to pursue.³⁰⁸ It noted the available facts indicated that one or more federal violations might exist, but the USAO was "CONSIDERING THE LIKELIHOOD OF PROVING SUCH VIOLATIONS AND THE MANPOWER OPPORTUNITY COST TO OTHER PRIORITY INVESTIGATIONS" of investigating McDougal again.³⁰⁹ Finally, the October 16 teletype mentioned that FBI-Little Rock was awaiting referrals from the RTC about two large thrift failures in Arkansas – Savers Savings and First Federal, whose losses were \$650 million and \$900 million. The teletype said the loss at Madison Guaranty was \$47.7 million.³¹⁰ FBI-Little Rock asked Headquarters to contact the RTC and ask it to prepare referrals on Savers Savings and First Federal, both of which were viewed by Little Rock as having "much greater prosecutive potential" than Madison Guaranty.³¹¹

Pettus said the teletype accurately reflected his feelings about the referral then.³¹² The "extensive review" of the referral and its exhibits constituted, in Pettus's view, the "limited" investigation that FBIHQ had directed in its October 9 teletype.³¹³ Banks mostly agreed with the

³⁰⁷ Id. at 1-3.

³⁰⁸ Id.

³⁰⁹ Id.

³¹⁰ Id.

³¹¹ Id.

³¹² Pettus 5/10/95 Int. at 4.

³¹³ Pettus 6/6/95 GJ at 35.

teletype's assessment of his attitude then.³¹⁴ He said if the language meant that he was withholding judgment on whether to move against McDougal until after the election, then "that's what I was saying to them."³¹⁵

19. FBIHQ Received the October 16 Teletype.

Potts recalled receiving the October 16 teletype stating the USAO-EDAR's view that the referral did not warrant opening an investigation then.³¹⁶ Potts said according to usual procedures, the FBI would not open an investigation if the U.S. Attorney did not deem it appropriate.³¹⁷ Potts understood from Pettus that even if USAO-EDAR said an investigation was appropriate, it would have been put behind other priority matters pending in the Little Rock Division.³¹⁸ Potts also recalled Pettus strongly agreeing with Banks's position that the referral might warrant an investigation, but should not be initiated then.³¹⁹ For his part, Potts's position was the Bureau would conduct an investigation if needed, but he wanted an assessment of the referral done in a way that did not negatively affect anyone without cause.³²⁰

After the teletype, Potts's position was that the FBI would take no action on the referral until after the election; he did not think the USAO-EDAR had declined the matter, and believed

³¹⁴ Banks 5/23/95 GJ at 85-96.

³¹⁵ Id. at 89-90.

³¹⁶ Potts 2/9/95 Int. at 2-3.

³¹⁷ Id. at 3.

³¹⁸ Id.

³¹⁹ Id.

³²⁰ Id.

the referral would be revisited.³²¹ Verinder agreed with the October 16 teletype, and thought the U.S. Attorney had courage and did the right thing by not pushing an investigation before the election.³²² Dick said once Little Rock's October 16 teletype was received, the matter was in a holding pattern until follow up after the election.³²³ Kubic thought the teletype was an accurate assessment of the referral.³²⁴

20. FBIHQ Transmitted a Copy of the October 16 Teletype to Main Justice.

Potts wrote out a buck slip dated October 19, 1992 transmitting a copy of the October 16 teletype to Mueller at Main Justice.³²⁵ Potts wrote: "I have discussed with [SAC Pettus] and agree with the contents of this teletype [i.e.] no investigation is justified at this time."³²⁶

Mueller thought the matter was being appropriately handled.³²⁷ His rationale was that the teletype said the FBI had reviewed the matter; the FBI in Little Rock was comfortable with the decision that no additional investigative activity was warranted then; and the U.S. Attorney in Little Rock was also comfortable with that stance.³²⁸ Mueller was sure that if Raphaelson had not

³²¹ Potts 2/9/95 Int. at 3-4.

³²² Verinder 3/14/95 Int. at 3.

³²³ Dick 5/31/95 Int. at 2.

³²⁴ Kubic 3/8/95 Int. at 4.

³²⁵ Buck Slip from SA Potts, FBI to Mueller referencing teletype from Little Rock (Oct. 19, 1992) (Doc. No. 000502).

³²⁶ Id. Mueller did not remember receiving the slip, but he said he "undoubtedly did." Mueller 5/25/95 GJ at 30.

³²⁷ Mueller 5/25/95 GJ at 33.

³²⁸ Id.

received a copy of Potts's slip, then he would have told Raphaelson about the results or made certain that Raphaelson got a copy.³²⁹

Raphaelson recalled "something like" Potts's October 19 buck slip, and that at some point he saw a copy of FBI-Little Rock's October 16 teletype.³³⁰ He was not satisfied because he was distrustful of FBI-Little Rock for having withheld information from FBIHQ.³³¹ He testified there was nothing for him to do then because he did not feel he should put his judgment in conflict with FBI-Little Rock until after the election.³³²

21. Banks's October 16, 1992 Letter.

Banks wrote to Pettus at the FBI in Little Rock on October 16, 1992.³³³ Banks wrote he was following up on his "previous meeting" with Pettus.³³⁴ Banks restated his "serious reservations" about prosecuting the individuals listed in C-0004.³³⁵ Banks opined there was no case provable beyond a reasonable doubt against any of the witnesses, though Banks said they may have exhibited "poor judgment, possible conflicts of interest or ethical infractions."³³⁶ Banks

³²⁹ Mueller 5/25/95 GJ at 34.

³³⁰ Raphaelson 6/6/95 GJ at 46-47.

³³¹ Id. at 47-48.

³³² Id. at 48.

³³³ Letter from Charles A. Banks, United States Attorney Eastern District of Arkansas to Mr. Don Pettus, Special Agent in Charge, FBI-Little Rock (Oct. 16, 1992) (Doc. Nos. 007088 through 89). The letter indicates that it was dictated on October 14, 1992. See id. at 1.

³³⁴ Id.

³³⁵ Id.

³³⁶ Id.

identified the McDougals and Aunspaugh as the only individuals "worthy of possible deliberation for investigation."³³⁷ Banks expressed doubt about going forward in light of McDougal's previous acquittal, his then-current ill mental health, and the low probability of recovering any of Madison Guaranty's losses.³³⁸ Banks continued:

I am now advised that you have been ordered to do an immediate review to determine if in[v]estigation is warranted. As part of same, you are required to send a prospective proposal for such investigation by Friday, October 16, 1992. Such an order does not apply to this office.

However, I do believe it might be helpful to reiterate what I have told you previously. Neither I personally nor this office will participate in any phase of such an investigation regarding [C-0004] prior to November 3, 1992. You may communicate this orally to officials of the FBI or you should feel free to make this part of your report.³³⁹

Banks said the referral was an attempt to influence the election.³⁴⁰ He said it was "inappropriate" for him to participate in such an investigation, and that doing so would amount to "prosecutorial misconduct . . . detrimental to the Department of Justice, FBI, this office and to the President of the United States."³⁴¹

Banks's letter concluded:

In due time, I will be happy to meet with you to discuss a limited examination and [the] possibility of proving some of the allegations regarding Mr. and Mrs. McDougal and A[u]nspaugh. In the event I conclude that their case

³³⁷ Id.

³³⁸ Id.

³³⁹ Id.

³⁴⁰ Id.

³⁴¹ Id.

should be declined, which at this point is a distinct possibility, the DOJ can certainly override that decision and commit Department of Justice personnel and resources to both the investigation and prosecution of the case.³⁴²

Banks had the impression that Pettus was being ordered to do something overt before the election, and he wanted no part of that.³⁴³ He agreed there was nothing wrong with doing an "immediate review," but he testified that he understood Pettus's orders differently then.³⁴⁴ He thought that such a review had been done.³⁴⁵ Banks later said he may have "miscommunicated."³⁴⁶ He said the referral had been at Main Justice since October 6, and he had heard nothing.³⁴⁷

Banks sent a copy of his October 16 letter to Henneman at the EOUSA in Washington.³⁴⁸ Banks felt if he was doing anything wrong on the referral, then he would have heard something from Main Justice. Banks said if the "hot-button line" (the urgent reporting system) worked as intended he would get a response back in a hurry.³⁴⁹ He did not.³⁵⁰

³⁴² Id.

³⁴³ Id.; Banks 5/23/95 GJ at 90-99.

³⁴⁴ Banks 5/23/95 GJ at 96-97.

³⁴⁵ Id.

³⁴⁶ Id. at 95-96.

³⁴⁷ Id. at 97.

³⁴⁸ Copy of October 16, 1992 transmittal letter from Charles A. Banks, United States Attorney, Eastern District of Arkansas to Donna Henneman, Executive Office United States Attorney, Ref. RTC Referral No. C0004 (Oct. 16, 1992) (Doc. No. 000091).

³⁴⁹ Banks 5/23/95 GJ at 100.

³⁵⁰ Id.

22. Main Justice Received Banks's October 16 Letter.

A copy of Banks's October 16 letter arrived at Main Justice on October 20, 1992.³⁵¹ The EOUSA prepared an Urgent Report, to "update" the prior October 7.³⁵² Barr could not remember the October 20 Urgent Report, but he did remember hearing about a letter in which Banks criticized the FBI's handling of the referral.³⁵³

Mueller knew that he saw the October 20 Urgent Report with the attached Banks letter at some point.³⁵⁴ He took no action on the letter.³⁵⁵ He thought that Main Justice had done the right thing, and that Banks was "overreacting," because to Mueller's understanding, no one was pushing for an investigation.³⁵⁶ Other than that, Mueller agreed with Banks's posture.³⁵⁷

³⁵¹ Copy of October 16, 1992 transmittal letter from Charles A. Banks, United States Attorney, Eastern District of Arkansas to Donna Henneman, Executive Office United States Attorney, Legal Counsel, date stamped October 20 Ref. RTC Referral No. C0004 (Oct. 16, 1992) (Doc. No. 000091).

³⁵² Urgent Report transmitting to listed recipients a copy of Banks's October 16 letter and a copy of the earlier, October 7 Urgent Report (Oct. 20, 1992) (Doc. No. 007153).

³⁵³ Barr 6/2/95 Int. at 6-7. Barr was upset because at no time did he, or anyone working for him, suggest to Banks that USAO-EDAR should do something with the referral that would be considered improper. Id.

³⁵⁴ Mueller 5/25/95 GJ at 35.

³⁵⁵ Id. After reviewing the October 16 Banks letter, Mueller testified that in retrospect, he was not sure if he ever saw the teletype from FBIHQ to FBI-Little Rock directing that a preliminary investigation be undertaken (the October 9 teletype); in his view, that directive went beyond what he recalled discussing at his meeting with FBI officials. Id.

³⁵⁶ Id. at 36.

³⁵⁷ Id.

23. Mueller's October 23, 1992 Note to Keeney.

On October 23, 1992, Mueller sent the October 19 Potts buck slip and a copy of FBI-Little Rock's October 16 teletype to Keeney. Accompanying those documents was a buck slip from Mueller to Keeney that read: "FYI."³⁵⁸ Mueller sent this material to Keeney to keep him apprised so Mueller could get his advice in the future if any additional steps were taken.³⁵⁹

Keeney recalled the note.³⁶⁰ He endorsed on the buck slip's bottom the notation: "I don't see us as involved at this point. Bureau's position is reasonable."³⁶¹ He sent the note and accompanying materials to Gerald McDowell, the Chief of the Fraud Section, for the latter's information.³⁶²

24. The Period between October 23 and the Election.

This Office interviewed Mueller about the reasons why Main Justice took no action during October 1992. He said the referral was within the jurisdiction of USAO-EDAR, and nothing had happened to trigger Main Justice's involvement.³⁶³ The matter had not progressed

³⁵⁸ Buck slip from Bob Mueller, Assistant Attorney General, Criminal, to John B. Keeney, Deputy Assistant Attorney General Criminal Division, DOJ, FYI (Oct. 23, 1992) (Doc. No. 000500). See Mueller 5/25/95 GJ at 36-37.

³⁵⁹ Mueller 5/25/95 GJ at 37.

³⁶⁰ Keeney 4/7/95 Int. at 3.

³⁶¹ Buck slip from Bob Mueller, Assistant Attorney General, Criminal Division, to John B. Keeney, Deputy Attorney General Criminal Division, DOJ, FYI (Oct. 23, 1992) (Doc. No. 000500).

³⁶² Id.; Keeney 4/7/95 Int. at 2. Although McDowell did not remember seeing the note, he recalled seeing the October 16 teletype at some point. McDowell 5/12/95 GJ at 19-20.

³⁶³ Mueller 3/27/95 Int. at 7.

enough to require Main Justice's approval to proceed.³⁶⁴ Mueller viewed his role as making certain the matter was being appropriately handled, and the referral's naming of the Clintons as witnesses did not alter that approach.³⁶⁵ He wanted to avoid any appearance that the Justice Department was improperly involved.³⁶⁶ Once he was satisfied the matter was being handled properly, his involvement was over.³⁶⁷

B. Post-Election Handling of the Referral.

1. The Referral's Status in USAO-EDAR from November 3, 1992 to January 27, 1993.

Banks testified that after the November election, he started making plans to return to private practice.³⁶⁸ He assumed that if the referral had merit, it would be taken up by Main Justice.³⁶⁹ He did not think he assigned the referral for action in his office.³⁷⁰ He did not give a specific reason for not assigning it other than "the same sense of sensitivity" that existed before the election.³⁷¹ Banks said he heard nothing from either the FBI or the Justice Department, and he was working on other matters, so the referral "was just sitting there pending."³⁷²

³⁶⁴ Id.

³⁶⁵ Id. at 6.

³⁶⁶ Id.

³⁶⁷ Id.

³⁶⁸ Banks 5/23/95 GJ at 103-04.

³⁶⁹ Id. at 105.

³⁷⁰ Id.

³⁷¹ Id. at 105-06.

³⁷² Id. at 106.

Banks believed that if "somebody" needed to move forward with an investigation, that was something that he would not be allowed to do, and he would have asked to be recused "due to his position" and because he was going to leave his post.³⁷³ Banks still had a nomination to the federal bench pending in the Senate and felt with President Clinton in office, moving forward on C-0004 would have appeared politically vindictive.³⁷⁴

Banks thought C-0004 was Main Justice's case after the referral and his letter had been sent to the EOUSA.³⁷⁵ He insisted he believed that once he sent the referral to Washington via the "hot button" route, given the allegations against the witnesses (including the Clintons), "the roof would come off," and he would hear "something back in a hurry."³⁷⁶ Instead, he was met with "dead silence," which indicated to him there was no urgency.³⁷⁷ Banks did not believe Main Justice could have interpreted his prior actions and correspondence to mean that USAO-EDAR would move on C-0004 after the election.³⁷⁸

Dodson knew he also would be leaving because of the election results, and he did not see any urgency to moving forward on C-0004 when he could not finish it.³⁷⁹ Dodson also thought

³⁷³ Id. at 108-09.

³⁷⁴ Id. at 107-08.

³⁷⁵ Id. at 106-07.

³⁷⁶ Id. at 110, 112.

³⁷⁷ Id. at 110-12.

³⁷⁸ Id. at 113.

