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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:

Misc. No. 98-267

MOTION TO CONTINUE

Washington, D. C.
July 28, 1998
4:30 p.m.

.....

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE NORMA HOLLOWAY JOHNSON
CHIEF JUDGE, UNITED STATES DISTRICT COURT

APPEARANCES:

For the Office of
Independent Counsel:

ROBERT BITTMAN, ESQUIRE
SAUL WISENBERG, ESQUIRE
JOSEPH DITKOFF, ESQUIRE

For the Movant,
President Clinton:

DAVID E. KENDALL, ESQUIRE
NICOLE SELIGMAN, ESQUIRE
MAX STIER, ESQUIRE
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Computer-Aided Transcription of Stenographic Notes

P R O C E E D I N G S

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THE COURT: Good afternoon.

COUNSEL: Good afternoon, Your Honor.

THE DEPUTY CLERK: Miscellaneous Case Number 98-267,
In re Motion to Continue. Representing the Office of the
Independent Counsel are Robert Bittman, Saul Wisenberg, and
Joseph Ditkoff. Representing President Clinton is David
Kendall, Nicole Seligman, Max Stier, and Alicia Marti.

THE COURT: All right.

Counsel, I received this afternoon President Clinton's
motion for continuance. I'm sure the Office of Independent
Counsel would like a chance to respond to that motion. In the
interest of time, and certainly in light of the public interest
in moving this matter expeditiously, I will allow each side to
present oral argument on the motion for continuance rather than
asking the parties to submit written responses. I will hear
from each of you for I hope not more than ten minutes a side
and then make my ruling. If you need more than ten minutes, I
certainly will grant you additional time. But I would hope
that we could do it in about ten minutes a side.

And since it is the President's motion, I will hear
from Mr. Kendall first.

MR. KENDALL: May it please the Court. We've moved
for a two-week continuance of a subpoena ad testificandum
delivered to counsel for the President on Friday, July 17th.

1 In some ways, Your Honor, I regret the need to burden you with
2 this motion; I think it was unnecessary. But we were unable to
3 get a continuance worked out with the Office of Independent
4 Counsel.

5 I would like to explain a little about the background
6 of this, if I may. This is not the first time the President's
7 testimony has been sought. Indeed, on three different
8 occasions he has given testimony at the behest of the
9 Independent Counsel during the Whitewater investigation. The
10 first time this occurred was in June of 1994, when Mr. Fisk was
11 Independent Counsel. The second time was in April of 1995,
12 after the present Independent Counsel was appointed on August
13 5th, 1994. And the third time was in July of 1995. Now, on
14 each occasion we were able to work out a mutually acceptable
15 way of providing for this testimony.

16 The President also testified twice by videotape in
17 criminal trials of defendants indicted by the Whitewater grand
18 jury in Arkansas. And on those occasions, the Independent
19 Counsel was able to cross-examine the President.

20 As is clear from our motion, we had correspondence
21 with the Independent Counsel earlier this spring about the
22 President voluntarily appearing. I had many concerns about
23 this. They were set forth in the correspondence. That
24 correspondence really lapsed in April. The next thing we heard
25 was the letter attached to the subpoena which was delivered to

1 me at approximately 6:00 p.m. Friday, July 17th.

2 Your Honor, I initially sought time because this is
3 the summer. Various people are somewhat scattered.

4 Mr. Kantor, for example, is in China. He's been in China --

5 THE COURT: Mr. who?

6 MR. KENDALL: Mr. Mickey Kantor.

7 THE COURT: Oh, okay.

8 MR. KENDALL: One of the President's private attorneys
9 who has been advising on this matter.

10 We were, however, able to make a quite specific
11 proposal to the Independent Counsel, which was delivered
12 yesterday, and that is at Tab 6 of our papers. This is a
13 letter in which I try to outline some of our concerns, how they
14 may be met. It provides a date, a specific date for the
15 President to give testimony and an alternative date. And that,
16 I hoped, would be a good faith offer that would allow us to
17 negotiate, as we have in the past, and settle on both the
18 timing and terms of the President's testimony.

19 I was surprised that the Independent Counsel refused
20 to withdraw or suspend this subpoena, and therefore, I made
21 this motion. I think it unseemly for the President of the
22 United States to be in any way in violation of legal process.
23 I think there are obvious reasons for that. And therefore, in
24 an effort to avoid that, we made a motion for a brief
25 continuance.

1 Your Honor, there are no deadlines, there are no
2 statutes of limitation, there are no pending trials. There is
3 really nothing substantive to warrant the denial of this very
4 brief continuance.

5 I think that we may not in fact need the two weeks.
6 It may be possible that we can very quickly work with the
7 Independent Counsel to come to an agreement on the terms and
8 timing. But as the motion papers make clear, this is a
9 literally unprecedented legal act. The testimony of the
10 President has never been compelled before a grand jury before,
11 and there are very serious constitutional questions, the
12 litigation of which would be quite time-consuming. We don't
13 necessarily want to have to tackle those questions if we can
14 come to an agreement that would allow both sides -- this has
15 happened often in this investigation -- to maintain their
16 positions but work together to get by a common problem.

