OSC ISSUES WITH THE OIC'S RENDITION OF OSC'S SUMMARY

Keith:

I've set forth below some of our concerns with your summary of our Summary. The list is not inclusive and not in any particular order (except in order of appearance in your draft), nor have I taken the time to get our tenses and verbiage perfect. The page numbers are to your most recent redlined version. I apologize for the length, but in a sense, it demonstrates how seriously we feel about this. As I have said to you, I believe there is great public and professional interest in this investigation and its outcome and we want to do it right.

Obviously, we need to adhere to considerations of privacy and the public interest, and we will work with you and the Department's representatives from OIP, OLC, OPR, and whatever, to assure an appropriate balance. As you and I agreed on Friday, because of our independent status and interest in this matter, we will be at the table from the git-go as public disclosure is discussed.

Our strong preference

1. You guys want to trade on our statements praising the OIC for respecting our independence at the same time that you are re-writing our Summary and changing our factual determinations, actions which could be read as disrespecting our independence.

   In this unusual context, where OSC was promised complete independence in connection with its inquiry, the sound and simple way to deal with OIC's rejection of OSC's analysis and conclusion is to publish the independent OSC Summary as is, and, to publish as part of the package, whatever OIC chooses regarding its rejection. In Bob's words when we originally discussed my role and the way in which we would deal with any disagreement: "put both out there and let the public decide."

2. The two attempts by OIC to summarize our Summary demonstrate the difficulty of making clear which entity is saying what. This would not present a problem if our bottom lines were the same; but it leads to considerable confusion when there is a basic disagreement. In earlier conversations, I have referred to this as the awkward factor.

3. In short, I do not grasp the reason why you would prefer to try to take credit or bear the freight, so to speak, for a summary of our report when you disagree with its bottom line.

4. We can understand why -- as a matter of fairness and clarity -- that you would want your conclusion placed up against our conclusion in whatever document is released (see your p. 4). We have no objection to the concept.

3. At this point, I believe the statement about complete independence is getting frayed around the edges.

P. 1, Para. 2

1. To describe Mary: "... and her co-counsel Mary Frances Harkenrider, who was her Counsel in the Criminal Division, and for six years a federal prosecutor in the Northern District of Illinois."

P. 2-3, Para. 1-2

1. Actually, our differences could be summarized in a single sentence quoting accurately from OPR's Analytical Framework: "Harris and Harkenrider believe that [redacted] actions were 'in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take' and the OIC believes that they were not 'in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take.'" See, Framework, p. 9.

   It really boils down to the simple proposition that the OSC and the OIC have different judgments about the Department's expectations for its lawyers. Query as to whether the Department's OPR ought to have a say here.

P. 4, Para. 2

1. On the undercover tape Lewinsky clearly stated she was not telling Carter the truth. We see no reason to hedge it. You will recall from our Report, although we didn't include it in the Summary, that Tripp reported to Fallon that Lewinsky indicated she was lying to her attorney.

P. 6, Para 1

1. You have deleted a number of sentences beginning with: "In fact ... " Why? These sentences are important to our analysis. The fact is that we specifically found that

   A. [redacted] analysis of the contacts issue was superficial and inadequate. He failed to read the regulation and failed to see the closeness of the call as to whether Lewinsky was represented. He was wrong in his assertion that it did not matter whether she was represented because it was pre-indictment. He failed to seek advice from any others knowledgeable about the regulation. He failed to exercise the caution consistently urged and applied by the Department in close cases – specifically, to act as though she were represented by respecting the prohibitions of 77.8, 77.9 and the Manual provisions regarding targets. Indeed, not only was his conduct at odds with all of the Department's advice, it was at odds with his

own advice in his lectures on the subject. In short, he did not proceed with the caution required by these facts.especially given the context of the case and the predictable fall-out; and that,

B. In planning the confrontation with Lewinsky, he failed to recognize that the deliberate plan to prevent her from calling Frank Carter was in derogation of the Department's sensitivity to attorney-client relationship and to a person's right to choose an attorney free from government interference, regardless of whether the person could be considered "represented" within the meaning of the contacts regulation. Finally, in executing the confrontation, he stood by as others implied that the attorney she wished to contact would not put her interests foremost and, having offered her immunity, conditioned that immunity on her not contacting the attorney of her choice.