³⁷⁹ Dodson 2/15/95 Int. at 7; Dodson 5/23/95 GJ at 52-53.

that Justice's silence indicated that Justice agreed with the USAO's position.³⁸⁰ He also thought his office had a conflict, in the sense that proceeding on the referral would appear like "one last blow at Clinton."³⁸¹ He did not think the referral would be left for handling in the hands of the USAO-EDAR; he thought the Justice Department would take up the referral, or a special prosecutor would be appointed.³⁸²

2. Main Justice's Posture on the Referral from November 3, 1992 to January 27, 1993.

After the November 1992 election, Barr felt that both the FBI and career professionals in the Criminal Division of the Justice Department were aware of the referral and would insure that it was properly handled.³⁸³

Raphaelson also did nothing about the referral after the election. No one at Justice ever contacted him for a briefing on significant matters when he left his position as Special Counsel.³⁸⁴ He did not contact Banks because he thought a call from him to USAO-EDAR would prompt

³⁸⁰ Dodson 2/15/95 Int. at 8.

³⁸¹ Dodson 5/23/95 GJ at 53.

³⁸² Id. at 52-53. The FBI Little Rock also was under the impression the referral had been set aside by Main Justice. See Irons 2/14/95 Int. at 6 (Irons heard nothing about the referral and believed that DOJ was reviewing it; he received no additional instructions about C-0004 from DOJ or USAO-EDAR and considered it a "dead issue").

³⁸³ Barr 6/2/95 Int. at 7. Barr appointed Daniel Levin, his Chief of Staff, to coordinate the transition. Id. Levin did not brief the transition team about C-0004, and knew of no one who did. Id.

³⁸⁴ Raphaelson 6/6/95 GJ at 71-72.

Banks to charge that Main Justice was attempting to politicize the matter.³⁸⁵ Mueller did not remember anything that happened on the referral from after election to when he left the Department of Justice on January 19, 1993.³⁸⁶

3. Banks's January 27, 1993 Recusal Letter.

On January 27, 1993, Banks sent a letter to the EOUSA saying his office had a "conflict of interest" on C-0004, asking to be recused from the matter, and asking for decisions about its "investigation, indictment, prosecution or declination" be made by the Department of Justice.³⁸⁷ He also noted that his resignation as U.S. Attorney was effective March 1, 1993.³⁸⁸ Banks said he sent the letter following a call to USAO-EDAR from the RTC where the RTC asked how it should respond to a request for documents on the referral.³⁸⁹ Banks's letter read:

RTC's contact with us was to determine the position of this office regarding their response to the [media Freedom of Information Act] request. Specifically, RTC

³⁸⁵ Id. at 63-64, 72.

³⁸⁶ Mueller 5/25/95 GJ at 37-38. For several months following the election, FBIHQ had nothing to do with any investigation involving Madison Guaranty. Later in 1993, there was a renewed interest in the thrift arising from Little Rock's separate investigation about David Hale, which originated from an FBI-Newark lead. See Potts 2/9/95 Int. at 5; Verinder 3/14/95 Int. at 4; Kubic 3/8/95 Int. at 5; Kendrick 3/13/95 Int. at 4; Irons 2/14/95 Int. at 6-7.

³⁸⁷ Letter from Charles A. Banks, United States Attorney, Eastern District of Arkansas to Ms. Donna Henneman, Office of Legal Counsel, Executive Office for United States Attorneys (Jan. 27, 1993) (Doc. Nos. 007116 through 17).

³⁸⁸ Id.

³⁸⁹ Id. Dodson said Lewis from the RTC had called him about the media request. Dodson 5/23/95 GJ at 55-56. He thought she was using the FOIA request as a way to find out what was going on with the referral. Id. at 56. Dodson told Banks about the Lewis query. Id. at 57; see Banks 5/23/95 GJ at 117; see also Lewis 5/18/95 GJ at 23-24 (recalling contact with Dodson about the FOIA request, on January 7, 1993).

wanted to know if a production of referral documents would affect our investigation.

The purpose of this letter is to clarify any possible confusion.

First, we have no investigation ongoing. Second, we have informed RTC of this and further suggested they should follow the appropriate FOIA law in responding to the request. I believe this RTC inquiry makes it appropriate for me to advise you as to the present status of the . . . Referral.

Our position as related in the enclosed [copy of Mr. Banks's October 16, 1992 letter to Mr. Pettus] is self-explanatory. As previously indicated, it seems prudent that a limited preliminary investigation of allegations pertinent to Mr. and Mrs. McDougal and Ms. A[u]nspaugh should be considered. The taking of 302's from these individuals should determine whether there is merit to substantiate further investigation.

I believe this office has a conflict of interest in conducting an investigation or presenting an indictment against these individuals. Previous prosecution of Mr. McDougal and two other defendants resulted in a not guilty verdict. Several allegations suggesting political prosecutions were made during the trial. These were patently false but a second investigation/prosecution could easily give the appearance of inappropriate motivation by this office.³⁹⁰

At that point, with his judicial nomination still pending, Banks felt it would look "even worse" for him to start pushing an investigation of C-0004 before leaving office.³⁹¹ He testified that in lay language, he was trying to tell Main Justice:

Whatever you folks are supposed to be doing under this referral service, this hot-button service, if you're not doing it, wake up.

I'm telling you again, we don't have an investigation going. This referral is

³⁹⁰ Letter from Charles A. Banks, United States Attorney, Eastern District of Arkansas to Ms. Donna Henneman, Office of Legal Counsel, Executive Office for United States Attorneys (Jan. 27, 1993) (Doc. Nos. 007116 through 17).

³⁹¹ Banks 5/23/95 GJ at 117.

basically holding, and you need to tell me what you want to do about it.

That was during the interim. Now, I'm telling you as far as I'm concerned, I've got a conflict. You need to come on and do something with this.

Your silence is confusing.³⁹²

Banks testified that he did not seek recusal before January 27, 1993 because he assumed that if Main Justice and the FBI truly wanted to move on C-0004, he would have heard something long before.³⁹³

4. Banks Spoke with His Successor about C-0004.

Banks recommended to Justice that Richard Pence, an assistant in his office, be appointed to serve as Interim U.S. Attorney for the Eastern District of Arkansas following Banks's departure.³⁹⁴ Banks recalled talking with him generally about C-0004.³⁹⁵ Dodson recalled giving Pence an "update," about a number of cases, including C-0004, "just to let him know what was going on."³⁹⁶ Pence recalled that shortly before Banks and Dodson left the USAO-EDAR, one or the other told Pence the RTC had referred a matter on Madison Guaranty and that Banks had recused and referred the matter to Justice.³⁹⁷ Dodson did not say the matter had been declined.³⁹⁸

³⁹² Id. at 120-21.

³⁹³ Id. at 121.

³⁹⁴ Id. at 124-25.

³⁹⁵ Id. at 125.

³⁹⁶ Dodson 5/23/95 GJ at 68.

³⁹⁷ Pence 5/12/95 GJ at 5.

³⁹⁸ Id. at 5-6.

Pence testified that they did not show him any documents about the referral.³⁹⁹

C. Main Justice's Handling of Banks's Recusal Request.

1. Initial Handling of Banks's Recusal Request.

On February 9, 1993, Anthony Moscato (then serving as the Director of the EOUSA), sent a memorandum on Banks's recusal to Stuart Gerson, then the Acting Attorney General, through Douglas Frazier, the Principal Associate Deputy Attorney General.⁴⁰⁰ The memorandum summarized the nature of the matter, and attached copies of Banks's October 16, 1992 letter, his January 27, 1993 letter seeking recusal, the October 7 and 20, 1992 Urgent Reports, and the referral.⁴⁰¹

By memorandum dated February 18, 1993, Frazier sent the recusal package for "review and recommendation" to Keeney, the Acting Assistant Attorney General for the Criminal

³⁹⁹ Id. at 6.

⁴⁰⁰ Memo for Stuart M. Gerson, Acting Attorney General, through Douglas N. Frazier, Principal Associate Deputy Attorney General, from Anthony C. Moscato, Director, Executive Office for United States Attorney, Subject: Recusal by the United States Attorney's Office for the Eastern District of Arkansas on a Resolution Trust Corporation Referral (Feb. 9, 1993) (Doc. Nos. 006671 through 72). The memorandum was prepared by Robert Marcovici, a Senior Attorney Advisor in the Office of Legal Counsel, EOUSA. Marcovici 1/18/95 Int. at 1, 2. The memorandum initially was typed on February 4, and then retyped February 5, 1993, indicating that perhaps some changes were made either by Moscato, or by Deborah Westbrook, another attorney in the EOUSA's Office of Legal Counsel. S. Johnson 1/10/95 Int. at 2. The memorandum left the office on February 9. Id.

⁴⁰¹ Memo for Stuart M. Gerson, Acting Attorney General, through Douglas N. Frazier, Principal Associate Deputy Attorney General, from, Anthony C. Moscato, Director, Executive Office for United States Attorney, Subject: Recusal by the United States Attorney's Office for the Eastern District of Arkansas on a Resolution Trust Corporation Referral (Feb. 9, 1993) (Doc. Nos. 006671 through 72).

Division.⁴⁰² Keeney sent the package to the Fraud Section.⁴⁰³

2. Handling of the Recusal Request by the Fraud Section.

Once in the Fraud Section, Gerald McDowell, the Section Chief, assigned the matter to Mark MacDougall, a trial attorney in the section.⁴⁰⁴ MacDougall's understanding was that he was to review C-0004 and recommend whether it merited going forward; and to look at the documents in the package forwarded by Keeney and determine if the information met the Department's standards for opening an investigation.⁴⁰⁵ He testified that he was not asked to examine Bank's recusal issue.⁴⁰⁶

McDowell said the Fraud Section did not receive many recusal requests.⁴⁰⁷ If there was some question about the need for recusal, then the section might look at the merits of the substantive case and do an analysis, as happened with the referral and the Banks recusal request.⁴⁰⁸ McDowell felt there was no basis for Banks's recusal, but the merits of C-0004 were

⁴⁰² Memo to John C. Keeney, Acting Assistant Attorney General, from Douglas N. Frazier, Associate Deputy Attorney General, Ref. Recusal by the U.S. Attorney's Office for the Eastern District of Arkansas on a Resolution Trust Corporation Referral (Feb. 18, 1993) (Doc. No. 001986).

⁴⁰³ Keeney 7/6/95 GJ at 11-12.

⁴⁰⁴ MacDougall 2/3/95 Int. at 1. There was some testimony that George Allen Carver, the Section's Principal Deputy Chief, made the assignment. McDowell 7/19/94 Int. at 2 (believes he asked Carver to assign the matter for analysis to a staff attorney); Carver 7/6/95 GJ at 33 (sure that McDowell made assignment, but Carver would have been in the process).

⁴⁰⁵ MacDougall 2/3/95 Int. at 1-2; MacDougall 5/30/95 GJ at 66-67.

⁴⁰⁶ MacDougall 5/30/95 GJ at 67.

⁴⁰⁷ Id.

⁴⁰⁸ Id. at 21.

examined so McDowell could answer any questions he might receive from his superiors.⁴⁰⁹

3. MacDougall's February 23, 1993 Memorandum.

MacDougall remembered that around February 18, 1993, he was in the Fraud Section's Washington offices, and McDowell called him over and gave him the referral, asking if he would review it.⁴¹⁰ MacDougall had never received such an assignment before.⁴¹¹ MacDougall believed he got the assignment because he was "walking down the right or wrong corridor on the right or wrong day."⁴¹² MacDougall said he worked on his project over the weekend and gave it to

⁴⁰⁹ McDowell 7/19/94 Int. at 2. When MacDougall was assigned to analyze the referral, he had been in the Fraud Section for two years. MacDougall 2/3/95 Int. at 1. Although officially assigned to Main Justice in Washington, he spent most of his time regularly commuting to Dallas, Texas where he served as a trial attorney with the Dallas Bank Fraud Task Force. From September 1992 through January 1993, he was involved in the trial of several bank fraud cases in Dallas. MacDougall 2/3/95 Int. at 1. In January 1993, he was involved in seeking and returning an indictment in a Dallas bank fraud case, and also was asked to travel to Boston, Massachusetts to review some investigations pending there. MacDougall 2/3/95 Int. at 1.

⁴¹⁰ Id. February 19, 1993 was a Friday; MacDougall believed that he started the assignment that weekend and took it home with him. Id. There is some evidence the recusal package was not received in the Fraud Section until February 22, 1993, in which case MacDougall received the assignment no earlier than four days after he believed he did. See Correspondence Tracking System Status/Actions, Record Update, (Doc. No. 014577); see also Letter to Kenneth W. Starr, Esquire, Office of Independent Counsel from G. Allen Carver Jr., Fraud Section's Principal Deputy Chief, Referencing the Office's handling of Mr. Carver's Grand Jury Appearance at 3 (July 17, 1995) (stating that Criminal Division's case tracking system indicated the recusal request was received in the Fraud Section on February 22, 1993). If that is correct, then MacDougall's memorandum, dated February 23, 1993, was produced in one day. See S. Rep. No. 104-280, at 171 (1996) (noting that MacDougall memorandum was produced in a day).

⁴¹¹ MacDougall 5/30/95 GJ at 18.

⁴¹² Id. McDowell said he discussed the assignment with Carver, and the matter was given to MacDougall because of the latter's experience and that fact that MacDougall was soon to leave DOJ and had the time to perform the work. McDowell 7/19/94 Int. at 2; see

McDowell's secretary on February 23 or 24, 1993.⁴¹³ He testified that he spent eight to twelve hours on the project.⁴¹⁴

MacDougall reviewed only documents he was in possession of: the referral itself (including the RTC's September 1, 1992 transmittal letter accompanying the referral), Banks's October 16, 1992 letter to Pettus, and Banks's January 27, 1993 recusal letter to the EOUSA.⁴¹⁵ He did not review any of the referral's exhibits, and had no knowledge of them.⁴¹⁶ He did not attempt to contact any investigators acquainted with the matter -- either at the RTC or the FBI -- and did not contact the U.S. Attorney's Office in Little Rock.⁴¹⁷ He did not review the exhibits, because: "I was asked to review what was in the package, and there were no exhibits in the package."⁴¹⁸ He said he did not contact any of the investigators familiar with the referral, because that would have been beyond the scope of his assignment:

The assignment I had been given was, as I understood it, very specific, to review the Referral. I had not been directed or authorized to conduct an investigation, and I was confident had I asked to do so that that was beyond what the Fraud Section had been asked to do. For me to have gone outside of that channel and to

also McDowell 5/30/95 GJ at 48 (MacDougall was one of the Fraud Section's "best prosecuting attorneys"). Carver testified that MacDougall was bright and had a banking background, and was a reasonable choice to examine a referral that spoke of banking transactions. Carver 7/6/95 GJ at 44.

⁴¹³ MacDougall 2/3/95 Int. at 2; MacDougall 2/10/95 Int. at 1.

⁴¹⁴ MacDougall 5/30/95 GJ at 24.

⁴¹⁵ MacDougall 2/3/95 Int. at 3.

⁴¹⁶ MacDougall 5/30/95 GJ at 30.

⁴¹⁷ Id. at 28-29.