17 The President of the United States -- I would be
18 making this motion if it were anybody, in order to get the
19 requisite time to try and work something out; and if things
20 can't be worked out, to get the input of the people necessary
21 to determine the proper arguments to be made on behalf of the
22 President of the United States. The President is the
23 President, however. He has public duties. And the language of
24 the Jones case, the Clinton versus Jones case, is, I think,
25 quite on point here because, while the Supreme Court did rule

1 that the President while in office could be subjected to civil
2 litigation, it also ruled that the conduct of that litigation
3 had to be undertaken by the supervising judge with great
4 sensitivity to the President's duties and great deference to
5 the many demands on his time.

6 It is difficult to convey -- I have represented busy
7 people before. It is difficult to convey how busy the
8 President is, how many demands there are on his time. And in
9 the past it has taken us time to work out not only a time for
10 the President to testify, but a time in which he can be
11 adequately prepared, because he has many duties and many
12 demands. And every client deserves the effective assistance of
13 counsel in getting them ready to testify so they can testify as
14 effectively and accurately as possible.

15 We quoted some of the language in Clinton versus
16 Jones. One of the things the Court stated was it articulated
17 the assumption that any testimony from the President may be
18 taken at a time that will accommodate his busy schedule. Your
19 Honor, again, I think that the -- we've set forth in the letter
20 the considerations that are important to us, considerations
21 about the President's schedule. And we respectfully submit
22 that this continuance is not lengthy. It may in fact make
23 unnecessary other litigation. And we respectfully would
24 request that the Court grant us a two-week continuance.

25 THE COURT: What do you want to do with the two weeks?

1 You know, you ask me for a two-week continuance. Are you
2 asking me to give you two weeks to let the President respond to
3 the subpoena, or are you asking me to give you two weeks to
4 determine how you wish to respond to the subpoena? Just what
5 are you asking me for?

6 MR. KENDALL: I think the former, Your Honor. I think
7 it's the former.

8 THE COURT: Well, since I've said a couple of things,
9 you'd better tell me what my former is.

10 MR. KENDALL: The former, Your Honor, as I understood
11 it, was to enable the President to determine how most
12 appropriately to respond to the subpoena.

13 It may be -- and I don't know what the -- because I
14 didn't -- I've had communications with Mr. Bittman. I don't
15 know. My own view is that we should take testimony as we have
16 done it before. That has the great value of precedent. And I
17 think not only judges, but lawyers, there's a value in doing
18 things the way they've been done in the past. I think if we
19 can do that and find a date, the rest of the motion will be
20 moot and we will come to agreement on a time and terms. That's
21 what I hope will happen. We will try to make that happen.

22 Now, it's possible that we will not be able to come to
23 those terms. A subpoena has been issued here. It's possible
24 that the response would be some kind of a motion. And that
25 would be done at the end of that two-week period.

1 So, I think what happens at the end of the two weeks
2 really depends on what goes on during it.

3 THE COURT: So you're really not seeking just a two-
4 weeks continuance of the return of the subpoena. You are
5 actually seeking two weeks to determine what you want to do
6 with respect to the subpoena.

7 MR. KENDALL: Your Honor, I think that's correct,
8 although --

9 THE COURT: Because the way I understand it -- I could
10 be wrong, because I haven't seen the subpoena, and I haven't
11 asked anybody to see it, but the way I understand it, the
12 subpoena that he received in July stated that he should appear
13 in person today. Is that correct?

14 MR. KENDALL: That's correct, Your Honor.

15 THE COURT: Okay. So, what you're saying to me is
16 you're not asking me to just continue that appearance for two
17 weeks. You're asking me to give you two weeks to raise further
18 or additional legal argument.

19 MR. KENDALL: Your Honor, I don't know. It seems to
20 me that I am asking you to continue it as well. What we don't
21 want to have is the President in violation of the subpoena.
22 And therefore, in the normal case you would phone up the
23 prosecutor and say, "You've subpoenaed my client for Monday;;
24 she's going to be in Chicago that day. Could you move it to
25 Wednesday?" And normally, that's possible.

1 THE COURT: Yes.

2 MR. KENDALL: Depending on the grand jury.

3 Here, I think if we can get the continuance, in the
4 interim I hope we will be able to work out an agreement whereby
5 we won't have to come back to the Court at all, we will do the
6 testimony. If we can't, then at the end of that period we
7 would file a motion.

8 THE COURT: All right.

9 MR. KENDALL: Thank you, Your Honor.

10 THE COURT: Thank you.

11 I'll be happy to hear from you now, Mr. Bittman.

12 MR. BITTMAN: Good afternoon, Your Honor. Robert
13 Bittman, on behalf of the United States.

14 Let me clarify something as to how we got involved in
15 the chronology of what occurred. It was exactly six months ago
16 today that we invited the President the first time to appear
17 before the grand jury. Six months ago today.

18 Mr. Kendall correctly referred to the fact that our
19 office has received testimony from the President before. That
20 was via negotiation. But it was always with an invitation
21 first, which the President accepted immediately, and then we
22 hammered out some of the details as to when and how the
23 President would testify.

