

May 15, 2002

Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Dear Sir or Madam:

As Chairman of the House Committee on the Judiciary and Chairman of the Subcommittee on Courts, Intellectual Property, and the Internet, which are responsible for oversight of the federal judiciary, we are writing pursuant to 28 U.S.C. § 372(c)(1) to request that the Chief Judge, pursuant to 28 U.S.C. § 372(c)(4) and (5), convene a special committee of judges to investigate the facts and evidence surrounding Senior Circuit Judge Richard D. Cudahy's August 17, 2000 disclosure to an Associated Press reporter that a grand jury was considering evidence regarding President William Jefferson Clinton's now admittedly false sworn testimony regarding his relationship with Monica Lewinsky.

In our judgment, Judge Cudahy's conduct may have been prejudicial to the effective and impartial administration of justice in connection with his responsibilities as a judge on the Division for the Purpose of Appointing Independent Counsels ("Special Division") of the United States Court of Appeals for the District of Columbia Circuit.¹ Equally important, the improper

¹ This request follows an inquiry by this Committee of the circumstances surrounding Judge Cudahy's disclosure. Specifically, in October 2000, shortly after the disclosure, the Committee requested that the Independent Counsel and the judges of the Special Division provide information regarding the incident. As a result of those requests, the Committee learned that the Independent Counsel had first requested that Judge Cudahy recuse himself from matters relating to his office and, when Judge Cudahy refused, referred the matter to Chief Justice Rehnquist for whatever action he deemed appropriate. Letter from Independent Counsel Robert W. Ray to the Honorable Richard D. Cudahy (Aug. 25, 2000)(Attachment 1); Letter from the Circuit Judge Richard D. Cudahy to Robert W. Ray, Esq. (Sept. 6, 2000)(Attachment 2); Letter from Independent Counsel Robert W. Ray to the Honorable William H. Rehnquist (Sept. 14, 2000)(Attachment 3).

Independent Counsel Ray's referral to the Chief Justice cited the District of Columbia Bar Rules of Professional Conduct that require a lawyer practicing in the District of Columbia to inform the "appropriate authority" whenever a lawyer has knowledge that "a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for Office." Letter from Independent Counsel Robert W. Ray to the Honorable William H. Rehnquist (Sept. 14, 2000) (citing Rule 8.3, "Reporting Professional Misconduct," D.C. Rules of Professional Conduct (Jan. 2000)). In response, the Chief Justice expressly disagreed that he was the appropriate authority, but informed Independent Counsel Ray

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disclosure (and Judge Cudahy's delay in making public his responsibility for the disclosure) had the potential to affect adversely the affairs of the nation and the due administration of justice by exposing the Office of Independent Counsel to unfair and unjustified attacks by public officials and the media. We are concerned that those attacks, even though they later proved to be unjustified, could have influenced the Independent Counsel's decision not to seek an indictment of President Clinton, notwithstanding the evidence, and the outcome of any proceeding if an indictment had been brought.

Evidence obtained by the Committee reveals that Judge Cudahy's disclosure may constitute (1) a violation of Fed. R. Crim. P. 6(e) prohibiting disclosure of "matters occurring before the grand jury" and (2) a violation of the confidentiality requirements relating to sealed material under the local rules applicable to the Special Division. Moreover, other evidence obtained by the Committee suggests that Judge Cudahy may have made knowingly false statements related to this matter to the Chief Justice of the United States and this Committee that may constitute violations of 18 U.S.C. § 1001 (prohibiting false statements).

That evidence reveals that Judge Cudahy, following the initial press report that a grand jury had been convened, failed to disclose his responsibility for more than 24 hours, while the Independent Counsel endured a barrage of attacks on national television and in the newspapers by media commentators and government officials on the evening of Vice President Al Gore's acceptance of the formal acceptance of the Democratic Party nomination for President of the United States. Judge Cudahy further appears to have sought to prevent the initiation of a criminal investigation that would have revealed his role and admitted that he was the source only after he had failed to persuade the other judges on the Court not to seek such an investigation and

that he "took what [he] believe[d] to be appropriate action." Letter from Chief Justice William H. Rehnquist to Robert W. Ray, Esq. (Oct. 5, 2000)(Attachment 4).

In response to a July 19, 2001 letter from this Committee regarding his actions with respect to Judge Cudahy, Chief Justice Rehnquist provided his August 28, 2000 letter to Judge Cudahy seeking assurances that Judge Cudahy intended to abide by applicable standards relating to the "duties of confidentiality imposed by the statutory provisions governing the work of the [Special Division], the code of Conduct for United States Judges, and the rules governing grand jury secrecy." Letter from Chief Justice William H. Rehnquist to the Honorable Richard D. Cudahy (Aug. 28, 2000)(Attachment 5). Judge Cudahy replied that he intended to abide by those standards. Letter from the Circuit Judge Richard D. Cudahy to the Honorable William H. Rehnquist (Sept. 1, 2000)(Attachment 6).

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was threatened with a polygraph test.

Despite the evidence of his delay and efforts to prevent discovery of his responsibility, Judge Cudahy described his admission as “entirely gratuitous, spontaneous and unforced by any other person” in a letter to this Committee and as “voluntary” and “immediate” in a letter to the Chief Justice of the United States. Those statements may constitute criminal violations of 18 U.S.C. § 1001 (regarding false statements). In our judgment, this conduct is particularly inconsistent with the responsibilities of a federal judge.

The Initial Disclosure May Have Constituted a Knowing Violation of Fed. R. Crim. P. 6(e) and the Court’s Confidentiality Rules Relating to Sealed Material.

It appears that Judge Cudahy’s disclosure of the grand jury investigation may well constitute a knowing violation of provisions of Fed. R. Crim. P. 6(e) prohibiting the public disclosure of “matters occurring before the grand jury.” According to documents obtained by the Committee, Independent Counsel Robert W. Ray, at the request of the judges of the Special Division, informed them by letter dated August 7, 2000 that a grand jury had been empaneled to consider evidence in connection with the Court’s “mandate In re: Monica Lewinsky.” Letter from Independent Counsel Robert W. Ray to the Honorable David B. Sentelle, Presiding, the Honorable Peter T. Fay, and the Honorable Richard D. Cudahy (Aug. 7, 2000)(Attachment 7). By his own admission, Judge Cudahy disclosed this information to the press. The existence and subject matter of a grand jury investigation may be prohibited from disclosure as “matters occurring before the grand jury” under Fed. R. Crim. P. 6(e).