⁴¹⁸ Id. at 88.

have, essentially, begun my own investigation by contacting the RTC and the agents and so forth would have run well afoul of what I had been asked to do, and I did not do that for that reason.⁴¹⁹

McDowell testified that MacDougall's authority was not so restricted.⁴²⁰ Carver supported MacDougall's understanding: MacDougall was to review what he had and that was it.⁴²¹

MacDougall produced a five-page, single-spaced memorandum summarizing the results of his analysis of C-0004.⁴²² The memorandum gave a detailed summary of the referral's factual allegations.⁴²³ In the "Analysis" section MacDougall agreed the referral provided "substantial factual support for the assertion that Mr. and Mrs. McDougal's conduct may have constituted a breach of fiduciary duty, abuse of position, and self-dealing."⁴²⁴ MacDougall concluded the referral failed to provide "factual allegations sufficient to establish the elements of any of the criminal statutes used in the prosecution of bank fraud cases."⁴²⁵

MacDougall's "Recommendation" section read:

⁴¹⁹ Id. at 29-30.

⁴²⁰ McDowell 5/30/95 GJ at 35-36.

⁴²¹ Carver 2/1/95 Int. at 2 (had MacDougall asked, Carver would have told him to review what he had); Carver 7/6/95 GJ at 47 (MacDougall was supposed to review the materials sent over "from across the street" and it was not his place to conduct an investigation).

⁴²² Memo from Mark J. MacDougall, Trial Attorney, to Gerald E. McDowell, Chief, Fraud Section, Ref. Resolution Trust Corporation Criminal Referral No. C0004, dated August 31, 1992, Naming James B. McDougal, Susan H. McDougal and Lisa Aunspaugh (Feb. 23, 1993) (Doc. Nos. 004567 through 72).

⁴²³ Id.

⁴²⁴ Id.

⁴²⁵ Id.

Based solely upon available information, and in light of applicable law and current Fraud Section standards for prosecution, the conduct of James B. McDougal, Susan H. McDougal and Lisa A[u]nspaugh as described in the criminal referral does not appear to warrant the initiation of a criminal investigation.⁴²⁶

MacDougall testified that if the decision whether to open an investigation had been his, he would not have relied solely on his memorandum and would have required more information.⁴²⁷ He said his memorandum was not meant to be the final word on whether C-0004 should be investigated or declined and that if someone declined solely from his memorandum, that person was "certainly avoiding . . . [her] obligations at the time."⁴²⁸

There was some testimony critical of MacDougall's failure to review the referral's exhibits and contact investigators. Donald Mackay, a Fraud Section attorney who later led the DOJ team investigating Madison Guaranty, opined that MacDougall's memorandum "missed the boat," and thought the referral had enough information and allegations to warrant opening an investigation.⁴²⁹ Dwight Bostwick, another Fraud Section attorney who later assisted Mackay in his investigation of Madison Guaranty, testified that his practice was to look at a referral's

⁴²⁶ Id. MacDougall testified that what he meant by "Fraud Section standards" was what members of the Dallas Bank Fraud Task Force had learned through the many cases it tried, to more than 200 convictions, and some acquittals. MacDougall 5/30/95 GJ at 55. MacDougall said the Task Force tried to apply what it had gleaned from trying so many cases to its review of referrals. Id. McDowell thought that MacDougall was referring to "standards he was used to in the Dallas Bank Fraud Task Force." McDowell 5/30/95 GJ at 48.

⁴²⁷ MacDougall 5/30/95 GJ at 72 ("If I was being asked to make the final decision, I would have asked for more information than I had in hand because of who the witnesses were").

⁴²⁸ Id. at 70-72.

⁴²⁹ Mackay 6/27/95 GJ at 19-24, 81-83.

exhibits, because "the importance of a referral is the documents underlying [it]."⁴³⁰

4. DOJ's March 19, 1993 Memorandum.

After MacDougall, Carver drafted a transmittal memorandum for Keeney summarizing the Fraud Section's views on Banks's recusal request and the merits of the referral. The memorandum, which was dated March 19, 1993, read:

The attached recusal package was forwarded for review from your office on February 18, 1993. We have reviewed the material in the package and have concluded that there is no identifiable basis for recusal by the U.S. Attorney. Further, we would not question a decision by the U.S. Attorney to decline further substantive action on the Referral. A copy of the Fraud Section's memorandum summarizing our review is attached for your use and, should you decide it is appropriate, for forwarding to the U.S. Attorney in Little Rock.⁴³¹

The memorandum was typed on March 2,⁴³² and initialed by both Carver and McDowell on the same date.⁴³³ He did not know of any changes after he prepared it, nor did he remember conversations with anyone outside of the Fraud Section about it.⁴³⁴

Carver said the position against recusal was McDowell's decision, backed by a strong recommendation from Carver.⁴³⁵ In Carver's view, Banks gave no reason for his recusal, short of

⁴³⁰ Bostwick 7/6/95 GJ at 17.

⁴³¹ Memo from John C. Keeney, Acting Assistant Attorney General, to Douglas N. Frazier, Associate Deputy Attorney General, Subject: Recusal by the U.S. Attorney's Office for the Eastern District of Arkansas on a Resolution Trust Corporation Referral (Mar. 19, 1993) (Doc. No. 017491).

⁴³² Id.; Carver 2/1/95 Int. at 2; Carver 7/6/95 GJ at 56-57.

⁴³³ Carver 7/6/95 GJ at 59.

⁴³⁴ Carver 2/1/95 Int. at 2.

⁴³⁵ Id.

not wanting to handle the case.⁴³⁶

The March 19 memorandum said the Fraud Section "would not question a decision by [USAO-EDAR] to decline further substantive action on the [R]eferral."⁴³⁷ Carver doubted that he had ever before drafted a memorandum in a recusal situation like the March 19 memo, where the Fraud Section's view of the merits of the underlying matter was included.⁴³⁸ Carver agreed that the referral did not present a strong case.⁴³⁹

Carver believed the USAO-EDAR thought C-0004 was not meritorious.⁴⁴⁰ Carver claimed the statement in the March 19 memorandum -- that the Fraud Section would not question a decision by USAO-EDAR to decline additional substantive action on C-0004 -- had no ulterior purpose and that "[t]here was no intent to steer the U.S. Attorney in any particular direction, beyond calling on the U.S. Attorney to handle and decide the matter."⁴⁴¹ Carver said "what we were saying was, we don't see any compelling reason to go forward and conduct an investigation

⁴³⁶ Id.

⁴³⁷ Memo from John C. Keeney, Acting Assistant Attorney General, to Douglas N. Frazier, Associate Deputy Attorney General, Subject: Recusal by the U.S. Attorney's Office for the Eastern District of Arkansas on a Resolution Trust Corporation Referral (Mar. 19, 1993) (Doc. No. 017491).

⁴³⁸ Carver 2/1/95 Int. at 3; Carver 7/6/95 GJ at 63.

⁴³⁹ Carver 2/1/95 Int. at 50.

⁴⁴⁰ Carver 7/6/95 GJ at 68 (USAO-EDAR was of the view that C-0004 "was not a very compelling case to pursue").

⁴⁴¹ Carver 7/17/95 at 2; see Letter to OIC, Kenneth W. Starr, from G. Allen Carver Jr., Fraud Section's Principal Deputy Chief, dtd, Ref: Grand Jury Appearance at 2-3 (July 17, 1995).

of McDougal if you don't want to."⁴⁴² The language chosen for the March 19 memorandum "simply communicated that from our review of it, we don't really see any compelling reason to question the U.S. Attorney and the FBI."⁴⁴³ Carver said his purpose was "to share with the U.S. Attorney and officials up the chain in the Department what the Fraud Section thought of the RTC Referral."⁴⁴⁴

Justice Department witnesses (including Carver) agreed they had never seen a memorandum denying a U.S. Attorney's recusal request and saying no question would be raised about a merits-related course of action by that official.⁴⁴⁵

⁴⁴² Carver 7/6/95 GJ at 50-51.

⁴⁴³ Id. at 65-66.

⁴⁴⁴ Letter to Kenneth W. Starr, Esquire, Office of the Independent Counsel, from G. Allen Carver Jr., Fraud Section's Principal Deputy Chief, at 2 (July 17, 1995); see also Carver 2/1/95 Int. at 3 (the "not question a decision" language was put in the March 19 Memorandum so that Kenney and Frazier would know the Fraud Section and the Criminal Division would not be critical if the case was declined); Carver 7/6/95 GJ at 63-64 (the language was for Frazier and Keeney to get an idea, if necessary, what the Fraud Section thought of the case).

⁴⁴⁵ Carver 2/1/95 Int. at 3 (Carver doubted he ever put a similar statement in a Memorandum addressing a recusal request, but each recusal request is "one of a kind"); Frazier 6/1/95 GJ at 94 (could not remember seeing similar language in memoranda dealing with recusal issues in other situations); Margolis 4/5/95 Int. at 3 (could not remember a situation where a recusal request was denied and then the Criminal Division was asked for an opinion on the merits); Keeney 4/7/95 Int. at 4 (could not remember ever seeing a combination of a recusal denial and an opinion on the merits of the related case); Urgenson 6/1/95 GJ at 34-35 ("not normal" for DOJ to communicate its opinion on a case assigned to a United States Attorney, but explaining that this was "not a normal case");

5. The Transmission of the March 19 Memo.

Carver's memo, which was post dated to March 19, was sent to and received on March 2 by Larry Urgenson, Acting Deputy Assistant Attorney General for the Criminal Division.⁴⁴⁶

Urgenson recalled signing and approving the memo for Keeney.⁴⁴⁷ Keeney knew about the March 19 memorandum and recusal package, and said Urgenson probably discussed it with him.⁴⁴⁸ Keeney may have seen the March 19 memorandum after it was sent out of the Criminal Division.⁴⁴⁹

Urgenson could not explain the delay between March 2 (when the memo was delivered to his office) and March 19 (the date it left).⁴⁵⁰ He did not remember having any meetings or discussions with anyone about the memo between March 2 and March 19.⁴⁵¹ He thought he may have reviewed the package and put it aside to examine more closely later.⁴⁵² Urgenson suggested

⁴⁴⁶ Urgenson 3/29/95 Int. at 1, 3; see Correspondence Tracking System Status/Actions, Record Update (June 2, 1994) (Doc. No. 014577) (Criminal Division correspondence tracking sheet indicating receipt by Urgenson on March 2, 1993); (Doc. No. 017491) (copy of Memo to Douglas N. Frazier, Associate Deputy Attorney General, from John C. Keeney, Acting Assistant Attorney General (Mar. 19, 1993) (showing Urgenson's last name typed on lower left hand corner of document); Carver 7/6/95 GJ at 45, 83.

⁴⁴⁷ Urgenson 3/27/95 Int. at 3; see also Keeney 4/7/95 Int. at 3 (not unusual for Urgenson to sign on his behalf).

⁴⁴⁸ Keeney 4/7/95 Int. at 3. Urgenson did not remember discussing the contents of the March 19 memorandum with Keeney. Urgenson 6/1/95 GJ at 43.

⁴⁴⁹ Keeney 4/7/95 Int. at 3. On the MacDougall memorandum, Keeney had no specific recollection of having seen it, but he "assume[d]" he read it. Keeney 7/6/95 GJ at 14.

⁴⁵⁰ Urgenson 3/27/95 Int. at 3; Urgenson 6/1/95 GJ at 26.

⁴⁵¹ Urgenson 3/27/95 Int. at 3.

⁴⁵² Id.

the gap was due to the transition between administrations, which left only a few people to run the Criminal Division.⁴⁵³

Urgenson thought that he put the memo in the Deputy Attorney General's out box.⁴⁵⁴ He did not remember discussing the matter with Frazier; nor could he say for sure whether Frazier received the March 19 memorandum⁴⁵⁵ The evidence shows Frazier did not receive it until June 1993, three months after it had been signed out of the Criminal Division by Urgenson.⁴⁵⁶

The Criminal Division's correspondence tracking system showed the March 19 memo was sent to the Executive Secretariat on March 19. The Executive Secretariat tracking sheet indicated it did not receive the March 19 memo; it was not sent to Frazier in the Deputy Attorney General's office.⁴⁵⁷ Remarks on the Executive Secretariat's tracking sheet showed that efforts were made to obtain a copy of the March 19, 1993 memo without success and the matter finally was closed out on August 17, 1994, with a notation that a copy of the March 19, 1993 memo was not available.⁴⁵⁸

Around June 23, 1993, Frazier finally learned that a decision on the Banks recusal letter

⁴⁵³ Id.

⁴⁵⁴ Id. at 5.

⁴⁵⁵ Id. at 3, 5.

⁴⁵⁶ Frazier 6/1/95 GJ at 71-72.

⁴⁵⁷ Plavchan 3/20/95 Int. at 3; Correspondence Tracking System Status/Actions, Record Update (June 2, 1994) (Doc. No. 014577); Department of Justice Executive Secretariat History Data Sheet, from Anthony Moscato, Director, EOUSA to Acting AG through Frazier Acting Deputy Attorney General (Feb. 17, 1993) (Doc. No. 017456); Chiarizia 3/22/95 Int. at 2.

⁴⁵⁸ Plavchan 3/20/95 Int. at 3.

was still outstanding when the EOUSA, acting in response to a C-0004 status inquiry from the RTC, contacted him to find out what decision had been made on the recusal request.⁴⁵⁹

D. The David Hale Matter Revived Little Rock's Interest in Madison Guaranty, and DOJ Sent the Referral Back to USAO-EDAR.

1. Brief Background.

The FBI Little Rock field office did not investigate Madison Guaranty until the end of April or early May 1993, when it received an auxiliary office lead in a wire fraud case from the FBI in Newark.⁴⁶⁰ As a result, FBI-Little Rock opened a new fraud investigation targeting Little Rock Municipal Court Judge David Hale and Capital Management Services ("CMS"), Hale's Small Business Investment Company ("SBIC").⁴⁶¹ Around May 24 or 25, 1993, FBI-Little Rock received a referral from the SBA's Inspector General, indicating that audits of CMS raised questions about delinquent loans at the company.⁴⁶² One of the delinquent loans was CMS's \$300,000 loan to Susan McDougal, d/b/a Master Marketing. The pursuit of the Hale/CMS matter, which included the July 21, 1993 execution of a search warrant directed at Hale and his businesses, turned up information establishing a connection between CMS and Madison

⁴⁵⁹ Memo from Deborah C. Westbrook, Legal Counsel to Douglas N. Frazier, Associate Deputy Attorney General, ref. Conversation of June 7 (June 8, 1993) (Doc. No. 006675); Frazier 6/1/95 GJ at 64-65, 70-74, 84-86; Henneman 1/31/95 Int. at 2-3.

⁴⁶⁰ Irons 2/14/95 Int. at 6; Irons 5/21/96 GJ at 50-51.

⁴⁶¹ Irons 2/14/95 Int. at 6.

⁴⁶² Irons 5/21/95 GJ at 52-55.

Guaranty.⁴⁶³ On August 20, 1993, FBI-Little Rock opened a bank fraud investigation targeting Madison Guaranty.⁴⁶⁴

2. The RTC Asked USAO-EDAR about the Status of C-0004.

On May 4, 1993, RTC Criminal Investigator Jean Lewis wrote to Richard M. Pence, the Interim U.S. Attorney in Little Rock, requesting written advice about where the referral stood.⁴⁶⁵ Pence spoke to an assistant in his office, Fletcher Jackson.⁴⁶⁶ Jackson confirmed what Pence already knew: The matter had been sent to DOJ, and Banks had suspected there was a possible political motivation behind the referral.⁴⁶⁷ He also found the "file" in the office safe, and read Banks's prior correspondence, including the January 27, 1993 recusal letter.⁴⁶⁸

By letter dated May 10, 1993, Pence responded to the RTC.⁴⁶⁹ His letter discussed the allegations of inappropriate political motivation that had been levied against the USAO-EDAR

⁴⁶³ Irons 2/14/95 Int. at 6; Irons 5/21/96 GJ at 59-60.