24 In this case, we, and the grand jury, I might add,
25 felt it necessary to issue a subpoena to the President because

1 the President had refused six invitations to testify. They
2 were, frankly, just, in my words, stringing us along, and the
3 grand jury. The President publicly stated that he was prepared
4 to cooperate with the investigation and give information sooner
5 rather than later, more rather than less, and yet he refused --
6 or declined, rather, six consecutive invitations to testify.

7 As you know, the grand jury has been working very,
8 very hard, at great sacrifice to them. It has had effects on
9 their families; it has had job effects. And they've been
10 working very, very hard. They have been very gracious in
11 allowing us extra days and extra time recently.

12 This litigation -- or, pardon me, this investigation
13 has also had a number of parties assert various privileges that
14 have burdened not only this Court but the Court of Appeals, and
15 some of them have gone all the way to the Supreme Court.

16 And we have tried to move things along as
17 expeditiously as possible. The grand jury has been working
18 very hard. And it is time to receive the President's
19 testimony, if he so chooses.

20 THE COURT: And you say there have been six
21 invitations?

22 MR. BITTMAN: There have been six invitations.

23 THE COURT: All right. And how did those invitations
24 go? Were they in writing, as opposed to oral?

25 MR. BITTMAN: The first invitation was oral. The

1 other five were all in writing. And I believe Mr. Kendall
2 appended all of the invitations to his pleading. All of them
3 are in there.

4 THE COURT: All right.

5 MR. BITTMAN: And then Mr. Kendall's responses are all
6 there, also.

7 THE COURT: All right.

8 MR. BITTMAN: With regard to the President's schedule,
9 he is a very busy person. And the Jones v. Clinton case makes
10 it clear that the justice process should accommodate the
11 President's schedule and should defer to him in his official
12 capacity. I'm sure Mr. Kendall knows the President's schedule
13 better than I do, but we have done some research, even in terms
14 of when we set today, to make sure that he was in town. We've
15 checked it in the future, too. And our understanding is that
16 the President, for example, is going away this weekend for some
17 fund-raising events and for some rest and relaxation, and then
18 he's taking a two-week vacation in August.

19 We do not want to interrupt the President's foreign
20 trips or any official business that the President, obviously,
21 will be involved in. But we think the timing is right. The
22 grand jury, you know, has been working, once again, as I said,
23 very hard. And I don't think I want to reveal to Mr. Kendall
24 exactly why the grand jury wishes the President's testimony
25 now. And we're certainly not obligated to, and we're not going

1 to. But this is the time.

2 We have tried to accommodate the President's schedule.
3 We have offered innumerable dates through August 7th. We will
4 go -- well, we haven't worked out the exact, precise details of
5 how we would receive the President's testimony, but I'm
6 confident we can do that if we get an agreement from the
7 President that he will appear before -- in the very near
8 future. And that just hasn't been forthcoming.

9 The date offered by Mr. Kendall in mid-September is
10 just unacceptable. It is just unacceptable to the grand jury's
11 schedule and to the grand jury's investigation. We just cannot
12 wait that long for the President's testimony.

13 The investigation is very, very important. The
14 President has so stated that. And I don't think that the
15 investigation should wait for him to play golf, for
16 fund-raising events, and for his vacations.

17 Mr. Kendall in his papers discusses that this could
18 raise some sort of a constitutional crisis. We don't believe
19 so. We have thoroughly reviewed the law and we believe we are
20 absolutely entitled, with the grand jury's approval, to issue a
21 subpoena to the President. The Nixon case made clear that the
22 President of the United States may be subpoenaed in a criminal
23 trial. The Jones v. Clinton case itself authorizes a court
24 to -- that the President appear at a deposition in a civil
25 case. Clearly, if he has to appear in a civil case and answer

1 to civil charges, he would have to answer a criminal grand jury
2 subpoena.

3 The President also, as we've discussed, has appeared
4 before. He's provided depositions to us. He's appeared in
5 criminal trials. He was subpoenaed by the defense in two
6 trials in Arkansas. He testified in those trials -- after
7 being deposed, but he testified. And then in this case, we
8 issued a grand jury subpoena duces tecum, for documents, to the
9 President early on in the investigation and he complied with
10 that subpoena. I think it's odd now to all of a sudden say,
11 well, he's not going to comply with this one.

12 So, unless Your Honor has any questions for me. We
13 just want to get this resolved. We wish to know exactly what
14 the President is going to do.

15 THE COURT: So what I understand from you is that you
16 do maintain that the grand jury wants to have the President
17 appear before it.

18 MR. BITTMAN: Yes.

19 THE COURT: And that you're saying you need it now.

20 MR. BITTMAN: Yes.

21 THE COURT: Rather than in September.

22 MR. BITTMAN: Yes.

23 THE COURT: Do you have any idea -- and if you don't,
24 I can understand, because I do know enough about grand juries
25 to know that you can't always tell how many questions a grand

1 jury may choose to ask or anything like that. Do you have any
2 sense of how long he might be required to appear before the
3 grand jury? Do you have any sense?