Judge Cudahy’s disclosure also appears to have impermissibly disclosed a matter under seal. It is our understanding that any other person appearing to have violated a court’s seal would be required to appear before the court and show cause why he or she ought not be held in contempt. It is hardly comforting to the average citizen who might perceive that judges are held to lower standard. Indeed, as Chief Justice Rehnquist noted for the Court in United States v. Aguilar, 515 U.S. 593, 606 (1995): “Government officials in sensitive confidential positions may have special duties of non disclosure.” (involving the disclosure of confidential information by a federal judge and expressly citing Fed. R. Crim. P. 6(e)).

Moreover, the rules of the United States Court of Appeals for the District of Columbia Circuit also expressly reflect the confidential nature of matters under seal. See, e.g., D.C. Cir. R. 47.1(a) (charging parties and their counsel with “assuring that material under seal remains under seal and is not disclosed to the public”); Id. 47.1(d)(3)(stating that “[b]riefs filed with the Court under seal are available only to authorized court personnel and will not be made available to the public”).

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There is also substantial evidence that Judge Cudahy may have disclosed this matter knowing that it was grand jury information and knowing that it was material under seal. Independent Counsel Ray's August 7, 2000 letter to all of the judges of the Special Division included in the upper right hand corner in bold-faced type the following text:

**Under Seal - Contains
Fed. R. Crim. P. 6(e)
Information**

This information was plainly visible and legible to any reader of the letter. It is hard to imagine that Judge Cudahy had not seen this text when he received this letter.

Moreover, the article that first reported that the grand jury had been empaneled suggests by its own terms that the disclosure was with knowledge that the information being disclosed should not be disclosed. The Associated Press wire service story which ran on August 17, 2000 (Attachment 8) reported that the sources of the grand jury information spoke "**on condition of anonymity.**"(emphasis supplied). Such a request for anonymity is inconsistent with any claim that the disclosure was made "inadvertently."

Judge Cudahy May Have Sought to Conceal His Responsibility and Made False Statements to the Chief Justice and this Committee.

A. Judge Cudahy May Have Sought to Conceal His Responsibility for the Disclosure.

Evidence obtained by the Committee reveals that Judge Cudahy may have sought to conceal from the Independent Counsel and the other Judges of the Special Division his responsibility for the disclosure. According to information provided by Presiding Judge David B. Sentelle, Senior Circuit Judge Peter T. Fay, and Independent Counsel Ray, Judge Cudahy failed to disclose his responsibility in a conference call the next afternoon – 24 hours after the initial AP story and following continuous public criticism of the Independent Counsel – until he realized that he would be unable to persuade the other two judges not to seek a criminal investigation and only after Independent Counsel Ray made clear that Judge Cudahy, among others, would be subjected to a polygraph examination.

According to Presiding Judge David B. Sentelle's account:

I requested my colleagues to join in a request to the Attorney General and the Independent Counsel for a full investigation into the source of the leak. Judge Fay

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immediately agreed. **Judge Cudahy at first objected to the investigation, stating that we should not “Go off half-cocked,” and we should “just let the story die.”**

Response of Presiding Judge David B. Sentelle to Inquiry of the House Judiciary Committee at 1 (accompanying Letter from United States Circuit Judge David B. Sentelle to The Honorable Henry Hyde (Oct. 19, 2000) (emphasis supplied)(Attachment 9).

Similarly, Judge Peter T. Fay recounted that:

Judge Sentelle suggested that we ought to consider requesting an investigation to find out what was going on [as to the source of the leak]. [] Judge Fay immediately agreed with Judge Sentelle and suggested that we make a formal request of the Attorney General that the Department of Justice and the F.B.I. conduct a full investigation. [] Judge Cudahy made some comment to the effect that we shouldn't make too big a deal about it and he had doubts about asking for an investigation. [] Judge Sentelle and Judge Fay made strong statements that we were going to ask for an investigation and that if Judge Cudahy did not want to agree, we were going to do it as a two judge majority. [] Judge Cudahy then made a statement [admitting to having disclosed the matter] He said he was sorry, that it was inadvertent and he wasn't sure there was anything wrong with what he did.

Letter from Peter T. Fay, Senior Judge, to the Honorable Henry J. Hyde at 1-2 (Oct. 19, 2000)(Attachment 10).

Independent Counsel Ray's description, consistent with the descriptions of Judges Sentelle and Fay, was that Judge Cudahy revealed his role only after the Judges had committed to initiating a criminal investigation. Mr. Ray recalled further that Judge Cudahy's admission came only after Mr. Ray had outlined that such an investigation would involve polygraph examinations

of anyone with access to the confidential information, which included Judge Cudahy. Specifically, Mr. Ray stated:

Judge Sentelle made it clear to me, however, that – speaking for himself – he was going to request that a criminal investigation be conducted by the Independent Counsel or the Department of Justice to determine the source of the leak. At that point, Judge Sentelle asked for consideration of that request. [] Judge Peter T. Fay immediately concurred in the request and indicated that Judge Sentelle was no

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longer speaking for just himself but now for the Court. Judge Cudahy opposed the request for an investigation principally (as I recall and as he later stated in his letter to the Committee) that the information constituting the leak was not of “extraordinary importance.”

Judge Sentelle then asked for my thoughts, and I indicated that while I could understand the Court’s request for an investigation, I was reluctant to agree to one. I explained that our experience had been that leak investigations were time-consuming and disruptive to the work of the Office and would require interviews and **polygraph examinations of all persons who had access to the confidential information**. Judge Cudahy then stated words to the effect that, “Before this goes any further, there is something I need to say. I may have been the source of the information.”

Letter from Independent Counsel Robert W. Ray to The Honorable Henry Hyde at 3 - 4 (Oct. 27, 2000)(emphasis added)(Attachment 11).

B. Judge Cudahy’s Descriptions of These Same Events is Inconsistent with the Recollection of all Other Participants and May Constitute Knowingly False Statements in Violation of 18 U.S.C. § 1001.