PP. 8-9, Para. 3

1. On both of these pages you have changed our language from asking about "calling her lawyer" to asking "what would happen if she called her lawyer."

   We believe that she did in fact ask more than just what would happen if she called Carter, but we also carefully avoided stating that she directly asked to call her lawyer. She certainly made her preference for calling Carter known to all involved as reflected second-hand in Steve Bates' notes: "wanted to call attorney" and "wanted to call Frank Carter, attorney." [redacted] may want to qualify her statements at this time, but that is not consistent with the other participants' memories or with the substance of events relayed to those not on the scene. Additionally, our report cites a number of times when she went beyond asking what would happen. In the food court, she told the agents to talk to her lawyer. This was repeated to [redacted] upstairs. Had he been exercising the care expected of a Department attorney in this sensitive situation, he would have made sure he heard what was relayed to him. She also asked if everyone could get in a taxi and go to Carter's office to prevent him from calling anyone. Our wording is consistent with the recollections of the participants.

2. As you know, and surely agree, the FBI 302 was not only wholly inadequate, an important exchange about a call to Carter's office was deliberately omitted because it would have raised questions about all of the unrecorded times she discussed her lawyer. We think we are being very charitable to call this report "wholly inadequate." In addition, it is not gratuitous. Not only does Department policy strongly advise a contemporaneous and complete record be made, but [redacted] himself lectured of the need for the record and the responsibility of the attorney in assuring the record be adequate. During our interviews with him, however, [redacted] said he saw no need for a record of what he (or she) was saying. We think this was one more example of his poor judgment in not appreciating the risks of the situation and handling it with the care the Department

has a right to expect.

P. 12, Para. 1

1. We feel very strongly that our statement that the manner in which the confrontation with Lewinsky was handled brought into question the conduct of the OIC lawyers and federal prosecutors everywhere is supported by the public record. It is important to us that it be in this Summary.

P. 13-14, Para. 3 (and, on p. 14, the following para.)

1. We simply will not accept the changes regarding our "purely semantical viewpoint" and our "plain language" analysis. It is one of the linchpins of our analysis. I think you told me that certain quarters in the Department believe that the plain language analysis is the correct one. And I remind you that even [redacted] — once he had read the regulation, well after-the-fact — reported to his superiors that a plain reading of the regulation could lead to the conclusion that Lewinsky was represented on the subject matter of their confrontation.

P. 17, Para. 3

1. You have deleted the phrase " ... nor should it be, in spite of assertions by the OIC after the encounter." At [redacted] prompting Starr told Congress that the conduct of his lawyers in connection with the Lewinsky confrontation was "standard operating procedure." Starr's public testimony only compounded the public view that all federal prosecutors act like this. We believe they do not. And should not. Thus, this statement in our Report and Summary accurately reflects our view, and is important to our analysis.

P. 19

1. You have deleted reference to a statement by [redacted] or by the agents in his presence relating to Carter's involvement in the crimes being committed. We found, as a matter of fact, that Carter's possible involvement was discussed with Lewinsky. This is clearly important to our analysis. According to one of his superiors, even [redacted] reported later that they discussed with Lewinsky that Carter might be involved.

   Further, your addition in the same paragraph gives the impression that all Lewinsky did was to seek advice on whether she should call her attorney. You are simply changing the facts. Lewinsky did more than press the subject of "whether she should call her attorney". See above.

P. 20, Para. 2

1. You have deleted our statement that "these issues were worth more than the cursory thought [redacted] gave them." By his own words, [redacted] gave these issues no more than a moment's thought. In light of the Department guidance that urges caution, regardless of the contacts analysis, we believe that these issues were worth more than the cursory thought [redacted] gave them, and our conclusion is an important part of our analysis.