4 MR. BITTMAN: I think it would be several hours. Less
5 than -- well, I don't know. It would be several hours.

6 And let me amend one of my answers with regard to the
7 grand jury's wishes as to whether the President actually appear
8 before them. Without revealing too much of what goes on in the
9 grand jury --

10 THE COURT: Certainly.

11 MR. BITTMAN: -- that is their belief now. But we
12 believe that if given a concrete offer by the President, that
13 is, that he, the President, is willing to do this, to a
14 deposition, perhaps in front of the grand jurors in an area
15 outside the grand jury room, perhaps a deposition, obviously
16 under oath, just before attorneys from our office, something
17 like that in the immediate future, we believe that we can gain
18 the -- that we would speak to the grand jury and see if that
19 were acceptable to them.

20 THE COURT: Well, let me just say, I know that even
21 those type of issues could seriously be considered Rule 6(e).
22 But I just wanted to get some sense.

23 That subpoena was issued by the grand jury, is that
24 correct?

25 MR. BITTMAN: Yes.

1 THE COURT: And that was the subpoena that was
2 returnable today.

3 MR. BITTMAN: Yes.

4 THE COURT: At 1:30.

5 MR. BITTMAN: It was actually returnable originally
6 for 9:15, and then I permitted Mr. Kendall till 1:30. I
7 extended it to 1:30.

8 THE COURT: All right. So your position is that the
9 grand jury wishes to hear from him sooner than later.

10 MR. BITTMAN: Oh, yes. They have been kept informed
11 throughout about our invitations and the President's
12 declinations. And Your Honor knows that the grand jury's
13 investigation has proceeded. And it is time to hear from this
14 particular witness, the President.

15 THE COURT: Very well. Thank you.

16 MR. BITTMAN: And we at minimum wish, obviously, a
17 response to whether the President is going to testify and then
18 some concrete terms, because we just can't have this open-ended
19 thing where, okay, in two weeks they may file a motion to quash
20 which is going to further delay the investigation. If a motion
21 to quash is to be filed, we wish to litigate it right away.
22 And, frankly, we would ask Your Honor, if one is filed, for an
23 expedited briefing schedule and expedited hearing, because we
24 want this very, very quickly.

25 THE COURT: Very well. Thank you.

1 Mr. Kendall, I'll be happy to hear anything further
2 that you wish to say on this issue.

3 MR. KENDALL: Thank you, Your Honor.

4 I regret that these somewhat voluminous papers
5 probably hit your desk this afternoon.

6 THE COURT: Believe me, they did.

7 MR. KENDALL: They hit it with a thud, I'm sure.

8 THE COURT: Yes, they did.

9 MR. KENDALL: Your Honor, at Attachment 6, when
10 Mr. Bittman says --

11 THE COURT: Which I have not been able -- I have not
12 read your attachments yet, but I have read your motion.

13 MR. KENDALL: Okay. I would simply direct the Court's
14 attention to that because that was our attempt -- Mr. Bittman
15 and I had conversations and he wanted a specific proposal.
16 This is a specific proposal. It proposes both a time and
17 terms. It's as specific, really, as we can get it.

18 Your Honor, it's simply not the case that this matter
19 has been in discussion since January. It was in discussion in
20 late January to April, and then we heard -- my last letter,
21 which I've appended here, was not responded to. So there was a
22 long three months, plus, pause in this, and then suddenly we
23 got the subpoena. And so it is not --

24 THE COURT: Let me ask you, what about letters from
25 the grand jury? I understand that the grand jury was sending

1 him a written invitation?

2 MR. KENDALL: Well, we received invitations from the
3 Office of Independent Counsel. We never got anything from the
4 grand jury itself.

5 THE COURT: But I mean the invitations from the Office
6 of Independent Counsel indicated, though, that the purpose was
7 for him to appear before the grand jury, wasn't it?

8 MR. KENDALL: They did, Your Honor.

9 THE COURT: And you didn't consider that to be from
10 the grand jury?

11 MR. KENDALL: Well, Your Honor, I did. We responded
12 to each one of those. And we responded -- we had many
13 questions. And this Court is familiar with certain of our
14 concerns about this investigation --

15 THE COURT: Certainly.

16 MR. KENDALL: --- and the way it's progressed. We had,
17 and continue to have, very serious concerns about certain
18 aspects of it. I don't want to have to litigate the
19 constitutional questions, but they are important, they are
20 unresolved. I am reminded when Mr. Bittman -- and, you know, I
21 don't think the Court wants to hear those arguments today. We
22 haven't filed them. But --

23 THE COURT: No. Just the motion for continuance.

24 MR. KENDALL: Every pancake has two sides, Your Honor,
25 as is well known. And we stand ready to make those at an

1 appropriate time. But I think the --

2 THE COURT: But, you see, that's one of the things
3 that caused me to ask you gentlemen to come in here today. I
4 wasn't sure what you meant by give you until such-and-such a
5 time, and I really needed you to come in here and tell me, what
6 do you mean? Do you mean that you will be prepared to respond
7 to the subpoena by that day, or do you mean that "I'm going to
8 give this further thought and then two weeks from now I'm going
9 to tell you what I think?" I need to know precisely what you
10 mean.

11 And I think you have made it clear to me that the
12 motion for continuance that you filed today is not designed to
13 just continue the personal response to the subpoena. In other
14 words, you're not saying, "If you give me two weeks, the
15 President will respond by coming in to see the grand jury or
16 having the grand jury come to see him." And, God knows, I
17 would say to you, recognizing the duties of his office, if it
18 were more convenient, more secure for the grand jury to go to
19 him than for him to come to the grand jury -- and you know what
20 type of atmosphere we have around this building -- then that's
21 one thing. But if what you're saying is "I need two weeks to
22 consider how I'm going to deal with this," then that's another
23 question.