⁴⁶⁴ Irons 2/14/95 Int. at 6-7.

⁴⁶⁵ Letter to The Honorable Richard M. Pence from L. Jean Lewis, Criminal Investigator, (May 4, 1994) (Doc. No. 007062); Pence 5/9/95 Int. at 2; Pence 6/29/95 GJ at 6-7.

⁴⁶⁶ Jackson evidently had known about C-0004 since October 1992, when Banks called Jackson into Banks's office and had him review the referral. Jackson 5/9/95 Int. at 1. Banks said he did not intend to assign the matter to Jackson; he simply asked the latter a statute of limitations question and what Jackson thought about the referral. Id. at 1-2. Jackson thought the matter involved an in-house check-kiting scheme the RTC had not fully run down to determine if Madison Guaranty had suffered a loss. Id. Jackson understood he was not to talk about the referral with others. Id. at 2.

⁴⁶⁷ Pence 5/9/95 Int. at 2.

⁴⁶⁸ Pence 6/29/95 GJ at 6-7.

⁴⁶⁹ Id. at 7, 9-10.

because of the first McDougal matter, and that Banks had determined the USAO-EDAR had a "conflict of interest" on a "second" investigation from the referral.⁴⁷⁰ Pence said the referral had been sent to the EOUSA at Main Justice, and that he had not received a response.⁴⁷¹ Consequently, Pence did not know the referral's status.⁴⁷² He told the RTC to contact the EOUSA directly.⁴⁷³

3. The RTC Contacted the EOUSA.

After receiving Pence's May 10, 1993 letter, the RTC Criminal Investigator Jean Lewis called EOUSA to find out what had happened with C-0004.⁴⁷⁴ Lewis first called Henneman on May 19, 1993.⁴⁷⁵ Henneman embarked on a weeks-long search for the Banks recusal request and referral, leading her to express frustration to Lewis about the difficulty she encountered finding the material.⁴⁷⁶

There is evidence that at some point before June 7, 1993, the recusal package was located

⁴⁷⁰ Letter from Richard M. Pence, Jr., United States Attorney to Ms. L. Jean Lewis, Criminal Investigator (May 10, 1993).

⁴⁷¹ Id.

⁴⁷² Id.

⁴⁷³ Id.

⁴⁷⁴ Lewis 3/14/94 Fiske Int. at 2-3; see also Henneman 5/25/95 GJ at 30-51.

⁴⁷⁵ Henneman 5/25/95 GJ at 30.

⁴⁷⁶ See E-mail from Jean Lewis, Criminal Investigator, to L. Richard Iorio (May 26, 1993); Henneman 5/25/95 GJ at 38-40.

in the Fraud Section by Audrey Word, a Supervisory Paralegal Specialist in that Section,⁴⁷⁷ possibly received by EOUSA around June 2, 1993.⁴⁷⁸ Justice Legal Counsel Deborah Westbrook sent a short note to Frazier on June 8:

Pursuant to our conversation of June 7, 1993, attached is a memorandum dated March 19, 1993, regarding the recusal of the U.S. Attorney's Office for the Eastern District of Arkansas on a Resolution Trust Corporation referral. Please advise this office of your decision regarding this matter.⁴⁷⁹

By this point Deputy Attorney General Philip Heymann had been appointed by the new administration.⁴⁸⁰ One of his Associate Deputies was David Margolis.⁴⁸¹ Margolis worked on criminal matters, so Frazier referred Westbrook's June 8 note to him⁴⁸² Margolis asked for a briefing,⁴⁸³ and Frazier and Margolis met.⁴⁸⁴ Frazier had not yet read the February 23

⁴⁷⁷ Id. Word said she could not find any information about the referral in her computer system. Word 1/26/95 Int. at 1. Henneman testified the statement in Lewis's e-mail that Word located the referral in the Fraud Section, was correct. Henneman 5/25/95 GJ at 41-42. That e-mail also said Word claimed the individual assigned to the referral "'didn't want to deal with it,' so she sent the [R]eferral and all pertinent info back to Donna Henneman for further disposition." E-mail from Jean Lewis, Criminal Investigator, to L. Richard Iorio (June 8, 1993). Word said she "definitely" did not say that anyone "didn't want to deal" with the referral. Word 1/26/95 Int. at 2.

⁴⁷⁸ Henneman 5/25/95 GJ at 43-44.

⁴⁷⁹ Note to Douglas N. Frazier, Associate Deputy Attorney General to Deborah C. Westbrook, Legal Counsel (June 8, 1993) (Doc. No. 006675); Westbrook 6/22/95 GJ at 28; Henneman 5/25/95 GJ at 42-46; Frazier 6/1/95 GJ at 64-65.

⁴⁸⁰ Heymann 5/30/95 Int at 1.

⁴⁸¹ Margolis 8/23/95 Int. at 1.

⁴⁸² Note to Douglas N. Frazier, Associate Deputy Attorney General to Deborah C. Westbrook, Legal Counsel (June 8, 1993) (Doc. No. 006675); Frazier 6/1/95 GJ at 65.

⁴⁸³ Frazier 6/1/95 GJ at 65; see Note to Douglas N. Frazier, Associate Deputy Attorney General to Deborah C. Westbrook, Legal Counsel (June 8, 1993) (Doc. No. 006675).

MacDougall memorandum, so he flipped to the memo's recommendation section without reading the entire memorandum.⁴⁸⁵ Frazier noted the Criminal Division's opinion that "there really isn't a case,"⁴⁸⁶ but cautioned the matter was not so simple because of the March 19, 1993 Keeney memorandum.⁴⁸⁷ That memo said the Criminal Division would "acquiesce" or "wouldn't object" if the investigation was declined, which was "not as strong" a statement.⁴⁸⁸

Margolis agreed that recusal was not required and the matter probably should be declined.⁴⁸⁹ He did not discuss recusal or the referral with anyone at USAO-EDAR.⁴⁹⁰ Margolis said Main Justice's decision on recusal was "somehow" communicated to the District; he did not remember preparing a transmittal letter to Little Rock to notify that office of DOJ's decision.⁴⁹¹ It was possible that he told Frazier to prepare a transmittal letter, but Margolis was not sure.⁴⁹² Margolis told Frazier that the recusal package had been sitting around at Main Justice for some

⁴⁸⁴ Frazier 6/1/95 GJ at 67.

⁴⁸⁵ Frazier did not read the MacDougall memorandum until his interview with the OIC. Frazier 6/1/95 GJ at 67.

⁴⁸⁶ Id. at 66.

⁴⁸⁷ Id. at 67.

⁴⁸⁸ Id. at 68. Frazier thinks a memo may have been prepared for USAO-EDAR, saying there did not appear to be a need for recusal if they were going to decline, and they could rely on the analysis done in the Fraud Section. Id. at 69, 83. He did not know if he ever saw such a memo signed, and he had no additional discussions with Margolis on the matter. Id.

⁴⁸⁹ Margolis 4/5/95 Int. at 2.

⁴⁹⁰ Id. at 3.

⁴⁹¹ Id.

⁴⁹² Id.

time.⁴⁹³ Margolis thought the delay was caused by the change in administrations.⁴⁹⁴

Around June 17 to 21, 1993, Frazier left Main Justice to serve as Interim U.S. Attorney for the Middle District of Florida.⁴⁹⁵ On June 23, 1993, the EOUSA still had not heard from Frazier,⁴⁹⁶ so Henneman contacted him in Florida and asked what decision had been made on Banks's recusal request.⁴⁹⁷ Frazier was surprised the EOUSA did not know the status because he knew "we had instituted some action" (a "memo or letter or something" had been prepared), though he did not know if it had left the Deputy's office.⁴⁹⁸ Frazier told Henneman that Justice denied the recusal because the Criminal Division had determined there was nothing to investigate.⁴⁹⁹ Henneman noted on a copy of Westbrook's June 8 note: "Per Doug[,] 6/23[,] sent back to district for decision. Crim[inal Divsion] suggested declination."⁵⁰⁰ That same day, Henneman told the RTC the matter had been sent back to Little Rock and Justice found no basis for recusal.⁵⁰¹

⁴⁹³ Id. at 2.

⁴⁹⁴ Id. This was echoed by other DOJ witnesses. See, e.g., Keeney 4/7/95 Int. at 3-4.

⁴⁹⁵ Frazier 3/24/95 Int. at 1; Frazier 6/1/95 GJ at 84.

⁴⁹⁶ Frazier 3/24/95 GJ at 84-85.

⁴⁹⁷ Henneman 5/25/95 GJ at 47-48; Frazier 6/1/95 GJ at 84-85.

⁴⁹⁸ Frazier 6/1/95 GJ at 84-85.

⁴⁹⁹ Id. at 84.

⁵⁰⁰ Note from Douglas N. Fraizer, Associate Deputy Attorney General to Deborah C. Westbrook, Legal Counsel (June 8, 1993) (Doc. No. 006675); Henneman 5/25/95 GJ at 49; Frazier 6/1/95 GJ at 84-85.

⁵⁰¹ E-Mail from Jean Lewis, Criminal Investigator to L. Richard Iorio (June 23, 1993); Henneman 5/25/95 GJ at 47-48.

E. Back to Little Rock: The Declination of C-0004; the New Referrals and Casey's Recusal.

1. Pence and C-0004.

Interim USA-EDAR Pence received a call from the EOUSA around July 1993 telling him Main Justice had considered the recusal request of the USAO-EDAR and the Criminal Division had determined the referral lacked merit.⁵⁰² The EOUSA followed up on the call with a confirmation letter,⁵⁰³ enclosing a copy of the February 23 MacDougall memorandum.⁵⁰⁴ Pence spoke with Fletcher Jackson, who was working with the FBI in the investigation of Hale and CMS.⁵⁰⁵ Jackson told Pence there might be a connection between Hale and the referral.⁵⁰⁶ Jackson recommended the transactions outlined in the referral be included in the Hale investigation.⁵⁰⁷ Pence agreed and assigned Jackson.⁵⁰⁸ A separate case was not opened on the

⁵⁰² Pence 5/9/95 Int. at 2 (call was in July); Pence 5/12/95 GJ at 10. Pence testified the call "could have been late May, could have been June. I suppose even early July, I'm not sure." Pence 5/12/95 GJ at 10. Pence recalled not knowing what to do with it at first. Pence 5/12/95 GJ at 13. He believed he was told that it was up to the USAO-EDAR to make the final decision on C-0004, but at the same time he was told the Criminal Division did not think the referral set out a federal criminal offense. Pence 5/9/95 Int. at 2-3.

⁵⁰³ Pence 5/9/95 Int. at 3; Pence 5/12/95 GJ at 10-11; see also, Memo from John C. Keeney, Acting Assistant Attorney General, to Douglas N. Frazier, Associate Deputy Attorney General, re: Recusal by the U.S. Attorney's Office for the Eastern District of Arkansas on a Resolution Trust Corporation Referral (Mar. 19, 1993) (Doc. No. 017491).

⁵⁰⁴ Pence 5/9/95 Int. at 3; Pence 5/12/95 GJ at 12.

⁵⁰⁵ Jackson 5/9/95 Int. at 5.

⁵⁰⁶ Pence 5/9/95 Int. at 3; Pence 5/12/95 GJ at 13; Jackson 5/9/95 Int. at 2-3.

⁵⁰⁷ Pence 5/12/95 GJ at 13-14; Jackson 5/9/95 Int. at 3.

⁵⁰⁸ Pence 5/9/95 Int. at 3.

referral, but Pence considered it open.⁵⁰⁹

2. Paula Casey Was Appointed USA-EDAR.

President Clinton appointed Paula Casey as the U.S. Attorney in Little Rock, starting August 16, 1993.⁵¹⁰ Arkansas Senator Dale Bumpers asked Casey if she wanted the job.⁵¹¹ She told him she did.⁵¹² Casey did not discuss her interest in the job with the Clintons before her appointment.⁵¹³ Casey felt that if one person responsible for her appointment, it was Senator Bumpers and not the Clintons.⁵¹⁴ To her knowledge, President Clinton's role was limited to approving the names submitted to him.⁵¹⁵

⁵⁰⁹ Id. at 4; Pence 5/12/95 GJ at 15. Pence said he never reviewed C-0004. Pence 5/9/95 Int. at 4. He did not remember Jackson ever updating him on whether a connection existed between the Hale/CMS matter and the McDougal/Madison Guaranty transactions set out in C-0004. Pence 5/9/95 Int. at 4. Up until the arrival of Paula Casey, President Clinton's appointment to the post of U.S. Attorney in Little Rock, Pence did not know of any new developments relevant to the potential connection between the Hale and Madison Guaranty matters, and the possible involvement of the Clintons. Pence 5/9/95 Int. at 4-5.

⁵¹⁰ Casey 5/10/95 Int. at 1. Casey first met the Clintons in 1976 when she was a law school student at the University of Arkansas and the Clintons were professors at the school. Casey 5/10/95 Int. at 2. She helped with various jobs on Mr. Clinton's gubernatorial campaigns throughout the 1980s. Casey 5/10/95 Int. at 2. Casey pointed out that until the late 1980s, the Governor of Arkansas stood for re-election every two years. Casey 6/29/95 GJ at 8. She contributed to most of his gubernatorial campaigns, and she contributed to his presidential campaign. Id. She saw the Clintons on social occasions while they were in Little Rock, attending functions at the Governor's mansion as a member of the Pulaski County Democratic Committee. Id. Governor Clinton appointed her to a juvenile justice commission. Id. at 9.

⁵¹¹ Casey 5/10/95 Int. at 1.

⁵¹² Id.

⁵¹³ Id.

⁵¹⁴ Id. at 2.

⁵¹⁵ Casey 6/29/95 GJ at 10.

3. Pence Told Casey about the Referral.

On the Thursday night before she began, Casey spoke with Pence to let him know she would be starting on Monday.⁵¹⁶ Pence told Casey about two or three matters pending in the office.⁵¹⁷ Pence recalled there was a case involving the Clintons as witnesses, and that Banks had recused and sent the matter to the Justice Department.⁵¹⁸ Pence said Main Justice had sent the matter back, but not before reviewing it and finding no basis for a criminal violation.⁵¹⁹

4. Casey Reviewed C-0004.

Casey spent her first two or three weeks attending to various administrative matters, including the selection of her First Assistant.⁵²⁰ She met with each of the assistants and spoke with Jackson last.⁵²¹ The two spoke about a number of matters assigned to Jackson, including the Hale matter.⁵²² Jackson mentioned a prior referral from the RTC on Madison Guaranty, which had been forwarded to Washington, D.C.⁵²³ Jackson described the RTC referral as a "real hot potato" that had been closed.⁵²⁴ Jackson told her the Hale investigation could "reopen that can of

⁵¹⁶ Id. at 12-13. Pence recalled there may have been more than one phone conversation before his first meeting with Casey. Pence 6/29/95 GJ at 18.