Judge Cudahy’s descriptions of these events in correspondence with the Chief Justice and this Committee is inconsistent with the descriptions provided by Judges Sentelle and Fay and Independent Counsel Ray. These descriptions may constitute knowingly false statements in violation of 18 U.S.C. § 1001.

Judge Cudahy’s October 20, 2000 letter to Chairman Hyde may have contained knowingly false statements. Judge Cudahy stated: “My only motive in making the admission was concern that

Robert Ray was being unfairly accused” Letter from Circuit Judge Richard D. Cudahy to the Honorable Henry Hyde (Oct. 20, 2000)(Attachment 12). He continued:

[My admission] was entirely gratuitous, spontaneous and unforced by any other person. Until then, there had been no indication or suggestion that I was the one who had made the previous day’s disclosure. There was no evidence against me other than my own word. I confessed freely and did so determined that I would then, having informed my colleagues, find a way to publicly reveal myself as the

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source.

Judge Cudahy further stated to the Committee that “I told my colleagues as soon as they could assemble” Id.

Yet the accounts of all other participants to the conversation reveal that Judge Cudahy’s admission -- far from being “gratuitous, spontaneous and unforced” -- was made only after it became clear that there was going to be a criminal investigation which would in all likelihood uncover his misconduct. Indeed, rather than admit his own wrongdoing, Judge Cudahy appears to have taken affirmative action to prevent any investigation of the matter which would have revealed it. Thus, he appears not to have “confessed freely” or “told his colleagues as soon as they could assemble.” Indeed, a person whose “only motive . . . was concern that Robert Ray was being unfairly accused” would have admitted his responsibility without the intervening threat of a criminal investigation and a polygraph examination.

Judge Cudahy made other apparently false statements to the Committee that he had freely decided to make public his admission. He denied that he “had been coerced into making [his] confession public.” Letter from Circuit Judge Richard D. Cudahy to The Honorable Henry Hyde at 3- 4 (Oct. 20, 2000). Once more, Judge Cudahy’s statements are at odds with those of the other two judges. Judge Sentelle stated:

Even following [his admission to those on the conference call], Judge Cudahy still did not agree to release the fact that he was the source of the leak but urged that we should “let the story die.” I insisted that if there were no release, there would be no excuse for not conducting a criminal investigation into the source of the leak. At some point during the conversation Ray pointed out that if there were a criminal investigation it would involve polygraphs. Finally, I said that if Judge Cudahy did not himself release a statement admitting that he was the source of the leak, I would release a statement identifying him as the source of the leak. Judge

Fay agreed that we would do so as a majority of the court. Then and only then, did Judge Cudahy agree to issue the press statement admitting responsibility.

Letter from United States Circuit Judge David B. Sentelle to The Honorable Henry Hyde at (Oct. 19, 2000).

Judge Fay recounted that following Judge Cudahy’s admission to the call participants:

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[] Judge Sentelle then asked Judge Cudahy what he intended to do about it. Judge Cudahy again stated that he didn't think it was a big deal. Judge Sentelle stated that it was a big deal to him and that if Judge Cudahy was not willing to release a public statement immediately acknowledging that he was the source of the leak, that he and Judge Fay would go forward with a formal request for a full and complete investigation.

[] Judge Cudahy stated that he would issue a statement if that would eliminate the need for an investigation.

Letter from Peter T. Fay, Senior Judge, to the Honorable Henry Hyde at 3 - 4 (Oct. 19, 2000).

Finally, Judge Cudahy's September 18, 2000 letter to the Chief Justice appears to contain similar false statements. In that letter, Judge Cudahy describes his admission as "voluntar[y]" and immediate[]." Letter from Circuit Judge Richard D. Cudahy to the Honorable William H. Rehnquist at 2 (Sept. 18, 2000)(Attachment 13). As with his description to this Committee of these same circumstances, Judge Sentelle's, Judge Fay's, and Independent Counsel Ray's descriptions contradict Judge Cudahy's letter to the Chief Justice.

Judge Cudahy May Have Wrongly Refused to Recuse Himself

Judge Cudahy's refusal to recuse himself may have been improper under the standards set forth for recusal. The judicial recusal statute requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. Given the evidence of Judge Cudahy's conduct, we believe that his impartiality might reasonably be questioned.

Following Judge Cudahy's admission, the Independent Counsel requested that Judge Cudahy at least recuse himself from decisions involving his office. In light of this record, that request was

both measured and appropriate. In addition to citing to appropriate Judicial Canons of Ethics, the Independent Counsel informed Judge Cudahy that:

[T]his Office must have confidence that any matter provided to the Court in confidence and under seal remains inviolate. I no longer have that confidence.

Letter from Independent Counsel Robert W. Ray to the Honorable Richard D. Cudahy at 2 (Aug. 25, 2000)(Attachment 13).

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Despite this modest request and the compelling circumstances described in this letter that may have justified recusal, Judge Cudahy refused. Letter from Circuit Judge Richard D. Cudahy to Independent Counsel Robert W. Ray (Sept. 6, 2000) (Attachment 14). In addition, Judge Cudahy dismissed the Independent Counsel's expressed concern over his ability to keep in confidence matters which come before the Court, saying "[T]here is no chance I would ever **knowingly** repeat [making such a disclosure]." Id. at 3.

This is a remarkable statement, for it was consistently Judge Cudahy's position that he **never knowingly** disclosed a matter at all. As stated above, he has repeatedly asserted that his wrongful disclosure was **inadvertent**. If the disclosure was inadvertent, then another future inadvertent disclosure would not be inconsistent with Judge Cudahy's pledge never to knowingly make such a disclosure in the future. Accordingly, such an assurance to the Independent Counsel provided no assurance at all.

We are concerned that Judge Cudahy's disclosure of grand jury matters that violate the Court's own seal without knowing he has done so reflects an insufficient regard for his responsibilities in a highly sensitive case. These circumstances suggest to us that Judge Cudahy also wrongfully failed to recuse himself from matters related to Independent Counsel Ray's office. Judge Cudahy's continued presence on the court deprived Independent Counsel Ray of the confidence in the panel to which he was entitled.