24 MR. KENDALL: Your Honor, again, the letter at
25 Attachment 6 is a very --

1 THE COURT: As I said, I'll read it tonight.

2 MR. KENDALL: Yes. It's a very specific offer. And
3 it's premised -- we've worked this out, really, three times in
4 the past successfully. I think that both our concerns and the
5 Independent Counsel's concerns were met. I think the letter is
6 a good faith attempt to do that again. And I hope that after
7 discussion, we can work out a way -- reserving our questions.
8 I mean, these are negotiations in which both sides want to
9 reserve their option. But three times before, we've had the
10 President testify and that has --

11 THE COURT: Three times before testified with respect
12 to what? This case?

13 MR. KENDALL: With respect to this investigation.
14 This is the Whitewater -- in other words, he gave testimony
15 about various phases of it, Vincent Foster and David Hale and
16 the 1990 gubernatorial campaign.

17 THE COURT: But I don't think this grand jury wants to
18 ask any of those questions.

19 MR. KENDALL: Oh, no. No. I understand that, Your
20 Honor. This is the Lewinsky --

21 THE COURT: Yes.

22 MR. KENDALL: And that's what we're talking about
23 here. My only point is, we've been able to work this out three
24 times in the past. And it's my hope that based upon the
25 proposal we've made in the letter at Tab 6, that we can do it

1 again, and so we won't be coming back to Your Honor.

2 THE COURT: Well, let me just say, apparently -- and
3 I've got to believe this -- with your letter dated July 27th,
4 which was yesterday, they have had an opportunity to read that
5 letter before they got your papers that you filed in the court
6 today around midday. Isn't that true? Every reason to believe
7 they've had an opportunity to read that.

8 MR. KENDALL: That's correct, Your Honor.

9 THE COURT: And even though they have had that
10 opportunity to read it, their stated position on the record is
11 to the contrary of what you're saying -- of what you say your
12 letter says: That they can work it out. In fact, what I heard
13 Mr. Bittman say is that he needs the testimony. You're saying
14 you think you can work it out.

15 MR. KENDALL: Your Honor, we are trying to work it out
16 to give them the testimony.

17 THE COURT: Let me just ask you something, Mr.
18 Bittman. Had you read this letter before you came in here
19 today?

20 MR. BITTMAN: Yes, Your Honor. We responded to it.

21 THE COURT: Oh, you did? And is it here, too?

22 MR. BITTMAN: Yes.

23 THE COURT: Okay.

24 MR. BITTMAN: That's at Attachment 7.

25 THE COURT: I haven't read the attachments, all right?

1 I will read them before I leave here this evening, though,
2 okay?

3 You see, what I -- I mean just applying a little
4 common sense here, if you sent this letter yesterday, they
5 received it, they read it, they responded to it. Still, the
6 subpoena remained outstanding, and the grand jury, who actually
7 was the only body that could authorize that subpoena,
8 apparently was waiting for the subpoena to be responded to
9 today. Then we get your request. And, as I said, you asked me
10 for two weeks and I just didn't quite understand what that two
11 weeks meant. I understand now, based upon your statement to
12 me, what you mean by giving you that additional two weeks, but
13 that does not take into consideration the body which sought the
14 subpoena. You see, that's what concerns me, Mr. Kendall.

15 I'm not saying -- and I want you to understand, I'm
16 not saying that this grand jury has a right to subpoena the
17 President of the United States. I'm sure that they have
18 subpoenaed the President of the United States. And what I am
19 not hearing from you is that "We oppose this subpoena because
20 the grand jury does not have that right." You're saying, "Just
21 give me two weeks to think about something, and then two weeks
22 from now I'll tell you something." And then if two weeks from
23 now you say, "Well, I don't really think they have the right to
24 subpoena the President, and therefore, Your Honor, may I have
25 two more weeks to file a motion to quash the subpoena." I just

1 think that based upon what we all know about this case, the
2 sooner we make a decision, the better.

3 MR. KENDALL: Your Honor, may I respond to that?

4 THE COURT: Surely you may.

5 MR. KENDALL: And I will respond, I hope, in a factual
6 way. I'm not saying that I want a limitless set of extensions.
7 I think that these are very important constitutional questions.
8 If we go to war over them --

9 THE COURT: No question about it, but the question is,
10 do we have to deal with the constitutional issue? Because if
11 we do, let's do that head-on.

12 MR. KENDALL: But, Your Honor, if we go to war over
13 that, that is going to take a lot of time.

14 THE COURT: We're not going to go to war, and we're
15 going to do it the same way the Court of Appeals has you do
16 things. I just find it so interesting. Everybody needs 10, 12
17 days if you are here in the district court, but I understand
18 that those judges on the Court of Appeals give two days or
19 three days. I said, "Why can't I exercise that power? I have
20 a commission too." So, no, we aren't going to be in it
21 forever, okay? All right.