⁵¹⁷ Casey 6/29/95 GJ at 12-14; Pence 6/29/95 GJ at 18-19.

⁵¹⁸ Pence 6/29/95 GJ at 18-19.

⁵¹⁹ Id. at 19.

⁵²⁰ Casey 6/29/95 GJ at 11-14; Casey 5/10/95 Int. at 3.

⁵²¹ Casey 6/29/95 GJ at 14.

⁵²² Id. at 14-15; Casey 5/10/95 Int. at 3.

⁵²³ Casey 6/29/95 GJ at 15; Casey 5/10/95 Int. at 3.

⁵²⁴ Casey 6/29/95 GJ at 15; Casey 5/10/95 Int. at 3.

worms."⁵²⁵

Casey also learned from Jackson that the RTC was working on additional referrals on Madison Guaranty.⁵²⁶ Jackson said he expected them by the end of August.⁵²⁷

Casey did not remember learning then that the 1992 Referral mentioned Tucker; her feeling then was that she would have to recuse from any investigation by her office involving Governor Tucker.⁵²⁸ She did not feel the same of the Clintons.⁵²⁹ She did remember Jackson telling her that the new referrals would deal with Tucker.⁵³⁰

Jackson said he did not brief Casey on the Hale/Madison Guaranty investigations.⁵³¹ During a meeting, Assistant U.S. Attorney (AUSA) Michael Johnson (whom Casey designated First Assistant)⁵³² asked all AUSAs for a list of significant cases.⁵³³ Jackson said he listed Hale, Tucker, and the Clintons, gave it to Johnson, and left.⁵³⁴

⁵²⁵ Casey 6/29/95 GJ at 15; Casey 5/10/95 Int. at 3.

⁵²⁶ Casey 5/10/95 Int. at 3. On October 8, 1993, the RTC transmitted nine additional Madison Guaranty-related referrals to the attention of Casey in Little Rock; see also Letter from Lee O. Ausen, RTC Supervisory Investigator to Honorable Paula Jean Casey, United States Attorney, Eastern District of Arkansas (Oct. 8, 1993) (Doc. No. 017692).

⁵²⁷ Casey 6/29/95 GJ at 20.

⁵²⁸ Casey 5/10/95 Int. at 4.

⁵²⁹ Id.

⁵³⁰ Casey 6/29/95 GJ at 20.

⁵³¹ Jackson 5/9/95 GJ at 6.

⁵³² Johnson 6/29/95 GJ at 4-5.

⁵³³ Jackson 5/9/95 Int. at 6; Johnson 6/29/95 GJ at 18-19.

⁵³⁴ Jackson 5/9/95 Int. at 6-7. The evidence indicates that Jackson did write such a memorandum. See Memo from Fletcher to Michael, "My significant cases are as follows" (Sept.

Casey did not remember any particular discussion with Pence about C-0004 after joining the USAO-EDAR, but she felt that she must have at least discussed it with him in passing, because he had the referral sent to her.⁵³⁵ She read the referral, as well as the February 23 and March 19, 1993 MacDougall and Keeney memoranda.⁵³⁶ The Clintons, Tucker and Stephen A. Smith were listed as witnesses.⁵³⁷ In addition to knowing the Clintons and Governor Tucker, she also knew Smith.⁵³⁸

Casey felt there was little merit to the referral.⁵³⁹ She relied heavily on the MacDougall memorandum; she did not review any of the referral's exhibits.⁵⁴⁰ Casey said she did not analyze the documents she had read because the matter was "finished" and there was nothing she needed

16, 1993). It listed three matters, the first of which was "David Hale and Madison Guaranty, et al." It did not specifically list Tucker or the Clintons.

⁵³⁵ Casey 6/29/95 GJ at 15-16.

⁵³⁶ Casey 5/10/95 Int. at 4; Casey 6/29/95 GJ at 16. Although she was not entirely sure, Casey thought that she also saw Moscato's February 9, 1993 memorandum to Gerson about the recusal of USAO-EDAR. Casey 6/29/95 GJ at 19. She also saw Banks's October 16, 1992 and January 27, 1993 letters, although she was not sure that she saw them with her first review of the referral. *Id.* at 18-19. *See* Memo from Mark J. MacDougall, Trial Attorney to Gerald E. MacDowell, Chief, Fraud Section (Feb. 23, 1993) (Doc. Nos. GEM 000098-102); Memo from John C. Keeney, Acting Assistant Attorney General to Douglas N. Frazier, Associate Deputy Attorney General (Mar. 19, 1993) (Doc. No. GEM 000062).

⁵³⁷ RTC Crim. Ref. No. C-0004 at 18 (Aug. 31, 1992). Casey was "sure" she read the list of witnesses. Casey 6/29/95 GJ at 76.

⁵³⁸ Casey 6/29/95 GJ at 40-41.

⁵³⁹ Casey 5/10/95 Int. at 4.

⁵⁴⁰ Casey 6/29/95 GJ at 18; Casey 5/10/95 Int. at 4-5. Casey thought the exhibits were no longer in the USAO, but had been turned over to the FBI in Little Rock. Casey 6/29/95 GJ at 18; Casey 5/10/95 Int. at 5.

to do.⁵⁴¹

5. Casey Met with Hale's Attorney.

Casey became personally involved in the Hale investigation in late August 1993 when she received a telephone call from Hale's attorney, Randy Coleman.⁵⁴² Coleman asked for a meeting, which occurred at Casey's office on September 7, 1993.⁵⁴³

Coleman said Hale had information about people the USAO-EDAR would want to prosecute.⁵⁴⁴ In return, Hale wanted immunity or a misdemeanor plea.⁵⁴⁵ Casey said she was not willing to confer immunity on Hale regarding the ongoing SBA fraud investigation; she was willing to talk about a reduction of sentence; but because Hale was a public official, she would insist that he plead to at least one felony count.⁵⁴⁶ She said she offered to allow Hale to make a proffer, something that she recalled doing a number of times.⁵⁴⁷ She testified that Hale never took her up on that offer.⁵⁴⁸

⁵⁴¹ Casey 6/29/95 GJ at 17; Casey 5/10/95 Int. at 4.

⁵⁴² Casey 5/10/95 Int. at 5.

⁵⁴³ Id.; Casey 6/29/95 GJ at 21. Jackson did not attend, but may have furnished Casey with information before her meeting with Coleman. Casey 5/10/95 Int. at 6. Johnson also did not attend. Johnson 6/29/95 GJ at 21. Pence also was not involved. Pence 5/9/95 Int. at 6.

⁵⁴⁴ Casey 5/10/95 Int. at 6.

⁵⁴⁵ Id.

⁵⁴⁶ Id.

⁵⁴⁷ Casey 6/29/95 GJ at 24.

⁵⁴⁸ Id.; Johnson 6/29/95 GJ at 34-35, 45-46.

Casey testified that Coleman said Hale would be willing to wear a wire.⁵⁴⁹ He may have made that offer during the September 7 meeting or at a later time.⁵⁵⁰ Casey said she was unable to evaluate that offer because she never received a proffer to determine whether Hale had any value as a potential "undercover" operative.⁵⁵¹ The meeting lasted only five or ten minutes, with no resolution.⁵⁵² No promises were made at this meeting, and Coleman never mentioned who Hale supposedly had useful information about.⁵⁵³ Casey nevertheless suspected Coleman was referring to President Clinton and Governor Tucker.⁵⁵⁴

6. The Recusal Issue Surfaced in Correspondence with Coleman.

On September 15, 1993, Coleman wrote Casey complaining about the status of the plea negotiations⁵⁵⁵ and suggested that she recuse herself from the Hale matter.⁵⁵⁶ Casey discussed the Coleman letter with Johnson, who was concerned.⁵⁵⁷ He felt there was no basis for Casey to recuse.⁵⁵⁸ Casey recalled that at some later point, either in a phone call or letter to Coleman, she

⁵⁴⁹ Casey 6/29/95 GJ at 25.

⁵⁵⁰ Id.

⁵⁵¹ Id.

⁵⁵² Casey 5/10/95 Int. at 6.

⁵⁵³ Id.

⁵⁵⁴ Id.

⁵⁵⁵ Johnson 6/29/95 GJ at 34.

⁵⁵⁶ Casey 5/10/95 Int. at 6; Johnson 6/29/95 GJ at 34.

⁵⁵⁷ Casey 5/10/95 Int. at 7.

⁵⁵⁸ Id.

told him that Hale would have to make a proffer.⁵⁵⁹ Casey said Coleman never complied, and never provided any specifics or names to her office.⁵⁶⁰ She said Coleman only made vague allegations that "these people were just too big for [USAO-EDAR] to prosecute."⁵⁶¹

Casey and Johnson discussed a response to Coleman's letter, which was sent out September 16.⁵⁶² The letter said Hale was making vague allegations about important people and was trying to talk the USAO-EDAR out of presenting his case for indictment in September.⁵⁶³ The USAO was more than willing to listen to anything Hale had to say.⁵⁶⁴ Johnson testified there was a series of letters going back and forth between Coleman and the USAO between September 15 and 20, 1993.⁵⁶⁵ In one of the letters, Coleman suggested that Casey recuse herself from the Hale matter.⁵⁶⁶

Johnson believed Coleman was not dealing with the USAO in good faith and was attempting to manipulate the process.⁵⁶⁷ He never produced Hale for a proffer.⁵⁶⁸ Johnson's sense of Hale's bona fides was compounded by his (Johnson's) being contacted at about this time by

⁵⁵⁹ Id.

⁵⁶⁰ Id.

⁵⁶¹ Id.

⁵⁶² Johnson 6/29/95 GJ at 34.

⁵⁶³ Id.

⁵⁶⁴ Id.

⁵⁶⁵ Id.

⁵⁶⁶ Id. at 35.

⁵⁶⁷ Id. at 34-35.

⁵⁶⁸ Id. at 34.

FBI-Little Rock; the Division's SAC told Johnson the Bureau had been contacted by reporter Jeff Gerth of the New York Times.⁵⁶⁹ Gerth said he had spoken with Hale and Coleman, who had given Gerth the detailed information that they told Gerth USAO-EDAR refused to hear.⁵⁷⁰ Johnson believed that Hale's willingness to contact the press with information that he was unwilling to give to the USAO was evidence of bad faith.⁵⁷¹

7. Main Justice Learned of Hale's Allegations.

Irvin Nathan, the Principal Associate Deputy Attorney General under Deputy Attorney General Phil Heymann, said that in the middle of September 1993, Gerth called.⁵⁷² Gerth said there was a municipal judge in Arkansas named David Hale with a complaint against USAO-EDAR.⁵⁷³ Gerth told him the judge's attorney had been negotiating with the local USAO about a Small Business Administration matter and was raising questions about the competence and connections of the U.S. Attorney.⁵⁷⁴ Gerth said the attorney did not believe the USAO should be handling the case.⁵⁷⁵

Gerth additionally said Hale had information about Madison Guaranty, including the

⁵⁶⁹ Id. at 35.

⁵⁷⁰ Id.

⁵⁷¹ Id.

⁵⁷² Nathan 4/4/95 Int. at 1-2.

⁵⁷³ Id. at 2.

⁵⁷⁴ Id.

⁵⁷⁵ Id.

involvement of the Clintons and Arkansas Governor Tucker.⁵⁷⁶ Gerth said Hale wanted charges dropped in exchange for his cooperation.⁵⁷⁷

Nathan believed Gerth when he said he had spoken with Hale and/or his attorney and the FBI.⁵⁷⁸ Nathan told Gerth that he knew nothing about the matter, but that he would check.⁵⁷⁹

Nathan briefed Heymann about what he learned from Gerth.⁵⁸⁰ Heymann asked Nathan to get background information, which Nathan did by contacting the Fraud Section.⁵⁸¹ He learned that an RTC criminal referral had been sent to the USAO-EDAR in the fall of 1992, and the USAO sent the matter to DOJ before the election.⁵⁸² Nathan said he learned that DOJ communicated back to the District in March or April 1993.⁵⁸³

Nathan saw copies of Casey's correspondence with Coleman.⁵⁸⁴ He thought Casey's position on plea negotiations was reasonable; he thought Coleman was not giving the District anything of substance, not that Casey was refusing to accept information.⁵⁸⁵

⁵⁷⁶ Id.

⁵⁷⁷ Id.

⁵⁷⁸ Id.

⁵⁷⁹ Id.

⁵⁸⁰ Id. at 2-3.

⁵⁸¹ Id. at 3.

⁵⁸² Id.

⁵⁸³ Id.

⁵⁸⁴ Id. at 5.

⁵⁸⁵ Id.

Nathan spoke with Gerth a couple of times, but not with Coleman.⁵⁸⁶ Gerth raised Casey's recusal with Nathan, and Nathan responded he did not understand why Coleman had gone to the press and that Coleman should approach the Criminal Division at Main Justice if he thought Casey was a problem.⁵⁸⁷ Nathan nevertheless suggested to Keeney that he contact Casey to see if recusal was appropriate.⁵⁸⁸

8. Keeney Urged Casey to Recuse.

On September 20, 1993, Keeney called Casey and urged her to consider recusing herself from the Hale investigation.⁵⁸⁹ Casey said this telephone conversation was the first time she heard Hale's allegations about President Clinton; Keeney passed on to her what he had learned from Nathan.⁵⁹⁰ Keeney specifically said that Hale claimed he was involved in a meeting with President Clinton about fraudulent activities.⁵⁹¹ Keeney expressed the opinion that such an allegation alone was enough to warrant Casey's recusal.⁵⁹² Casey resisted recusal, telling Keeney there was no basis for it.⁵⁹³ She was upset because she thought he was basing his request on an

⁵⁸⁶ Id.

⁵⁸⁷ Id.

⁵⁸⁸ Nathan 6/13/95 GJ at 14.

⁵⁸⁹ Keeney 7/6/95 GJ at 18; Casey 5/10/95 Int. at 7; Gangloff 3/29/95 Int. at 4-5.

⁵⁹⁰ Casey 5/10/95 Int. at 7.

⁵⁹¹ Id.

⁵⁹² Id. at 7-8.

⁵⁹³ Id. at 7.

anonymous phone call.⁵⁹⁴ She told Keeney that she was waiting for additional facts from Coleman before making any decision and that Coleman was refusing to proffer.⁵⁹⁵

Keeney agreed Casey seemed offended at the recusal suggestion.⁵⁹⁶ Keeney pointed out she was a Clinton appointee and Hale supposedly had information implicating President Clinton.⁵⁹⁷ Keeney did not think it appropriate that a President's appointee -- serving in his "hometown" -- should decide a matter involving that President.⁵⁹⁸

Casey would not recuse at that point.⁵⁹⁹ She told Keeney there were insufficient facts to warrant that step.⁶⁰⁰ Casey felt that if additional facts were turned up about Governor Tucker or Smith, then she would have to recuse.⁶⁰¹ She did not believe Keeney mentioned Governor Tucker's name, but thought she brought it up.⁶⁰² She said it did cross her mind that the Hale investigation might be connected with Madison Guaranty and the allegations in RTC Referral C-0004.⁶⁰³

⁵⁹⁴ Id.

⁵⁹⁵ Id.

⁵⁹⁶ Keeney 7/6/95 GJ at 18-19.

⁵⁹⁷ Id.

⁵⁹⁸ Id. at 19.

⁵⁹⁹ Casey 5/10/95 Int. at 8.