Because we believe the judicial branch should first attempt to resolve these questions, we believe a judicial investigation into these matters is warranted. Judicial independence is a cornerstone of a strong judicial system. Confidence in judicial independence can only be enhanced if the judiciary is willing to conduct a thorough investigation when the circumstances call for one. The *Committee and Subcommittee* will defer to the *Judicial Council* for now with the expectation that the Council will render a comprehensive report after a thorough review of this matter. The *Judicial Council* should not approach its task in a narrow manner. If other related information arises as a result of its inquiry, it should follow those leads and not be confined to the contents of this letter.

Thank you for your attention to this matter. If you have any questions, please contact Judiciary Committee Oversight Counsel Melissa McDonald at 202-225-5741.

Sincerely,

F. JAMES SENSENBRENNER, JR.

HOWARD COBLE

Clerk
United States Court of Appeals
for the Seventh Circuit
May 15, 2002
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Chairman

Chairman
Subcommittee on the Courts,
Intellectual Property, and the
Internet

fjs/jka

cc: The Honorable John Conyers, Jr.
The Honorable Howard Berman

Attachments



Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

August 25, 2000

CONFIDENTIAL

The Honorable Richard D. Cudahy
Senior Circuit Judge
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn, Suite 2648
Chicago, Illinois 60604

Dear Judge Cudahy:

After full consideration of the events of last week and only with great reluctance, I have reached the conclusion that it is necessary for me respectfully to ask that you voluntarily disqualify yourself from all matters coming before the Special Division related to this Office. I ask this because there is an appearance that you may be unable to consider with impartiality matters related to this Office. Your continuation in a position to consider matters related to this Office, if subject to such an appearance, would appear to constitute a violation of Canons 2(A) and 3(C)(1) of the Code of Conduct for United States Judges.

In my view, an appearance of a lack of impartiality now exists as the result of your disclosure to the media that this Office empaneled a grand jury and the circumstances of your subsequent statement that you were the source of the disclosure to the media. First, your disclosure to the media was contrary to the bold-faced designation on the face of my August 7, 2000 letter to the Court that the content of the letter was "Under Seal" and "Contains Fed. R. Crim. P. 6(e) Information."

Second, although the story revealing the grand jury's existence and subject matter -- when it was first published on Thursday, August 17, 2000 -- made clear that the source was not within this Office, members of the press, White House officials, and members of the United States House of Representatives and Senate immediately accused this Office of leaking that information. The evening news was saturated with these accusations, including the further unsubstantiated allegation by the CBS Evening News that the leak was "carefully orchestrated." The subsequent media coverage of the Democratic Convention and the next day's newspapers continued reporting these false accusations that caused serious harm to public confidence in this investigation.

Despite this outcry that was immediate and sustained following publication of the story on Thursday afternoon, you did not disclose your role until late Friday afternoon. Even then, that disclosure came only after a telephone conference (the details of which need not be recounted here) involving the members of the Court, including yourself, about the seriousness of the problem.

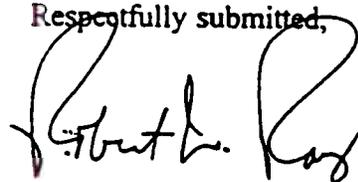
Canon 2(A) of the Code of Conduct for United States Judges provides that a "judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Improprieties that erode such confidence include "violations of law, court rules, or other provisions of th[e] Code [of Conduct]." Commentary, Canon 2(A), Code of Conduct for United States Judges. The appearance of an impropriety exists when "conduct would create in reasonable minds, with knowledge of all relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." Id.

In my judgment, your disclosure of the empaneling of a grand jury (and its subject matter) and the delay in making public your role in the disclosure creates at least the appearance of an impropriety. A reasonable person, with knowledge of all relevant circumstances, would have the perception that your ability to carry out your responsibilities with respect to this Office "with integrity, impartiality, and competence" is impaired.

Equally important, this Office must have confidence that any matter provided to the Court in confidence and under seal remains inviolate. I no longer have that confidence.

Canon 3(C)(1) requires that a judge "disqualify himself or herself in a proceeding in which the judge's impartiality might be questioned." In light of the analysis above, I believe that Canon 3(C)(1) requires that you disqualify yourself from any matters before the Special Division related to this Office.¹ Whether or not your disqualification is required, I respectfully request that you do so under these circumstances.

Respectfully submitted,



Robert W. Ray
Independent Counsel

cc: The Honorable David B. Sentelle, Presiding Judge
The Honorable Peter T. Fay, Senior Circuit Judge

¹ Should your honor agree to disqualify yourself from matters before the Special Division related to this Office, it is not clear to me how the Special Division will function with respect to this Office without a full complement of judges. See 28 U.S.C. § 46 (regarding the assignment of circuit judges, generally); id. § 49 (regarding the assignment of judges to the Special Division); and id. § 593 (regarding the duties of the Special Division). That is a matter, however, for the Court or the Chief Justice to resolve so that matters related to this Office are addressed by a full panel of judges.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

219 S. Dearborn Street, Room 2648
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RICHARD D. CUDAHY
Circuit Judge

E-mail: richard_cudahy@ca7.uscourts.gov

CONFIDENTIAL

September 6, 2000

Robert W. Ray, Esq.
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W., Suite 490-North
Washington, DC 20004

Dear Mr. Ray:

I have carefully considered your letter of August 25, 2000, and your request that I disqualify myself from actions of the Special Division relating to your office. My consideration has not only been careful but extended, because I know that you would not make such a request unless you felt that there were adequate reasons for making it. Nonetheless, it is impossible for me to see how the events of August 17 and August 18, 2000, or any related events, indicate any lack of impartiality with respect to, or any prejudice against, you or your office. I am completely confident that I can continue to deal with you and your office with integrity as well as with impartiality and competence, in the future, as I have in the past.

First, I should like to address the legal standards applicable to disqualification. The relevant section of the Code of Judicial Conduct to be applied to your request is Canon 3C(1) Disqualification, which states the general rule as follows:

A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned

As the following discussion indicates, I see no basis on which my impartiality with respect to you or your office or its affairs may reasonably be questioned.

Robert W. Ray, Esq.

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September 6, 2000

You have also included in your letter generous quotations from Canon 2 and its Commentary, relating to the obligation of a judge to avoid impropriety and the appearance of impropriety in all activities. I do not know whether or to what extent this is relevant to a request for disqualification. But, in any event, if the test for appearance of impropriety were to be applied here ("whether the conduct would create in reasonable minds, with all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired"), my conduct in dealing with the affairs of your office passes that test. Certainly, you have no valid complaint on grounds of integrity and impartiality and, as Canon 3 makes entirely clear, impartiality is the key. Based on this discussion of the legal standards, I should like to address the facts.