22 I'm being facetious, of course.

23 MR. KENDALL: My only point is, Your Honor, if the
24 object is to get the testimony to the grand jury, I think some
25 statesmanship on both sides is necessary. And I say that about

1 us as well as the Independent Counsel. I think that if we can
2 work this out, we are obligated to do so, because that really
3 is our civic duty. We've done it three times --

4 THE COURT: You all have had a long time, apparently,
5 to do that, Mr. Kendall, if what Mr. Bittman says is correct.
6 Mr. Bittman says that there was a subpoena issued one time.
7 Was that correct?

8 MR. KENDALL: Your Honor, only on the 17th of July. A
9 week ago.

10 THE COURT: Yes. Only the one on July 17th?

11 MR. KENDALL: Yes. I'm sorry. He mentioned -- excuse
12 me, Your Honor. He did mention a subpoena for certain objects
13 that was issued in January.

14 THE COURT: Oh, yes, duces tecum, and that was taken
15 care of. But I understand that there have been about six
16 invitations from the grand jury. So, apparently the President
17 has known for some time that the grand jury wished to speak
18 with him.

19 Now, I don't know, because, God knows, you know, I may
20 have to go up there and see if they have water and a few other
21 things from time to time, but I don't know what goes on before
22 the grand jury as you know. But I would think if somebody had
23 received six letters inviting him to appear before the grand
24 jury, that person -- and I don't mean to be unkind, but
25 certainly his counsel must know that somebody is going to get

1 tired of written invitations and look to other sources. I
2 mean, that's just common sense.

3 MR. KENDALL: Your Honor, we've tried in Tab 1 to give
4 you the complete correspondence, because it states our concerns
5 and the responses. And I think in fairness, that correspond-
6 ence terminated when I sent a letter on April the 17th. I
7 didn't know what the answer was. And a very long time elapsed.

8 My only point here, Your Honor, is that I --

9 THE COURT: Are you saying that there were no
10 invitations from the grand jury since April 17th?

11 MR. KENDALL: April 3rd, in fact, Your Honor, was the
12 last.

13 THE COURT: Was the last letter from the grand jury?

14 MR. KENDALL: Yes. And then all of a sudden, without
15 any warning, we get a subpoena. And that old lawyer's trick,
16 Your Honor, delivering it late Friday night so you can have
17 that date of the week and say, "We served it on July 17th." It
18 came in about 6:00 o'clock. That is what is forcing this
19 issue.

20 In the past, we have been able to resolve this. I
21 don't think it's seemly or statesmanlike, or even very
22 reasonable, to put us under the gun of saying, as they say in
23 their response to the letter of yesterday, "Well, you just
24 commit to this date," and it's an unreasonable date in terms of
25 the President's schedule. We're going to have to file a

1 motion. I don't think we should be in the position of having
2 to file a motion which, if we can resolve the other issues, may
3 be unnecessary.

4 THE COURT: Well, why do you need so much time to
5 resolve the other issues?

6 MR. KENDALL: I'm not sure we do, Your Honor. I'm not
7 sure we do. I'm not sure that we can't do this very speedily.
8 But the scheduling really is a problem.

9 THE COURT: What you're saying is, you have not as yet
10 made the decision whether you are going to challenge the
11 constitutionality of this subpoena.

12 MR. KENDALL: We have made a decision, Your Honor,
13 that we've testified in the past, we believe we can testify at
14 this time. But we don't know what their position is and they
15 may force us to challenge this, and then we'll challenge it.

16 I used the "war" metaphor. We're not going to go to
17 war. But we'll file motions to quash. And my only point is,
18 it is unreasonable -- you wouldn't do this in the normal case,
19 Your Honor. You wouldn't refuse to continue a subpoena for a
20 short time to see if it all was going to be unnecessary. And
21 that's really all we're seeking. And at the end of the day, we
22 may have to file a motion to quash, to bring on the
23 constitutional issue, to preserve the institutional concerns of
24 the Article II entity, person that we represent. It hasn't
25 been necessary in the past; I don't believe it necessarily will

1 be necessary now. But it could be.

2 THE COURT: Well, you say it may not be necessary, the
3 amount of time you're seeking, but you still seek that time.

4 MR. KENDALL: I do, Your Honor.

5 THE COURT: All right. Anything else?

6 MR. KENDALL: The only thing I would say is, in
7 reference to Mr. Bittman's statement about the President's
8 schedule, it is true, he does have a vacation planned for late
9 August. It's a well-deserved vacation. It, unfortunately, is
10 right on the eve of his Russia trip and Ireland trip. That's a
11 trip from August 31 to September the 6th. Both those countries
12 are very important. A lot of that vacation is going to be
13 absorbed with preparing for the Russia trip.

14 Again, we are trying -- we've given them the date in
15 September. We are aware from other parties who have been
16 subpoenaed that the grand jury's work is going on. There are
17 many other legal questions which are in the process of being
18 resolved. We really don't think that this date will delay the
19 grand jury's work, and we want to make it possible, if we can,
20 to give the President's testimony as soon as possible.