⁶⁰⁰ Id.

⁶⁰¹ Id.

⁶⁰² Id.

⁶⁰³ Id.

Johnson advised Casey on the Hale recusal issue, and she relied on his advice.⁶⁰⁴ Johnson felt recusal would be a mistake and bad policy.⁶⁰⁵ His fear was that by capitulating to a recusal request regarding Hale, a precedent would be set so that if someone told the press that he had information that implicated the President, then the office would be held hostage all of President Clinton's term.⁶⁰⁶ Johnson believed the office should hold firm and insist that Hale make a proffer so the information could be evaluated and the need for recusal more intelligently addressed.⁶⁰⁷

Casey told this Office that she knew she would recuse once she had information that would justify that step.⁶⁰⁸ If Hale had proffered information on President Clinton's and Governor Tucker's roles, then she would have recused.⁶⁰⁹ She refused to do so until those allegations were furnished.⁶¹⁰

On September 23, 1993, Hale was indicted.⁶¹¹ On the day of the indictment, an article about Hale's allegations in the Arkansas Democrat-Gazette summarized Hale's allegations about President Clinton and Governor Tucker and mentioned the failed negotiations with the USAO-

⁶⁰⁴ Id.

⁶⁰⁵ Johnson 6/29/95 GJ at 38.

⁶⁰⁶ Id.

⁶⁰⁷ Id.

⁶⁰⁸ Casey 5/10/95 Int. at 9.

⁶⁰⁹ Id.

⁶¹⁰ Id.; Casey 6/29/95 GJ at 33.

EDAR.⁶¹²

9. Casey's September 24 Meeting with FBI Little Rock Field Office.

On September 24, 1993, Casey, Johnson, and Jackson of the USAO-EDAR met with Whitehead, Irons, and Reign and Hall of the FBI-Little Rock.⁶¹³ Irons said the meeting was called to discuss problems the FBI was having with Jackson.⁶¹⁴

Irons provided Casey with a review of the FBI's ongoing investigation of Madison Guaranty.⁶¹⁵ Irons said the stated purpose of his review was to assist Casey in thinking about

⁶¹¹ Indictment, United States v. Hale et al., No. LR-CR-93-147 (E.D. Ark. Sept. 23, 1993); Casey 6/29/95 GJ at 42; Casey 5/10/95 Int. at 9.

⁶¹² Jonathan Groves, Judge Expects to be Indicted in SBA Loans, Arkansas Democrat-Gazette, Sept. 23, 1993, at 1A (Doc. No. 001151).

⁶¹³ Casey recalled the meeting as taking place in late September. Casey 6/29/95 GJ at 34; Casey 5/10/95 Int. at 9; Jackson 5/9/95 Int. at 9; Irons 5/21/96 GJ at 87-90; see also Facsimile sent from Paula J. Casey, United States Attorney, Eastern District of Arkansas, to Carl Stern, Department of Justice Public Affairs Office (Mar. 30, 1994) (Doc. No. 018717).

⁶¹⁴ Irons 2/14/95 Int. at 10; Irons GJ 5/21/96 GJ at 87-88. The FBI served a federal grand jury subpoena on the RTC in Kansas City for all the relevant records on Madison Guaranty and McDougal. Id. Irons thought that all Madison Guaranty records would be needed to conduct a thorough investigation. Irons later learned that Jackson had spoken with the RTC and, without previous consultation with the FBI, agreed to significantly limit the scope of the subpoenas. Id. Jackson did not believe it necessary to obtain the breadth of material Irons wanted. Jackson 5/9/95 Int. at 8. The FBI was having problems getting all Madison Guaranty documents and records from the RTC. Irons 2/14/95 Int. at 10; Jackson 5/9/95 Int. at 8. Jackson said the RTC could not find certain records and there were copying problems. Jackson told the RTC that if the records could not be obtained then, the agency could comply by the next grand jury. Jackson 5/19/95 Int. at 8-9. Jackson did not believe the RTC was being intentionally difficult about record production. Id. at 9.

⁶¹⁵ Irons 2/14/95 Int. at 10.

recusal.⁶¹⁶ Irons expressed his opinion that Tucker and Smith were involved in criminal conduct and that if the investigation proceeded as expected, they would be charged with felonies.⁶¹⁷ Irons said Casey told the group that she would have to recuse and her only remaining issue was the timing.⁶¹⁸

In addition to a discussion of the FBI's relationship with Jackson, there was a discussion of new RTC Madison Guaranty referrals that had not been received.⁶¹⁹ Casey said she raised the issue of recusal because she had not done so before, saying that if there was an investigation or if there were referrals involving Governor Tucker or Smith, then she could not participate.⁶²⁰ Casey agreed Irons may have mentioned the names of Tucker and Smith, causing her to raise the recusal issue.⁶²¹

Casey said that she did not recuse on September 24. She said the FBI was not then

⁶¹⁶ Id.

⁶¹⁷ Irons 5/21/96 GJ at 89.

⁶¹⁸ Irons 2/14/95 Int. at 10.

⁶¹⁹ Casey 6/29/95 GJ at 35; Irons 5/21/96 GJ at 89.

⁶²⁰ Casey 6/29/95 GJ at 35.

⁶²¹ Id. at 36. On March 29, 1994, Casey wrote a memorandum to Carl Stern in DOJ's Public Affairs Office in which she said "I told the FBI (Don Whitehead, Steve Irons, Dave Reign, and Gretchen Hall), AUSA Fletcher Jackson, and FAUSA Michael Johnson that I could not participate in investigation or prosecution matters pertaining to the Clintons or Jim Guy Tucker. It was also necessary for me to recuse because of my acquaintance with Steve Smith. That conversation took place sometime before October 1. Judging from my calendar I believe it took place on the morning of September 24, 1993." Memo from Paula Casey, United States Attorney, Eastern District of Arkansas to Carl Stern, Department of Justice, Public Affairs Office (Mar. 29, 1994) (Doc. No. 018718).

investigating Tucker or Smith; it was only "trying" to do so.⁶²² She did not think her position changed from the position she took with Keeney on September 20.⁶²³ According to Agent Irons, she said at that meeting, "I can't be any part of this and I am recused," and "I'm not going to announce this publicly that I've recused. But within the office, I'm putting everybody on notice that I don't want to hear anything about this."⁶²⁴

Johnson said he recalled that at the meeting the FBI probably mentioned specific names of people potentially involved in the Madison Guaranty matter.⁶²⁵ Johnson emphasized they were "dealing with the beginning of an investigation" as opposed to a "complete evaluation."⁶²⁶ He believed the recusal discussion on September 24 was "in the abstract" because at that point, they had nothing on which to base a judgment.⁶²⁷ Johnson said "it was adamantly clear from the beginning" that Casey would recuse if the investigation moved beyond the "allegation stage."⁶²⁸ Johnson said at that point, they had no records or anything to base their judgment on, so recusal was premature and unwise.⁶²⁹ He advised Casey along those lines, and she followed his advice --

⁶²² Casey 6/29/95 GJ at 38-39.

⁶²³ Id. at 41.

⁶²⁴ Irons 5/21/96 GJ at 89-90.

⁶²⁵ Johnson 6/29/95 GJ at 51.

⁶²⁶ Id.

⁶²⁷ Id. at 52.

⁶²⁸ Id.

⁶²⁹ Id.

according to Johnson "maybe against her better instincts."⁶³⁰

10. The New Referrals Reach Little Rock.

On October 8, 1993, the RTC in Kansas City sent nine more criminal referrals involving Madison Guaranty to Paula Casey in Little Rock.⁶³¹ Documentary evidence shows the referrals were sent via certified mail and received at FBI-Little Rock on October 12, 1993⁶³² and at the USAO-EDAR on October 14, 1993.⁶³³

Casey did not send an urgent report to DOJ about the new referrals; she did not then know the urgent report procedure existed.⁶³⁴ Cases were opened on the new referrals.⁶³⁵ The RTC notified the EOUSA about the new referrals by sending to Henneman copies of its transmittal letters to Little Rock, as well as summaries of the matters.⁶³⁶

⁶³⁰ Id. at 55-56.

⁶³¹ Letter from Lee O. Ausen, RTC Supervisory Investigator to Honorable Paula Jean Casey, United States Attorney, (Oct. 8, 1993) (Doc. No. 017692). The RTC also sent copies of the nine new referrals to the FBI in Little Rock. See Letter from L. Jean Lewis, Senior Criminal Investigator, to Donna Henneman, Ethics Program Manager (Oct. 13, 1993) (Doc. No. 066718).

⁶³² Nine Certified Mail Receipts addressed to Steve Irons, Supervisory FBI Agent and signed by B. Kell (Oct. 12, 1993) (Doc. Nos. P396620776, P396620777, P396620778, P396620779, P396620780, P396620781, P396620782, P396620783, P396620784).

⁶³³ Nine Certified Mail Receipts addressed to Paula Casey, United States Attorney Arkansas and signed by Amanda Perkins (delivery date Oct. 14, 1993) (Doc. Nos. P396620767, P396620768, P137330501, P137330495, P137330496, P137330497, P396620773, P396620774, P137330500).

⁶³⁴ Casey 6/29/95 GJ at 43.

⁶³⁵ Johnson 6/29/95 GJ at 70.

⁶³⁶ Letter from L. Jean Lewis, Senior Criminal Investigator to Donna Henneman, Ethics Program Manager (Oct. 13, 1993) (Doc. No. 006718).

11. Casey Declined C-0004.

In late September 1993, Casey received a call from the EOUSA about referral C-0004.⁶³⁷ Casey was told that RTC Investigator Jean Lewis was calling the EOUSA to find out the disposition of C-0004; the agency had not yet been told what had happened to it.⁶³⁸ According to Westbrook, she told Casey she needed to make a "prosecutive determination" on C-0004.⁶³⁹

Casey testified that her best recollection was EOUSA asked her to write the RTC and tell them the referral had been declined.⁶⁴⁰ Casey is not sure the EOUSA used the term "declined."⁶⁴¹ She thought EOUSA probably asked her to write Lewis so Lewis would stop calling.⁶⁴²

Johnson said Casey told him about her call from EOUSA.⁶⁴³ He understood that she was asked to write a letter to the RTC explaining the status of C-0004; he did not know if the word "declined" was used.⁶⁴⁴ Johnson said that "everybody's" understanding -- and by that he meant Casey's, his, and the EOUSA's understanding -- was the matter had been declined by DOJ,

⁶³⁷ Casey 6/29/95 GJ at 44-45. Casey was not sure about the date, but believed the call came in before her office moved from the courthouse; she placed it in the "last week of September." Id. at 44-45.

⁶³⁸ Id. at 45.

⁶³⁹ Westbrook 6/22/95 GJ at 34.

⁶⁴⁰ Casey 6/29/95 GJ at 46.

⁶⁴¹ Id.

⁶⁴² Id. at 47.

⁶⁴³ Johnson 6/29/95 GJ at 60-62.

⁶⁴⁴ Id. at 61.

because the Criminal Division had determined the referral had no prosecutive merit.⁶⁴⁵ He thought that because no one had told the RTC that was what Casey was being asked to do.⁶⁴⁶ Any notion the EOUSA told Casey that she was to make a decision on the referral and notify the RTC accordingly was "definitely inconsistent" with Johnson's recollection.⁶⁴⁷

Casey said that when Westbrook from EOUSA called, she was too busy to attend to the matter because she was in the middle of her office move.⁶⁴⁸ After the move, EOUSA called again, and Casey apologized for not having addressed the matter sooner.⁶⁴⁹ Casey reviewed C-0004 again, probably looked at the MacDougall memorandum once more,⁶⁵⁰ and then drafted a letter to the RTC.⁶⁵¹ Casey's October 27, 1993 letter to the RTC read:

I am writing at the request of the Office of Legal Counsel, Executive Office for U.S. Attorneys of the U.S. Department of Justice to let you know the status of [C-0004].

As you know, this referral was reviewed by the Criminal Division of the U.S. Department of Justice at the request of the previous U.S. Attorney for the

⁶⁴⁵ Id.

⁶⁴⁶ Id. at 61-62.

⁶⁴⁷ Id. at 62.

⁶⁴⁸ Casey 6/29/95 GJ at 47.

⁶⁴⁹ Id.

⁶⁵⁰ Id.

⁶⁵¹ Letter from Paula J. Casey, United States Attorney, Eastern District of Arkansas to L. Jean Lewis, Criminal Investigator (Oct. 21, 1993) (Doc. No. 007038); Casey 6/29/95 GJ at 47. Casey started the letter on October 21, but did not finish it until October 27. A comparison of the two letters shows no substantive differences. The changes to the final letter were merely formatting and punctuation. Letter from Paula J. Casey, United States Attorney, Eastern District of Arkansas to L. Jean Lewis, Criminal Investigator (Oct. 27, 1993).

Eastern District of Arkansas. The matter was concluded before I began working in this office, and I was unaware that you had not been told until I was contacted by the Office of Legal Counsel. After receiving the call from Legal Counsel I reviewed the referral, and I concur with the opinion of the Department attorneys that there is insufficient information in the referral to sustain many of the allegations made by the investigators or to warrant the initiation of a criminal investigation.

Although I am declining to take further substantive action on this referral, my decision does not foreclose future prosecutions about the matters covered by the referral or related matters in the event that my office and the FBI are given access to records or information indicating that prosecutable cases can be made.⁶⁵²

Casey testified that she looked at the referral before drafting the letter.⁶⁵³ When asked why she did not recuse from C-0004 because it mentioned Tucker and Smith⁶⁵⁴ -- the people she identified in September 24 meeting as requiring recusal -- her response was that she would have if the matter had not been reviewed by the Justice Department.⁶⁵⁵ As she saw it, the referral dated back to September 1992; it had "made the rounds" of the Criminal Division and Fraud Section at Justice, and had been analyzed by someone knowledgeable about such matters.⁶⁵⁶ Casey said she also could have sent it back to Justice where "it could have circled the rounds for another year."⁶⁵⁷ Alternatively she could have sent it back to the RTC and told the agency the referral had been reviewed and found insufficient to proceed, with the proviso that if the RTC found anything else

⁶⁵² Letter from Paula J. Casey, United States Attorney, Eastern District of Arkansas to L. Jean Lewis, Criminal Investigator (Oct. 27, 1993).

⁶⁵³ Casey 6/29/95 GJ at 47.

⁶⁵⁴ RTC Crim. Ref. No. C-0004 at 18 (Aug. 31, 1992) (Doc. No. 006660).

⁶⁵⁵ Casey 6/29/95 GJ at 49.

⁶⁵⁶ Id.

that might be relevant to C-0004, then USAO-EDAR would look at it again.⁶⁵⁸ She chose the latter course, regarding it as more a matter of taking care of final details than making a substantive decision whether to decline or accept the case.⁶⁵⁹ She pointed out that her letter said the "door was still open" to the RTC if it wished to submit anything more on C-0004.⁶⁶⁰ Casey did not remember consulting with anyone else -- Jackson, Johnson or the FBI in Little Rock -- about her letter.⁶⁶¹

Johnson said Casey showed him her draft letter to the RTC.⁶⁶² He read the referral (but not its exhibits), and he noticed that the Clintons, Tucker and Smith were all mentioned.⁶⁶³ When asked why Casey rendered a decision on C-0004, in light of her remarks about recusal to the FBI on September 24, Johnson said Casey had not made the decision being communicated in the letter.⁶⁶⁴ She merely "communicated to the RTC our understanding that a decision had been previously made about it."⁶⁶⁵ He did not review any documents indicating that Main Justice had actually declined or rendered an opinion on the referral; he had gotten his sense

⁶⁵⁷ Id.