First, I take it you have no complaint with my dealings with you beyond those you mention in your letter. I favored your selection as Independent Counsel and, so far as I am aware, there have been no suggestions of partiality, prejudice or bias during our professional relationship before the events of mid-August.

As to recent events, whatever else may be said about them, they do not suggest any effort to deal hostilely or prejudicially with you or your office. In fact, quite the opposite. The information about your impanelment of a grand jury was inadvertently mentioned by me in response to a question about why I supported the continuation of your office, a view apparently inconsistent with my decision the previous August. It was a point in your favor as far as 28 U.S.C. § 596(b)(2) was concerned, and, of course, that is why you, at Judge Sentelle's personal request as I understand it, supplied the information to the panel of judges in your August 4 letter.

Robert W. Ray, Esq.
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September 6, 2000

The timing of my disclosure had consequences that I certainly did not appreciate until I learned of the vehemence of the unfair charges, largely, but not solely, directed at you. The timing was not of my choosing; it was established by the reporter who asked the question, and I doubt that the reporter had any expectation, when he asked the question, of a potential effect on events at the Democrats' convention. Instead, the context of the question was the issuance of the order declining to terminate your office.

I am sure that these charges were painful to you (and apparently interrupted your vacation). As soon as I heard about them, I sympathized with your plight and began to realize that this was an unintended consequence of the "leak." It was then several hours before I finally began to appreciate that the only way to relieve you of the onus was to take responsibility publicly for the disclosure myself. It was just that simple in the end, and I have no regrets about setting the record straight despite the obvious painful embarrassment involved in such a disclosure. If you recall, our conference call finally took place at 2:00 p.m. EDT, and my public statement was delivered to the media before 4:00 EDT. I can understand that, from your perspective, you were left exposed for what seemed a long time, but no objective observer has faulted me for being too slow to act.

You also mention your concern about the security of your disclosures in the future. That is certainly a valid matter for you to be concerned about. But if you fear any disclosures by me in the future, you are thinking quite unrealistically. To take responsibility for a "leak" and to have one's indiscretion broadcast to the entire world is an intensely unpleasant experience and one—I can assure you—there is no chance I would ever knowingly repeat.

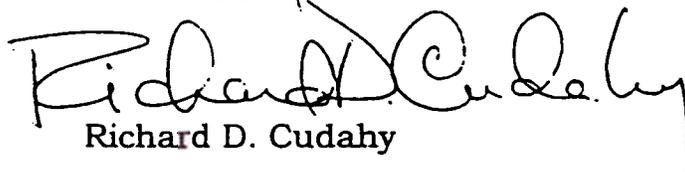
Robert W. Ray, Esq.

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September 6, 2000

It seems to me that this is the one fact you have left entirely out of your analysis. I took responsibility promptly for my indiscretion knowing that the price of candor would be very high. You, of course, were the principal beneficiary of my candor. I therefore cannot see how you can deem the whole episode one that showed partiality against you and/or your office, or how you can believe that this episode could ever be repeated. It is my most unshakable resolve that it will never be.

Sincerely yours,



Richard D. Cudahy

RDC/pj

cc: Judge David B. Sentelle
Judge Peter Fay





Office of the Independent Counsel

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September 14, 2000

CONFIDENTIAL

The Honorable William H. Rehnquist
Chief Justice of the United States
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Dear Mr. Chief Justice:

As Independent Counsel in the investigation *In Re: Madison Guaranty Savings & Loan Association* and other matters, I believe I must inform you of a significant matter of concern to me and this Office in connection with your responsibilities under 28 U.S.C. § 49(d) for designation and assignment of judges to the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit (the "Special Division").

On August 17, 2000, the existence and subject matter of a grand jury investigation in the United States District Court for the District of Columbia was disclosed to the media. The grand jury was empaneled on July 11, 2000 at my request to consider matters concerning Monica Lewinsky and others within the jurisdiction of this Office. On August 18, 2000, Judge Richard D. Cudahy of the Special Division publicly admitted that he "inadvertently" disclosed that information to a press reporter.

I considered what occurred to constitute a serious breach of confidentiality within the Special Division that required me to take action. Indeed, "[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure." *United States v. Aguilar*, 515 U.S. 593, 606 (1995) (involving the disclosure of confidential information by a federal judge and expressly citing the strictures of Fed. R. Crim. P. 6(e) prohibiting the disclosure of grand jury information).

As a result and after considerable thought, on August 25, 2000, I wrote to Judge Cudahy, with copies to the other judges serving on the Special Division, to ask that he voluntarily disqualify himself from matters before the Special Division involving this Office. Specifically,

The Honorable William H. Rehnquist
September 14, 2000
Page 2 of 2

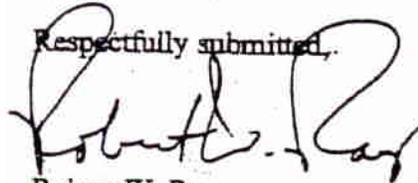
as authority for the request, I cited Canons 2(A) and 3(C)(1) of the Code of Conduct for United States Judges. I also informed him in that letter that I no longer had confidence that matters provided to the Court in confidence and under seal would remain so.

On September 6, 2000, in a confidential communication to me, Judge Cudahy responded and, after "careful" and "extended" consideration, declined my request. In his letter, he emphasized that such a disclosure would never knowingly happen again. In addition, Judge Cudahy's letter, in my judgment, contains an incomplete description of the circumstances surrounding his acknowledgement of the improper disclosure. Copies of both letters are attached hereto as Exhibits A and B, respectively.

As a member of the District of Columbia bar practicing law in this jurisdiction in my official capacity as Independent Counsel, I believe, under the circumstances, that I am required to inform the "appropriate authority" of my knowledge that "a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office." Rule 8.3, "Reporting Professional Misconduct," D.C. Rules of Professional Conduct, Jan. 2000. I am particularly mindful of the commentary to Rule 8.3 that requires the exercise of "judgment . . . in complying with the provisions of this Rule." Id. Comment [3].