21 THE COURT: Well, let me just say this. You know,
22 even I don't know what the grand jury is doing. And I'm
23 certain that Mr. Bittman has some sense because he knows what
24 has been presented to the grand jury and what he wishes to
25 present to the grand jury. But I haven't the foggiest notion

1 of what they have presented or what they wish to present. I
2 learn most of what I know about that grand jury the same way
3 most citizens in this city do, and we don't know how accurate
4 that is, but that's from the local press.

5 Now, what concerns me is this: This case is unlike
6 the Jones case. It truly is unlike the Jones case. And even
7 though it is quite unlike the Jones case, we know what the
8 Supreme Court felt about even a civil action of the type that
9 we have there. Here, we have a criminal investigation going
10 on. Here, we know from just reading the press that perhaps
11 witnesses who have been called in before this grand jury have
12 been testifying about certain conduct. I don't know what that
13 grand jury thinks, but it perhaps thinks that "We citizens have
14 been brought from our regular responsibilities and asked to
15 listen to certain evidence, and we have decided, based upon
16 what we have heard, that we need to hear from the President."

17 Now, maybe they don't have any legal right to hear
18 from the President. Maybe that is an issue we will have to
19 resolve before this subpoena can be honored. But what we need
20 to do, I think, is to move forward, and move forward
21 expeditiously.

22 Apparently, the President has been given, if you'll
23 excuse this slang, a heads-up by the number of invitations.
24 Did I determine that those invitations were in writing?

25 MR. KENDALL: Some of them were, Your Honor. They are

1 reflected, I think, in the correspondence in Tab 1.

2 THE COURT: As I said, I'll read this. But some of
3 it -- at any rate, he's received six invitations. And
4 apparently the grand jury has determined that "Although we
5 would like to honor your position as our President by simply
6 asking you to appear voluntarily, we have now reached the point
7 where we believe that you will not honor us with your presence
8 voluntarily, but we do believe that in our search for the
9 truth, we need to hear from you." And now, for him to say,
10 "Give me two weeks to think whether I'm going to challenge this
11 legally or what I'm going to do, give me two weeks to see if I
12 can work this out with the prosecutor, give me two weeks to see
13 whatever I need to do," but by the time that two weeks is up,
14 Mr. Kendall, you're saying to me he will -- I don't know
15 whether he's going to the Cape this year or not, but I know
16 that's where he generally goes. Whether he will be at the Cape
17 by the time the two weeks is up. And, clearly, I've been told
18 that after leaving the Cape, he'll be going to Russia. So,
19 when, if ever, unless somebody directs him, will he be willing
20 to respond to this grand jury? Or if he isn't willing to
21 respond to the grand jury, tell me.

22 MR. KENDALL: Your Honor, it's a fair question.

23 THE COURT: Tell me. And then we will do what we have
24 to do.

25 MR. KENDALL: We've given two dates. I think that's a

1 very fair question. You'll see in the letter at Tab 6 --

2 THE COURT: The July 27th letter?

3 MR. KENDALL: Exactly.

4 THE COURT: All right.

5 MR. KENDALL: We have said, because of the Russia
6 trip, because of the vacation and other travel. And, again,
7 it's very easy to sit there, whether you're reading a
8 newspaper, you're in the Office of Independent Counsel, and
9 say, well, that trip's not necessary, that's just a
10 fund-raising trip, and that's a political trip, and, look, I
11 don't think Ireland is such an important country. Those
12 concerns are the President's, and the President's alone, to
13 balance. And courts -- I mean, again, the teaching of Clinton
14 v. Jones, I think, is that a court must try to accommodate and
15 give deference to the President's schedule.

16 THE COURT: That's true. And as I said, I understand
17 that very, very clearly, because we know that as President of
18 these United States, this gentleman has concerns that none of
19 us know about. We know that there are issues of state that
20 none of us know about. We know all of that. But I also know
21 this: If he can vacation for a couple of weeks, he can appear
22 before a grand jury, too, you know.

23 And God knows, he needs a vacation. I know that. I
24 know he needs a vacation. And I don't know that the grand jury
25 will -- he doesn't know how -- the grand jury may just want to

1 see him. I don't know. They may not have any questions at
2 all.

3 MR. KENDALL: We did try to make a very specific
4 offer, including a date that would be consonant with his
5 schedule.

6 THE COURT: But that's sometime in September.

7 MR. KENDALL: It is.

8 THE COURT: Well, as I said, you see, I don't know the
9 interest of the grand jury, either. But one thing is for sure:
10 The grand jury has apparently attempted, even though you've
11 maintained that because there was no further response to some
12 letter you wrote in April, that, therefore, he could think that
13 maybe they didn't want him any more.

14 MR. KENDALL: Your Honor, I would like to distinguish,
15 if I could, between concerns. We, obviously, would like to
16 help the grand jury in its endeavors. The Office of
17 Independent Counsel we have our differences with about a number
18 of things. They are set forth in the letter. Those concerns
19 have not been responded to. We are willing to forgo some of
20 those or litigate them in other forums. We really did try,
21 however, to get a good faith offer that was specific in terms
22 of place, way of taking testimony, issues -- and leaks are one
23 of the things that we are concerned about. But we believe that
24 there can be safeguards. This is not an impossible task. And
25 time. And the time is really very critical. But we have tried

1 to put that all in a very specific proposal for the Independent
2 Counsel and for the Court.