⁶⁵⁸ Id. at 49-50.

⁶⁵⁹ Id. at 50.

⁶⁶⁰ Id. at 52.

⁶⁶¹ Id. at 50.

⁶⁶² Johnson 6/29/95 GJ at 58.

⁶⁶³ Id. at 62-64.

⁶⁶⁴ Id. at 62-65.

⁶⁶⁵ Id. at 64-65.

"[s]omewhere."⁶⁶⁶ Johnson said the only person concerned about C-0004 was Lewis.⁶⁶⁷ The FBI was not; Jackson was not.⁶⁶⁸ Johnson was not impressed with the referral; he felt that it was filled with "reckless speculation," and he was more concerned with moving forward on the "much more focused" independent investigation the FBI was conducting of Madison Guaranty.⁶⁶⁹ He saw the October 27 letter to the RTC as "housekeeping."⁶⁷⁰ The nine new referrals had come in before the October 27 letter was drafted and sent out,⁶⁷¹ and Johnson saw a lot of overlap between their allegations, and the matter that had been in the first referral.⁶⁷² Johnson said telling the RTC that USAO-EDAR was not going to act on C-0004 was of "no consequence," in light of the new referrals.⁶⁷³

By letter dated November 1, 1993, Lewis responded to Casey's October 27 letter; the RTC interpreted it as a "formal declination" of C-0004.⁶⁷⁴ The letter asked Casey to send the

⁶⁶⁶ Id. at 66.

⁶⁶⁷ Id.

⁶⁶⁸ Id.

⁶⁶⁹ Id. at 66-67.

⁶⁷⁰ Id. at 67.

⁶⁷¹ Id. at 70.

⁶⁷² Id.

⁶⁷³ Id. Johnson testified that with all the other things going on, the referral and the letter to the RTC were "the least significant things that I can think of that touched upon this matter." Id. at 73.

⁶⁷⁴ Letter from L. Jean Lewis, RTC Senior Criminal Investigator to The Honorable Paula J. Casey, United States Attorney, Eastern District of Arkansas (Nov. 1, 1993).

RTC any "documents . . . relative to the conclusion of this matter."⁶⁷⁵ Casey did not respond to Lewis's letter. Casey testified that by that point, it was "abundantly clear" that Lewis was leaking information to the press.⁶⁷⁶ Casey was trying to deal with C-0004 as a "substantive" matter, and she felt that Lewis was trying to deal with it as a "political" matter.⁶⁷⁷ Casey felt the best way to deal with Lewis was to stop sending her any information.⁶⁷⁸

12. Casey Recused Herself from the New Referrals.

Casey claimed that when the new referrals came in she began to think about what arrangements ought to be made for her recusal.⁶⁷⁹ One possibility was that she would recuse, but not her office.⁶⁸⁰ That would mean that Johnson, as First Assistant, would become the U.S. Attorney on the referrals.⁶⁸¹ Another possibility was the matters could be sent to Justice.⁶⁸² Casey was concerned about the former possibility because it would mean turning over what could become the office's biggest investigation to someone else; it could have led to difficulties if, for example, Johnson said he needed a great deal of staff.⁶⁸³ Casey would not have been in a position

⁶⁷⁵ Id.

⁶⁷⁶ Casey 6/29/95 GJ at 78.

⁶⁷⁷ Id.

⁶⁷⁸ Id.

⁶⁷⁹ Id. at 54.

⁶⁸⁰ Id.

⁶⁸¹ Id.

⁶⁸² Id. at 54.

⁶⁸³ Id. at 55.

to question him.⁶⁸⁴

The matter ultimately was resolved by the intercession of Main Justice on November 3, 1993. Casey recalled that she had to attend an orientation session for new U.S. Attorneys in Annapolis, Maryland during the first week in November.⁶⁸⁵ She had planned to discuss recusal with someone at the meeting.⁶⁸⁶ Once in Annapolis, Casey received a message from Deputy Attorney General Heymann, who was calling from Washington, D.C.⁶⁸⁷ He wanted her to come to his office on Wednesday for a meeting,⁶⁸⁸ which she did.⁶⁸⁹

Heymann testified that as the media started to raise more allegations about the Hale/Clinton connection, he became more and more uncomfortable with the relevant matters being handled by anyone who had a relationship with President Clinton.⁶⁹⁰ He arranged for her to come to a meeting at his office in Washington on November 3, 1993.⁶⁹¹ During the meeting, Heymann said he wanted to move the Hale and Madison Guaranty matters out of her office

⁶⁸⁴ Johnson 6/29/95 GJ at 55.

⁶⁸⁵ Casey 6/29/95 GJ at 55-56.

⁶⁸⁶ Id.

⁶⁸⁷ Id. at 56.

⁶⁸⁸ Id.

⁶⁸⁹ Id. Although precise recollections vary about who participated in the meeting, the evidence shows that in addition to Casey and Heymann, it was attended by Nathan, Jo Ann Harris (then the Assistant Attorney General, Criminal Division), and Gangloff, Keeney, McDowell, Moscato, Urgenson. Casey 5/10/95 Int. at 13; Heymann 4/6/95 Int. at 5; Nathan 4/4/95 Int. at 6; Harris 5/5/95 Int. at 3; Gangloff 3/29/95 Int. at 6; Keeney 4/7/95 Int. at 5-6; Moscato 1/18/95 Int. at 7-8; Urgenson 3/27/95 Int. at 6.

⁶⁹⁰ Heymann 6/13/95 GJ at 21-22.

because her relationships with President Clinton and Governor Tucker were too close.⁶⁹² He wanted it moved to the Criminal Division in Washington.⁶⁹³ Casey said she wanted to keep the Hale case, because it was so far along.⁶⁹⁴ The prosecutors in the room said that would not work -- the whole "bundle," including the Hale case, had to be transferred.⁶⁹⁵ Heymann did not remember Casey talking about a group of nine new referrals just received in her office, but he did have a vague memory they were talking about "a lot of different cases," particularly since Casey wanted to keep the Hale matter and get rid of the others.⁶⁹⁶ He also did not remember if he knew at the November 3 meeting that Casey already had declined C-0004.⁶⁹⁷ He remembered that coming up, but he could not remember whether it was before or after his meeting with Casey.⁶⁹⁸

Nathan recalled that Casey was not happy to be at the meeting and believed the recusal discussion was a personal attack on her.⁶⁹⁹ Casey said her office had done a lot of work on the Hale case, and she and her office were acting responsibly.⁷⁰⁰ He recalled there was a discussion of specific allegations about Tucker and Casey's possible business and social connections with

⁶⁹¹ Heymann 4/6/95 Int. at 5.

⁶⁹² Heymann 6/13/95 GJ at 22.

⁶⁹³ Id.

⁶⁹⁴ Id. at 26.

⁶⁹⁵ Id. at 26-27.

⁶⁹⁶ Id. at 27.

⁶⁹⁷ Id.

⁶⁹⁸ Id. at 28.

⁶⁹⁹ Nathan 4/4/95 Int. at 6.

⁷⁰⁰ Id. at 6-7.

him.⁷⁰¹ Heymann said he thought Casey should recuse.⁷⁰² Nathan recalled a discussion about whether responsibilities on the Hale case could be split between the USAO-EDAR and Main Justice as well as input from the Criminal Division that it should handle the entire matter.⁷⁰³

Nathan did not remember a discussion about the new referrals during this meeting. He also said he did not know the substance of Casey's October 27 letter then.⁷⁰⁴

Jo Ann Harris, Assistant Attorney General for the Criminal Division, recalled the Deputy Attorney General's office wanted to get everything on the table, though there was a strong feeling before the meeting that Casey should be recused.⁷⁰⁵ Casey strongly resisted recusal.⁷⁰⁶ Casey expressed the view that the USAO-EDAR could handle the Whitewater-related investigations professionally and with integrity.⁷⁰⁷ Harris recalled the Deputy Attorney General opted in favor of recusal because of the facts that Casey had been appointed by President Clinton, and that Casey's husband had prior involvement and association with both the President and Governor Tucker.⁷⁰⁸ Harris also recalled that at the November 3 meeting, an effort was made to summarize

⁷⁰¹ Id. at 7.

⁷⁰² Id.

⁷⁰³ Id.

⁷⁰⁴ Id.

⁷⁰⁵ Harris 5/5/95 Int. at 3.

⁷⁰⁶ Id.

⁷⁰⁷ Id.

⁷⁰⁸ Id.

the different RTC referrals.⁷⁰⁹ To the best of her recollection, she did not then know of the existence of C-0004; she thought the first she heard of the first referral was after the Mackay team (the team assigned by Main Justice to succeed USAO-EDAR) went to Arkansas to take over the Whitewater matters.⁷¹⁰ Even then, she believed that she first learned about it through newspaper accounts.⁷¹¹

According to Joseph Gangloff, Principal Deputy Chief of the Public Integrity Section, his impression at the time of the November 3, 1993 meeting was that a decision had already been made at DOJ's highest levels to handle the Madison Guaranty and Hale matters, and the meeting was called with the specific purpose of having Casey recuse herself.⁷¹² Casey was given a chance to explain her position.⁷¹³ She made the point that there was no evidence of any wrongdoing on President Clinton's part, her recusal would create the impression that something sinister was going on, and the President was involved.⁷¹⁴ Gangloff also recalled that someone made the point that it would be better for her to recuse herself than to be directed to do so by DOJ.⁷¹⁵ Casey acquiesced and was given the opportunity to request recusal.⁷¹⁶

⁷⁰⁹ Id.

⁷¹⁰ Id. at 4.

⁷¹¹ Id.

⁷¹² Gangloff 3/29/95 Int. at 6.

⁷¹³ Id. at 7.

⁷¹⁴ Id.

⁷¹⁵ Id.

⁷¹⁶ Id.

Anthony Moscato, Director of the EOUSA, recalled that Casey resisted recusal and Moscato supported her.⁷¹⁷ Moscato thought she was honest and capable enough to handle the Madison Guaranty and Hale matters and did not have to recuse.⁷¹⁸ Moscato recalled the nine new referrals had been received from the RTC before this meeting; he did not remember a specific discussion of their merits, but remembered that Casey did not think much of them.⁷¹⁹ There was a discussion of the referrals -- perhaps not all of them, but more than one or two.⁷²⁰ Casey would summarize the one at hand, and then the group would move on.⁷²¹ Moscato recalled the names of the Clintons and Tucker coming up.⁷²² Heymann wanted Casey to recuse.⁷²³ Heymann did not direct Casey to recuse; however, it was clear the Department thought she should do so.⁷²⁴ After the meeting, Moscato thought Casey was angry and felt pushed.⁷²⁵ Casey thought she would have to recuse and did not think she should have to do so.⁷²⁶ Moscato felt that Casey's resistance to recusal was for purely honorable reasons.⁷²⁷

⁷¹⁷ Moscato 1/18/95 Int. at 8.

⁷¹⁸ Id.

⁷¹⁹ Id.

⁷²⁰ Id.

⁷²¹ Id.

⁷²² Id.

⁷²³ Id.

⁷²⁴ Id.

⁷²⁵ Id. at 9.

⁷²⁶ Id.

⁷²⁷ Id.

Larry Urgenson, Acting Deputy Assistant Attorney General for the Criminal Division, expressed the view that Casey should recuse herself from all Whitewater-related matters.⁷²⁸ He remembered that Casey was concerned that her recusal would create the wrong impression and reflect in a negative manner on her reputation for objectivity and professionalism.⁷²⁹ She felt that her office could professionally and ethically handle most of the ongoing investigations.⁷³⁰ Urgenson remembered that Casey felt she had to recuse herself from all matters involving Clinton campaign issues, but that she had no problem handling any of the Madison Guaranty or McDougal investigations.⁷³¹ The decision was made that all pending investigations should be turned over to the Fraud Section.⁷³²

For her part, Casey said by the time of the meeting, she had "pretty much" made up her mind to recuse, but she was concerned that recusal would create a problem for her with the other attorneys in her office and that they would be upset if she turned everything over to Justice.⁷³³ She recalled the meeting participants were very concerned about the allegations relating to the Clintons.⁷³⁴ At the beginning of the meeting, Casey briefed the group on the details of the new

⁷²⁸ Urgenson 3/27/95 Int. at 6.

⁷²⁹ Id.

⁷³⁰ Id.

⁷³¹ Id. at 6-7.

⁷³² Id. at 7.

⁷³³ Casey 5/10/95 Int. at 13.

⁷³⁴ Id.

referrals.⁷³⁵ There was some discussion about splitting responsibilities between her office and the Fraud Section at Justice.⁷³⁶ Justice officials expressed as their major concern her recusal on matters involving the Clintons.⁷³⁷ Casey expressed her view that the Clintons were not responsible for her appointment as U.S. Attorney; rather, it was Senator Bumpers.⁷³⁸ She did resist recusal, but her primary reason for doing so was that she did not want to be perceived by her staff as giving away everything and not being capable of handling cases and problems that arose in her District.⁷³⁹

On November 5, 1993, Casey wrote a recusal letter, requesting recusal of herself and her office.⁷⁴⁰ After the meeting, she returned to Annapolis to complete her orientation meeting.⁷⁴¹ Once that was over, either on Thursday or Friday of that week, she went back to Washington for additional meetings.⁷⁴² Casey wrote the letter while in Washington on the latter trip; she did not have the facilities to do it before then.⁷⁴³ She wrote a recusal letter and had her secretary in Little Rock type it and fax it to Casey in Washington.⁷⁴⁴ Casey then reviewed it, signed it, and hand

⁷³⁵ Id.

⁷³⁶ Id.

⁷³⁷ Id.

⁷³⁸ Id.

⁷³⁹ Id. at 13-14.

⁷⁴⁰ Casey 6/29/95 GJ at 6, 66.

⁷⁴¹ Id. at 66.

⁷⁴² Id.

⁷⁴³ Id.

⁷⁴⁴ Casey 5/10/95 Int. at 14.

delivered it to Nathan's office on Friday.⁷⁴⁵ She returned to Little Rock on Friday night.⁷⁴⁶

F. Back to Main Justice.

The Mackay Team Took Over.

Main Justice assigned three Fraud Section trial attorneys to take over the Hale/Madison Guaranty matters: Donald Mackay, Jim Nixon, and Dwight Bostwick.⁷⁴⁷ Mackay made his first trip to Little Rock on November 8, 1993.⁷⁴⁸ Before the trip, he was given summaries of the nine new Madison Guaranty referrals from someone in the EOUSA.⁷⁴⁹ At that time, he was told nothing about the C-0004 referral.⁷⁵⁰ He believed that he first learned about C-0004 during his first trip to Little Rock.⁷⁵¹ Casey told him there was a letter from Keeney or someone else within the Criminal Division, stating there was no reason for a recusal of USAO-EDAR and the Division would not have a problem if the District decided to take no additional action concerning

⁷⁴⁵ Id.