P. 22, Para. 1

1. The sentence that you have deleted stating our concerned view of the adversarial nature of the OIC submissions is important to us. As I have noted above, we deliberately did not include in our Report findings relating to the intent of many of the misstatements, or to the identity of the person we believe was responsible. But we believe we are well within our mandate to discuss the nature of the evidence presented to us.

COMMENTS ABOUT OIC'S SUMMARY

As I have noted, our preference is to make public a Summary by us of our Report along with a Summary by you of OIC's Decision Memo. Each Summary, with due regard for privacy and public interest concerns, would be appropriately identified and perhaps attached to an Executive Summary disclosing both bottom lines.

Whether this happens quite this way or not, here are some comments about your current draft Summary (pp. 23 through 25) that we suggest you think about.

Para. 1

1. We did not say that we could not conclude that [redacted] analysis was incorrect. Having found, pursuant to the OPR's Analytical Framework, that there was ambiguity in the application of the regulation to the specific facts of this case which precluded a finding of misconduct, we did not need to answer the ultimate question of which analysis was correct.

Para. 2

1. We do not agree that a finding of poor judgment is inconsistent with a finding that the standard was ambiguous. Indeed, OPR's Analytical Framework specifically holds that such a finding does not preclude a finding of poor judgment.

2. [redacted] never lectured on the specific facts presented in this case. Rather his lectures were a general statement of the regulation without focus at all on the meaning of "the subject matter in question" in a case such as this. Thus, there was nothing to correct in [redacted] lectures; rather, his application in this real life situation (his first non-theoretical experience with the regulation, by the way) was deficient. Similarly, he did not

use a mode of analysis used by the Department; the Department had never opined on the application of the regulation to a set of facts like these. Moreover, it is only when confronted with specific factual scenarios that any difference in result may occur based on different readings of the regulation. In other words, in the vast majority of cases, the question of "subject matter" is not difficult at all. And, the Department was consistent in its advice, training and materials; in advocating caution in close cases. Indeed, it consistently advised attorneys to steer clear of the prohibitions of 77.8, 77.9 and the Manual in such cases.

3. It may be that [redacted] argues that his subsequent conduct was entirely dependent upon which mode of analysis was correct, but that is simply not correct. In the first place, all that says is that he failed -- in the face of changed circumstances -- to revisit his analysis and to exercise the caution expected by the Department. In addition, from an objective standpoint our conclusion that he exercised poor judgment on the scene at the hotel, has very little to do with his "contacts" analysis. Our conclusion is based upon our judgment that he did not meet the Department's expectations that its attorneys would be sensitive to 1) attorney client relationships and 2) an individual's preferred choice of an attorney, regardless of the contact regulation. As stated in Weiss, "The citizen's choice of, and relation with his attorney is none of the investigating government's business. It does not become the government's business because it fears the citizen will tell his attorney of his conversation with government counsel...."

Para. 3

1. We think you are perpetuating a cheap shot at the Department's representative. He was not there to give OIC advice of any kind, and was not an expert on contacts issues. In spite of that, he did give the OIC the best advice it ever got on the issue. He specifically suggested that the OIC use the Department's Margolis procedure for getting guidance and cover in these matters. OIC did not.

   Nor did [redacted] acknowledge or heed the suggestion of the Department lawyer to clarify the state of Lewinsky's representation if she raised the issue of an attorney. Finally, no one talked with anyone at the Department about the statements made about Carter to Lewinsky or about whether it was appropriate to withdraw an offer of immunity based on an individual's desire to consult with an attorney (or for that matter to premise an immunity offer on a person not seeking out specific counsel).

Para. 5

1. If you guys really believe that "an after-the-fact analysis of what went wrong ... cannot properly form the basis for a finding of poor judgment (or, presumably a finding of any kind)," we have to wonder what you hired us to do two years after-the-fact, and why you now think the OPR Framework which has been the basis for countless OPR findings of

poor judgment, after-the-fact, somehow does not apply to OIC lawyers.