3 THE COURT: All right. Thank you very much.

4 MR. KENDALL: Thank you, Your Honor.

5 THE COURT: Mr. Bittman, I'll hear from you finally.

6 MR. BITTMAN: Thank you. I'll be brief. Robert
7 Bittman on behalf of the United States.

8 Your Honor, in all respect, I think saying that we are
9 being unreasonable by issuing a grand jury subpoena with the
10 grand jury's approval is a little -- and that we're not willing
11 to accommodate or even give a little bit with regard to the
12 President's schedule, we are, we have been. I think that that
13 argument would have a lot more merit had there not been six
14 invitations.

15 We've tried to get his testimony since January. We've
16 tried. Since January 27th, we have tried. We've invited him.
17 And we made clear in all those invitations that we will
18 accommodate the President's schedule. And now, for the
19 President to -- and then after six invitations, you know, we in
20 the grand jury decide to issue a subpoena to the President
21 because that's within our power. You know, we tried to
22 accommodate him, we've tried all means necessary to avoid any
23 constitutional confrontation or something like that, but he
24 declined the invitation. What are we left to do? And we have
25 -- back then, when we extended these invitations, we have a lot

1 of room to negotiate in terms of when and how and where and
2 that kind of stuff. Well, now we're at the end of the
3 investigation, or near the end of the investigation, we decide,
4 with the grand jury's approval, to issue a subpoena to the
5 President. We don't have many options any more.

6 And so for them to come in here and say, "Oh, we want
7 them to be more reasonable," we were reasonable back then. And
8 they were the ones that said, "No, we're not going to do it.
9 We're not going to agree to this." So I think it is
10 disingenuous, with all respect.

11 I did notify Mr. Kendall last weekend -- and I might
12 also say, if they were really serious about trying to work
13 something out -- and Mr. Kendall did put forward a very
14 specific date. I agree with that. And that's in his
15 correspondence. But the date simply is not acceptable. That's
16 the bottom line. It's unacceptable. We told him it was
17 unacceptable.

18 THE COURT: That's the September date?

19 MR. BITTMAN: That's the September date. That is
20 unacceptable. And we have the power, we, with the grand jury,
21 have the power to compel the President. That's what we've
22 decided to do. We didn't want to do that. That's why we
23 issued the six invitations. But they put us in a box. We had
24 to do it because they weren't going to agree anyway. Now, we
25 have a limited opportunity in terms of time.

1 I notified Mr. Kendall that if they really wanted to
2 work out a date, an acceptable date with us, that we would be
3 available all weekend. Apparently Mr. Kendall -- I read that
4 Mr. Kendall was not available over the weekend. But we
5 responded within hours of his letter to me, and we said we're
6 available to work this out, to work out an acceptable date.
7 They didn't provide us with an acceptable date. It's that
8 simple.

9 We still are willing to work out an acceptable date,
10 but we're not going to wait two weeks for it. We have to move
11 this along.

12 THE COURT: Well, I think Mr. Kendall is asking for a
13 little more than two weeks, isn't he?

14 MR. BITTMAN: He is, because --

15 THE COURT: You see, that's why I really had to have
16 you all in here today, because I wanted to be certain of what
17 you meant. You could read Mr. Kendall's motion to maybe
18 suggest that, well, we'll be ready to go on that date, and I
19 said and you could also read it to mean that you won't be ready
20 to go, "but I'll be ready to tell you where I want to go two
21 weeks from now."

22 And I certainly have a duty to the President, but I
23 also have a duty to the grand jury. And here, this third
24 branch stands behind the first and the second branches, but,
25 you know, I do have a duty myself.

1 So, anything else you want to say? I'll have to take
2 this matter under advisement, but let me just say, I'm in a
3 better position to take it under advisement, having had you
4 come today, than I was just based on the papers alone.

5 MR. BITTMAN: Nothing else from me. Thank you, Your
6 Honor.

7 THE COURT: Anything else from you, Mr. Kendall?

8 MR. KENDALL: Thank you, Your Honor.

9 THE COURT: Okay. Well, thank you very much.

10 Let me just say, what I hope to do is call you first
11 thing in the morning and tell you -- I hope to be able to call
12 you first thing in the morning and tell you to come down and
13 pick up my decision or pick up an order or whatever the case
14 may be relative to today's hearing. Okay? I really hope to
15 be able to do it. And if you haven't heard from me by 11
16 o'clock -- well, let me just say this. If you haven't heard
17 from me by 11 o'clock -- no, that isn't what I want to say.

18 If you have not received a telephone call from me
19 before 11 o'clock, I will try to do a conference call at
20 11 o'clock. That's what I want to say. Okay? Thank you very
21 much.

22 (Proceedings concluded at 5:20 p.m.)

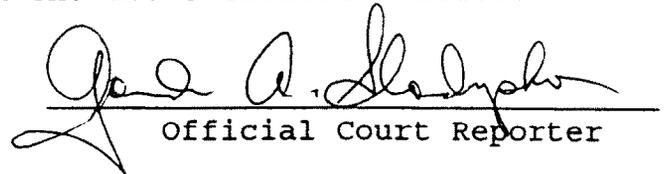
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcription from the record of proceedings in the above-entitled matter.


Official Court Reporter