Accordingly, in the exercise of judgment, I wish to inform Your Honor of the foregoing and am willing to provide any additional information that you might require. I believe it proper to advise Your Honor as the "appropriate authority" in connection with this matter, because it involves a judge on the Special Division, for whatever course of action you deem appropriate.

Respectfully submitted,



Robert W. Ray
Independent Counsel

cc: The Honorable David B. Sentelle, Presiding (w/o attachments)
The Honorable Peter T. Fay, Senior Circuit Judge (w/o attachments)
The Honorable Richard D. Cudahy, Senior Circuit Judge (w/o attachments)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 5, 2000

Robert W. Ray, Esquire
Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Ray:

On September 14, 2000, you wrote to inform me of your concerns relating to Judge Cudahy's service on the Special Division. You wrote to me because of your conclusion that, under Rule 8.3(b) of the D.C. Rules of Professional Conduct, I am the "appropriate authority" to receive such information.

Although I do not agree with your conclusion that I am the "appropriate authority" under Rule 8.3(b), I appreciate your informing me of your concerns. Prior to receiving your letter, I learned of the events you describe surrounding the public release of sensitive information relating to the impaneling of a new grand jury by your Office. After looking into the matter, I took what I believe to be appropriate action. I now consider the matter to be closed.

Sincerely,



cc: Honorable Richard D. Cudahy
Honorable Peter T. Fay
Honorable David B. Sentelle



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

August 28, 2000

PERSONAL & CONFIDENTIAL

The Honorable Richard D. Cudahy
Senior Circuit Judge
United States Court of Appeals
for the Seventh Circuit
2648 Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge Cudahy:

I am writing regarding your service as a member of the division of the Court of Appeals for the District of Columbia Circuit for the purpose of appointing independent counsels. As you know, I have received correspondence from Judge Sentelle recounting the events surrounding the public release of sensitive information relating to the impaneling of a new grand jury by Independent Counsel Robert Ray. I am also aware of the press accounts of the leak regarding the grand jury, as well as your comments acknowledging that you were the source of the leak and expressing your regret.

This incident raises serious concerns. I know that you are aware of the duties of confidentiality imposed by the statutory provisions governing the work of the division of the court for the purpose of appointing independent counsels, the Code of Conduct for United States Judges and the rules governing grand jury secrecy. Judges serving on the division of the court for the purpose of appointing independent counsels should not speak to the press about the division's deliberations or the materials upon which those deliberations are based.

The Honorable Richard D. Cudahy
Page Two
August 28, 2000

I would appreciate it if you would, at your early convenience, drop me a line indicating your intention to abide by these standards in your future work for the special division.

Sincerely,

A handwritten signature in cursive script, reading "William H. Paraguirre". The signature is written in dark ink and is positioned to the right of the typed name.

cc: The Honorable David B. Sentelle
The Honorable Peter T. Fay



W

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
RICHARD D. CUDAHY
CIRCUIT JUDGE

PERSONAL AND CONFIDENTIAL

September 1, 2000

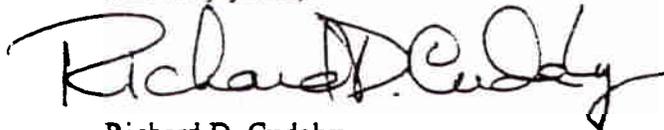
The Honorable William H. Rehnquist, Chief Justice
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543-0001

Dear Chief Justice Rehnquist:

I have received your letter of August 28, 2000, with regard to the "leak" of information relating to the impanelment of a new grand jury by Independent Counsel Robert Ray. On August 29 I sent you a letter commenting on Judge Sentelle's correspondence. I am aware that the incident to which you refer raises serious concerns, as you suggest, in the various respects that you have spelled out in your letter. You may rest assured that I will abide by all the standards mentioned in your letter during my service on the Special Division and elsewhere. I deeply regret any embarrassment, inconvenience or concern which any action of mine may have caused you or Judges Sentelle and Fay. You may be completely confident that in the future an action of the sort that has caused concern will not be repeated.

Thank you for your consideration.

Sincerely yours,



Richard D. Cudahy

RDC/pj

cc: Hon. David B. Sentelle
Hon. Peter T. Fay



Office of the Independent Counsel 1

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

August 7, 2000

Honorable David B. Sentelle, Presiding
Honorable Peter T. Fay
Honorable Richard D. Cudahy
Special Division
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Washington, D.C. 20001

**Under Seal - Contains
Fed. R. Crim. P. 6(e)
Information**

Re: Empanelment of Grand Jury 2000-03

Your Honors:

At the request of the Court, in addition to the information provided in the Annual Report to Congress, I confirm the existence of an ongoing grand jury investigation In re: Monica Lewinsky. The matter has continued with the empanelment, on July 11, 2000, of Grand Jury 2000-03 in the United States District Court for the District of Columbia. The work of the grand jury is not expected to conclude prior to January 2001. Accordingly, as reflected in the Annual Report to Congress, a prosecutorial decision with regard to the mandate In re: Monica Lewinsky will not be rendered until after the President leaves office in January 2001.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert W. Ray".

Robert W. Ray
Independent Counsel
Tel. No.: (202) 353-0201



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New grand jury assembled to probe Clinton in Lewinsky scandal: sources

PETE YOST; Associated Press Writer

WASHINGTON (AP) _ Independent Counsel Robert Ray has empaneled a new grand jury to hear evidence against President Clinton in the Monica Lewinsky scandal as he tries to determine if criminal charges are warranted, legal sources said Thursday.

The news angered Democrats on the night Vice President Al Gore was to accept the party's presidential nomination at its convention in Los Angeles. "It's probably just another Republican dirty trick," Rep. Charles Rangel, D-N.Y., said.

The move follows through on Ray's promise to consider whether the president should be indicted after he steps down from office next January. Legal experts cautioned the decision doesn't mean charges will ever be filed.

The sources, speaking on condition of anonymity, told The Associated Press that the grand jury was empaneled on July 11. Prosecutors identified the Lewinsky case as the sole purpose of investigation, said the sources, who are outside Ray's office.

The move comes a year and a half after Clinton was impeached by the House and then acquitted by the Senate, allowing him to serve out the remainder of his term.

The White House reacted angrily. "The timing of this leak reeks to high heaven," White House spokesman Jake Siewert said. "Given the record of the Office of the Independent Counsel, the timing is hardly surprising."