⁷⁴⁶ Id. It should be noted that at just about the same time Casey recused, Department of Justice official Webb Hubbell recused himself and his entire office on any pending matter "dealing with Madison Guaranty Savings and Loan or Mr. and Mrs. James McDougal." Memo from Webb Hubbell, The Associate Attorney General to The Attorney General, Deputy Attorney General, Acting Assistant Attorney General, for Criminal Division (Nov. 3, 1993) (Doc. No. 004778).

⁷⁴⁷ Mackay 5/4/95 Int. at 1-3.

⁷⁴⁸ Id. Nixon and Bostwick did not accompany him on this trip. Id.

⁷⁴⁹ Id. at 5.

⁷⁵⁰ Id.

⁷⁵¹ Id.

the referral.⁷⁵² Mackay recalled being upset that no one had previously told him about C-0004, but he did not make an issue out of that fact.⁷⁵³ He recalled that he got a copy of the first Referral from the FBI in Little Rock.⁷⁵⁴ He looked it over and remembered thinking to himself that C-0004 ought to be reopened for two reasons.⁷⁵⁵ First, in his mind, there was sufficient information in it to warrant additional investigation.⁷⁵⁶ Second, its open status would make it unavailable for media publication.⁷⁵⁷ The Mackay team reopened C-0004.⁷⁵⁸

During Mackay's first trip to Little Rock, Casey introduced him to Jackson, who Mackay learned was the only person in the USAO-EDAR with institutional knowledge about the investigations.⁷⁵⁹ Mackay asked for the case file involving the first prosecution of McDougal; Jackson said he threw the file away when the USAO moved its office.⁷⁶⁰ Mackay later reconstructed the file from FBI records.⁷⁶¹ Mackay also asked for the entire Hale file; the only thing of substance in it was the indictment.⁷⁶²

⁷⁵² Id. at 5-6.

⁷⁵³ Id. at 6.

⁷⁵⁴ Mackay 6/27/95 GJ at 18.

⁷⁵⁵ Id.

⁷⁵⁶ Id.

⁷⁵⁷ Id.

⁷⁵⁸ Id.

⁷⁵⁹ Mackay 5/4/95 Int. at 6.

⁷⁶⁰ Id.

⁷⁶¹ Id.

⁷⁶² Id. at 6-7.

Mackay stayed overnight during his first trip to Little Rock; on the second day of his visit, he met with Whitehead, Irons, and Reign of the FBI.⁷⁶³ It was either at this time or at a later date that Irons told Mackay about problems the FBI had had with the USAO, and in particular with Jackson, among others.⁷⁶⁴ Nixon also spoke about problems the Mackay team uncovered about how Jackson handled the Hale investigation.⁷⁶⁵

One of the issues the Mackay team and the Little Rock FBI had to deal with was records production from the RTC.⁷⁶⁶ During November 1993, Mackay traveled to Kansas City to deal with the records problem.⁷⁶⁷ Ken Donohue, an RTC official from its headquarters in Washington, traveled with him.⁷⁶⁸ L. Richard Iorio, a field investigations officer in Kansas City, recalled meeting with Mackay and others during this visit.⁷⁶⁹ Iorio recalled that as an aside, he asked Mackay what he (Mackay) planned to do with C-0004.⁷⁷⁰ Mackay responded that he planned to take another look at it.⁷⁷¹ Iorio recalled that he saw some kind of a note, which he believed may have been on a yellow "post-it" or on some other type of document, that said something to the

⁷⁶³ Id. at 7.

⁷⁶⁴ Id.

⁷⁶⁵ Nixon 5/1/95 Int. at 4.

⁷⁶⁶ Mackay 5/4/95 Int. at 8.

⁷⁶⁷ Id. at 9.

⁷⁶⁸ Id.; Donohue 10/27/94 Int. at 1.

⁷⁶⁹ Iorio 4/12/94 Int. at 8.

⁷⁷⁰ Id.

⁷⁷¹ Id.

effect that "We'd appreciate it if this thing would go away."⁷⁷² He did not know if the note was serious or not.⁷⁷³ Iorio did not remember Mackay saying anything to the effect that he was sent to make the matter go away.⁷⁷⁴

Mackay denied telling anyone that DOJ wanted him to make C-0004 go away.⁷⁷⁵ Mackay vaguely recalled that Iorio told him that C-0004 had been declined, and Iorio questioned why the RTC should believe that DOJ would move on the nine new referrals.⁷⁷⁶ At that time, Mackay knew of the March 19, 1993 Keeney memorandum denying the request for recusal and stating the Criminal Division would not object to a declination of C-0004.⁷⁷⁷ Mackay said he probably told Iorio about the Criminal Division's statement.⁷⁷⁸

The Mackay team took over and pursued the Hale plea negotiations.⁷⁷⁹ Casey's office had insisted that Hale plead to at least one felony count. That stance had led to an impasse; Mackay wanted to rectify that situation, so he took a more flexible approach in subsequent negotiations.⁷⁸⁰ His feeling was that if Hale came in and furnished substantial, credible information, then he

⁷⁷² Id.

⁷⁷³ Id.

⁷⁷⁴ Id.

⁷⁷⁵ Mackay 5/4/95 Int. at 11.

⁷⁷⁶ Id.

⁷⁷⁷ Id.

⁷⁷⁸ Id.

⁷⁷⁹ Id. at 17.

⁷⁸⁰ Id.

might agree to a misdemeanor plea.⁷⁸¹

Bostwick was responsible for readying the Hale case for trial, and he recalled their approach was open-minded.⁷⁸² He wanted a proffer from Hale and did not want to close the door on negotiations.⁷⁸³ Hale never gave a proffer to the Mackay team,⁷⁸⁴ and he did not enter a plea until March 22, 1994, some two months after Robert Fiske became regulatory Independent Counsel.⁷⁸⁵

On January 11, 1994, close to the end of the Mackay team's involvement in the Hale/Madison Guaranty matters, Mackay met with the FBI in Little Rock to discuss the issuance of a number of grand jury subpoenas.⁷⁸⁶ One of the entities discussed, as a potential recipient, was the Rose Law Firm.⁷⁸⁷ Shortly after the meeting, Mackay left for Washington, D.C. and the FBI in Little Rock started serving the subpoenas on January 11, 1994; the Rose Law Firm, and Rick Massey, an attorney at the firm, were served on January 13, 1994.⁷⁸⁸ Mackay told Irons to withdraw those subpoenas and not to proceed with two as yet unserved subpoenas on Betsey

⁷⁸¹ Mackay 6/27/95 GJ at 52-53.

⁷⁸² Bostwick 5/2/95 Int. at 5.

⁷⁸³ Id. at 4-5.

⁷⁸⁴ Id. at 5.

⁷⁸⁵ See Final Report of Robert B. Fiske Jr., Independent Counsel, In re: Madison Guaranty Savings and Loan Association at 32 (D.C. Cir. [Spec. Div.] Oct. 6, 1994)(under seal).

⁷⁸⁶ Mackay 5/4/95 Int. at 12; Irons 2/14/95 Int. at 11-12; Hall 2/16/95 Int. at 7-8.

⁷⁸⁷ Mackay 5/4/95 Int. at 12; Irons 2/14/95 Int. at 11-12; Hall 2/16/95 Int. at 8.

Wright and Seth Ward.⁷⁸⁹

Mackay said he had discussed with Irons the need to obtain higher-level Justice approval before serving the relevant subpoenas.⁷⁹⁰ At the time of his interview with this Office, he could not say for sure whether he mentioned the need for approval during meetings with the FBI.⁷⁹¹ Even if he did express the need for approval, he was not sure the FBI understood that it was to hold off on service of the subpoena on the Rose Law Firm.⁷⁹²

Irons recalled that at one point during the January 11 meeting, Mackay preferred to hold off on the Rose Law Firm, Massey, Wright, and Ward subpoenas.⁷⁹³ In hindsight, Irons felt there may have been a misunderstanding -- not as to the service of the relevant subpoenas, but as to

⁷⁸⁸ Irons 2/14/95 Int. at 12. Between January 11 and 15, 1994, 29 grand jury subpoenas were served. See id.; see also Memo from Irons, FBI Little Rock, AR, to SAC, Little Rock, containing a list of individuals and companies to be subpoenaed (Jan. 12, 1994).

⁷⁸⁹ Irons 2/14/95 Int. at 11.

⁷⁹⁰ Mackay 5/4/95 Int. at 12. See United States Attorneys' Manual, Title 9 § 9-2.161(a) (Oct. 1, 1990) ("Policy with regard to the Issuance of Grand Jury or Trial subpoenas to Attorneys for Information Relating to the Representation of Clients").

⁷⁹¹ Mackay 5/4/95 Int. at 13.

⁷⁹² Id. at 12. Not long after the subpoenas were withdrawn, the media reported on alleged shredding of documents at the Rose Law Firm. Id. at 14. Mackay was of the view there was no nexus between the subpoena withdrawal and the shredding. Id. Regarding the subpoenas to Wright and Ward, Mackay said the Wright subpoena posed a potential problem and needed higher-level approval. Mackay 6/27/95 GJ at 67. He had previously been criticized for his desire to obtain such records, but the procedure later was approved about the time the Attorney General said she would appoint a Special Counsel for the Hale/Madison Guaranty matters. Mackay 5/4/95 Int. at 13. By the time of his grand jury appearance, Mackay did not remember standing down on the Ward subpoena, and could not think of why he would have done so. Mackay 6/27/95 GJ at 73-74.

⁷⁹³ Irons 2/14/95 Int. at 11.

Irons's authority to determine the timing of service.⁷⁹⁴

Hall also attended the January 11 meeting, and felt sure that Mackay approved the service of all the subpoenas on the list under discussion.⁷⁹⁵ She also recalled that when the subpoenas were ordered withdrawn, Irons told her that Mackay said he did not authorize the service; she was not sure why they were withdrawn, but heard from someone, possibly Irons, that Mackay felt he needed proper DOJ authorization for the relevant subpoenas.⁷⁹⁶

Mackay testified that it was his decision alone to order withdrawal of the subpoenas.⁷⁹⁷ No one tried to influence him or make any suggestions about that step, and he did not consult with anyone before ordering the withdrawal.⁷⁹⁸ He recalled running into Carver on the same day as the withdrawal, and he told Carver what he had done.⁷⁹⁹ Carver said something to the effect that he could have gotten the service ratified.⁸⁰⁰ As it was too late, Carver told Mackay to "let it go."⁸⁰¹ Carver testified that because there were discussions under way for the appointment of a special counsel, he should have the freedom to choose what investigative paths to pursue

⁷⁹⁴ Id.

⁷⁹⁵ Hall 2/16/95 Int. at 8.

⁷⁹⁶ Id.

⁷⁹⁷ Mackay 6/27/95 GJ at 73; Nixon 5/1/95 Int. at 8 (believed it was Mackay's decision to withdraw the subpoenas, and had no knowledge of the involvement of DOJ supervisors in the decision).

⁷⁹⁸ Mackay 6/27/95 GJ at 73.

⁷⁹⁹ Id. at 72-73.

⁸⁰⁰ Id. at 73.

⁸⁰¹ Id.

"unfettered and unimpeded by what the Criminal Division might do."⁸⁰² □ The withdrawn subpoenas ultimately were served, in February 1994, with the approval of the newly-appointed regulatory Independent Counsel, Mr. Fiske.⁸⁰³

IV. ANALYSIS

The Department of Justice's consideration of the RTC's criminal referral C-0004 raised the question of whether anyone took any action with a corrupt intent to delay a full investigation by the Department of Justice of the allegations in the referral in violation of 18 U.S.C. § 1505.

The relevant portion of 18 U.S.C. § 1505 provided:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

The evidence was insufficient to prove beyond a reasonable doubt that anyone took any action in violation of 18 U.S.C. § 1505 to corruptly delay or impede the full investigation of the referral.⁸⁰⁴

The evidence regarding the Little Rock U.S. Attorney's office's conduct following receipt of the referral would not support a conclusion that anyone corruptly delayed the investigation.

⁸⁰² Carver 7/6/95 GJ at 103.

⁸⁰³ Irons 2/14/95 Int. at 12.

⁸⁰⁴ While these facts may also implicate 18 U.S.C. § 1503 (relating to obstruction of a grand jury proceeding), the Independent Counsel concluded that the evidence was insufficient to

Certain actions were inconsistent with ordinary procedures by the FBI in Little Rock and the U.S. Attorney's Office. The FBI did not notify FBI Headquarters of receipt of the referral and did not open a "case" for investigation. The U.S. Attorney's office also did not notify Main Justice of the receipt of the referral as a sensitive matter (because it mentioned the Clintons) or enter it into its own internal computer log.

But the FBI in Little Rock had notified FBI headquarters on August 26, 1992, before receipt of the referral, of its expected contents, including the reference to the Clintons. Also, the investigation in Little Rock appeared to be generally proceeding along a reasonable investigative path, given the timing of the referral and the involvement of the Clintons simply as potential witnesses.

There was no evidence the U.S. Attorney's decision to conduct a limited investigation was improper. The limited investigation authorized by the U.S. Attorney was ratified by officials at Main Justice, including the Assistant Attorney General for the Criminal Division, and by officials at FBI headquarters, once they were told of the history of allegations against Madison Guaranty and Jim McDougal and the limited nature of the involvement of the Clintons as witnesses.

The Independent Counsel also concluded the evidence about the handling by officials at Main Justice of the referral following the election of President Clinton was insufficient to prove beyond a reasonable doubt that anyone obstructed justice in violation of 18 U.S.C. § 1505. The

prove any corrupt intent to obstruct either an executive branch proceeding or a grand jury proceeding.

evidence about the analysis conducted by Mark MacDougall in the Fraud Section includes contradictory testimony on the scope of his assignment, the reason for the assignment to him, and the materials he was supposed to use in his analysis. Such contradictory evidence simply does not support any inference that anyone obstructed justice.

There was also no evidence that Paula Casey's resistance to recusal or Fletcher Jackson's handling of the referrals constituted obstruction of justice. Department of Justice witnesses to Paula Casey's explanation for her reasons for not recusing testified that her decision was motivated by the merits. Jackson's handling of the referrals, including his difficult relations with the FBI and the destruction or loss of records, although irregular, also were not improperly motivated.

Similarly, although MacKay was criticized for withdrawing the subpoenas to the Rose Law Firm, there is no evidence the withdrawal of the subpoena was corruptly motivated to permit the destruction of records before a new subpoena could be issued. MacKay's explanation of his decision to withdraw the subpoenas -- they required approval from senior officials -- was consistent with Department of Justice policy, and there is no evidence of any other improper motivation.

V. SUMMARY CONCLUSION

In sum, speculation about irregular conduct by various officials in the Department of Justice and the FBI was ultimately not substantiated but did raise serious questions that required substantial investigation in order to be resolved. The handling of the referrals occurred in a highly politicized environment of the 1992 Presidential election campaign and the subsequent

transition to a new administration of a different political party. Various officials were influenced by the election to handling the referrals in a manner that they might not have in the absence of the campaign.

The transition also influenced the way the referral was handled. Delays resulted from the lack of senior appointments to the new administration which also contributed to confusion about who should make a decision on the referral for the Department, as well as what that decision actually should be. The delay and confusion ultimately undermined confidence in the proper handling of the referral, raising suspicions of obstruction of justice. Whatever the reasonableness of these suspicions, the investigation found that they were entirely unsubstantiated by the evidence. The matter is now closed.