Gore's staff said the vice president wouldn't be deterred on the night he was to deliver his nomination acceptance speech.

"People are sick and tired of seeing the judicial system manipulated for political purposes," Gore spokesman Doug Hattaway said. "It seems clearly calculated to have a political impact."

House Democratic Whip David Bonior of Michigan added: "It's the ugliest kind of politics. It's something that will be rejected by the American people."

Karen Hughes, spokeswoman for Texas Gov. George W. Bush, the GOP nominee, said: "It's not appropriate for this type of announcement to be made on a day that the vice president is going to accept the Democratic nomination."

At issue is whether Clinton committed perjury or obstructed justice when he denied an affair in sworn testimony in the Paula Jones case.

The judge in the Jones case has already ruled the president gave false testimony and fined him for civil contempt of court. The disciplinary committee of the Arkansas Supreme Court has also moved to revoke Clinton's law license.

The issue for Ray is whether Clinton's conduct amounted to criminal conduct.

Ray also got the go-ahead to continue his investigation Wednesday from the three-judge panel that appointed him as Ken Starr's replacement last year.

The judges ruled that termination of the office "is not currently appropriate" under the independent counsel law, which expired last year but still applies to Ray's office under a grandfather clause.

Keith Ausbrook, senior counsel to Ray, declined comment about any grand jury activity, which is kept secret by law.

But in response to the judges' order, Ausbrook noted that "we've made public that the Lewinsky investigation remains open and that the e-mail investigation remains open."

The e-mail probe focuses on whether the White House concealed thousands of electronic messages sought by investigators. Presidential aides deny wrongdoing.

Ray's office recently closed the books on two other Clinton-era controversies _ the White House gathering of secret FBI files on Republicans and the firings of White House travel office employees. The prosecutor declined to bring criminal charges in either case.

An expert cautioned that empaneling a new grand jury is no guarantee that Ray will seek an indictment.

"It's merely a step in an investigation, not an indication an indictment would ever be approved by a grand jury or even presented to the grand jury," said John Douglass, a former prosecutor in the Iran-Contra scandal.

"At this stage in this particular investigation it would be highly unlikely for a new grand jury to receive any new information that had not already been considered at length by Ken Starr, the United States Congress and the prior grand jury," said Douglass, an expert in criminal law and criminal procedure at the University of Richmond.

Ray, however, has made no secret he intends to weigh whether Clinton should be indicted.

"There is _ as the public is well aware _ a matter involving the president of the United States in connection with the Lewinsky investigation," Ray said in a television interview with ABC in March.

"The country went through the matter of impeachment. The judgment was made by the country that it was not appropriate to remove the president from office," Ray said.

"It is now my task as a prosecutor, with a very limited and narrow focus, to determine again whether crimes have been committed and whether ... it is appropriate to bring charges."

The Clinton-Lewinsky grand jury is one of eight grand juries currently in operation at the federal courthouse in Washington.

Getting a separate grand jury for Clinton-Lewinsky is "a way for Ray to be prepared to act quickly and to deal with this question efficiently when he turns to it," said John Barrett of the St. John's University School of Law and a former Iran-Contra prosecutor.

The panel of federal appeals judges that renewed Ray's office is required by law to consider the investigation's status once a year.

Last year, one of the three judges, Richard Cudahy, said the "endless investigation" should be shut down with the departure of Starr. The two other judges, Peter Fay and David Sentelle, ruled the office should continue.

On Wednesday, all three judges were in agreement.

Keywords: Washington

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PETE YOST; Associated Press Writer

New grand jury assembled to probe Clinton in Lewinsky scandal: sources,08-18-2000

United States Court of Appeals

District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, DC 20001-2856

David B. Sentelle
United States Circuit Judge

October 19, 2000

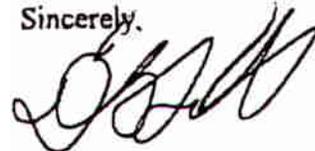
The Honorable Henry Hyde
Chairman, House Judiciary Committee
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Hyde:

After consultation with my colleagues and staff as to the propriety of response, I have come to the conclusion that it is appropriate given that the communications about which I will make disclosure included a person other than members of the court and therefore could not be considered confidential deliberations of the court. I have at times, where appropriate or efficient, combined the answers to various subparts to your numbered questions, so that my responses do not match number for number and letter for letter. Specifically, I have provided a narrative in response to question one (1) rather than broken down into subparts. If this is not satisfactory please advise and I will attempt to resubmit to your specifications.

There is minimal documentation, but I forward what I have related to the leak except for internal documents of the court.

Sincerely,



David B. Sentelle

CC: The Honorable Peter T. Fay
The Honorable Richard D. Cudahy
The Honorable John Conyers, Jr.
The Honorable Leonidas Ralph Mecham
Independent Counsel Robert W. Ray

***Response of Presiding Judge David B. Sentelle
to Inquiry of the House Judiciary Committee***

1. The following narrative is submitted in response to all parts and subparts of question 1:

On or about August 7, 2000, my court received from Robert W. Ray, Independent Counsel, information in support of the continuation of his office. That information bore the heading "Under Seal - Fed. R. Crim. P. 6(e) information." Within that filing under seal was included the information ultimately leaked concerning the ongoing Grand Jury. At my instruction, the filing was forwarded to each of my colleagues on the Special Division. It is my understanding that it was not received until several days later by Judge Cudahy as he was out of his chambers. Very shortly after Judge Cudahy had returned and received the information, an Associated Press reporter named Yost reported that "legal sources" had informed him of the existence and subject matter of the Grand Jury investigation. That story ran on August 17, 2000. In the ensuing hours various members of the media accused me, Robert Ray, and others of having made the improper and apparently illegal leak of information rendered secret by the seal of the court and more importantly by the Federal Rules of Criminal Procedure 6(e), protecting the secrecy of Grand Jury matters. I was away from my chambers at that time visiting at my daughter's home in North Carolina. Because of the highly charged and highly publicized nature of the accusations, Independent Counsel Robert Ray returned to Washington prematurely from a family vacation. Ray requested and I agreed to a conference call of himself and all judges to occur on the afternoon of August 18. At the time of that call on the afternoon of August 18, I had not heard from Judge Cudahy nor had Judge Fay, according to his then and subsequent account. Independent Counsel Ray requested leave of the court to release the original filing from his office to our court containing the single sentence reference to the existence and subject matter of the Grand Jury. Since the news stories had run so high as to potentially exaggerate the nature and extent of the disclosure far beyond anything in the letter itself, I immediately agreed that Ray should do so and I requested my colleagues to join in a request to the Attorney General and the Independent Counsel for a full investigation into the source of the leak. Judge Fay immediately agreed. Judge Cudahy at first objected to the investigation, stating that we should not "Go off half-cocked," and that we should "just let the story die." (I am not certain that this is an exact quote in either instance, but I will say that it is very close.) After both Ray and I commented that we each had been accused of the leak and that the story was not going to die or go away by itself, Judge Cudahy admitted that he "might have been the source of the information." Ray and I both reiterated that we were being accused of leaking something that he may have leaked and we wanted to know what he meant by saying "he might have been" the source of the information. It was only then that Judge Cudahy admitted that he had given the information to the Associated Press reporter.

Even following this exchange, Judge Cudahy still did not agree to release the fact that he was the source of the leak but urged that we should "let the story die." I insisted that if there were no release, there would be no excuse for not conducting a criminal investigation into the source of the leak. At some point during the conversation Ray pointed out that if there were a criminal investigation it would involve polygraphs. Finally, I said that if Judge Cudahy did not himself release a statement admitting that he was the source of the leak, I would release a

statement identifying him as the source of the leak. Judge Fay agreed that we would do so as a majority of the court. Then, and only then, did Judge Cudahy agree to issue the press statement admitting responsibility.

He subsequently relayed the admission that he was the source of the Associated Press story, in a press release, copy of which is attached to this response.

2. I have not been contacted by Attorney General Reno or anyone from the Department of Justice to review or investigate this matter. I know of no other investigation currently ongoing.
3. I attach Judge Cudahy's press release admitting responsibility for the leak.

Beyond that the only documents existing concerning this leak are internal communications within the court. If I am to furnish those, I will request a subpoena or a closed session of the Committee as the appropriate format.

Attachment

Federal Judge Richard D. Cudaby, a member of the Special Division that exercises oversight over the Offices of Independent Counsel, including Robert Ray, today disclosed that he had been the inadvertent source of the information that a new grand jury has been empaneled by Ray. Judge Cudaby today disclosed his role, with apologies to all concerned. The Judge stated that the nature of the controversy generated by his inadvertent disclosure yesterday prompted him to speak today.

Judge Cudaby's disclosure yesterday was made in response to a reporter's inquiry about a brief order of the Special Division issued yesterday. The inquiry was directed to reasons Judge Cudaby has concurred in this order, while he had dissented from a similar order issued in August of 1999. His dissent in 1999 had been predicated on the absence at that time of any direct information on the on-going activities of then-Independent Counsel Starr's office. Judge Cudaby's agreement to yesterday's order of the Special Division, which concluded that it would at this time be inappropriate to terminate Independent Counsel Ray's office, was largely based on the information contained in Mr. Ray's August 4, 2000, Annual Status Report to the Congress. In the course of discussing yesterday's order, though, the Judge inadvertently referred to the existence of a newly-empaneled grand jury as another reason offered by Ray for the continuance of his office. This fact, previously undisclosed, has led to considerable controversy, based on its timing. Judge Cudaby stated, however, that the timing resulted solely from the press inquiry following on the issuance of the Special Division's order.

10



CHAMBERS OF
PETER T. FAY, SENIOR JUDGE

(305) 536-5974
99 N.E. FOURTH ST.
SUITE 1255
MIAMI, FLORIDA 33132

October 19, 2000

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
The House of Representatives
2138 Rayburn House Office Building
Washington, D. C. 20515-6216

Dear Chairman Hyde:

It is with deep concern and some hesitation that I respond to your letter of October 13, 2000. In my opinion, the discussions between judges should be kept confidential. However, the information you have requested does not appear to be related to the "judicial" work of the three judge panel. Consequently, I feel obliged to respond to your questions as best as I can. It is my intent to cooperate fully with you and the Committee consistent with the obligations and restrictions on federal judges.

First, please allow me to preface my answers to your questions with a short statement. I want you to know that I have the utmost respect for Judge Cudahy and all Article III judges. Judge Cudahy has expressed to me, and to the world, that he made a mistake and that he is sorry. I believe he is sincere and deeply regrets what has happened.

In response to your questions, this information is to the best of my recollection:

1. A. Judge Cudahy did not contact me before he made his comment to the press.

The Honorable Henry J. Hyde

October 19, 2000

Page 2

1. B. To the best of my knowledge, based upon conversations with IC Ray and Judge Cudahy, he did not contact the Office of Independent Counsel before making his statement to the reporter(s). These conversations took place during a conference call on August 18, 2000.

1. C. The only way I know to respond to this question is to outline my recollection of the events leading up to and the content of a conference telephone call held between IC Ray and Judges Sentelle, Cudahy and Fay on August 18, 2000.
 1. Several television commentators made remarks about the "leak" shortly before Vice President Gore's speech at the Democratic National Convention.

 2. On Thursday (8/17) and early Friday (8/18) several friends reported that David Kendall and Larry Watkins had been interviewed on television and suggested that the source of the leak was probably those two Republican judges – David Sentelle and Peter Fay. I did not see any such interviews.

 3. My wife and I were traveling but my secretary relayed to me that IC Ray desired a conference call with the three judge panel and we discussed when it would be held and where I would be.

 4. The conference call was put together and these conversations took place in sequence on August 18, 2000:
 - a. IC Ray explained how upset he was about the "leak" and emphasized how careful he had been to notify us of his actions with clearly marked correspondence that was "sealed." He also relayed that he had left his family while on vacation and was back in his office and wanted to get to the bottom of what was going on.

 - b. Judge Sentelle outlined the reports in the media in the Washington, D.C. area and expressed his outrage at what was happening and the statements being made about him, IC Ray and Judge Fay. Judge Sentelle suggested that we ought to consider requesting an investigation to find out what was going on.

The Honorable Henry J. Hyde

October 19, 2000

Page 3

c. Judge Fay immediately agreed with Judge Sentelle and suggested that we make a formal request of the Attorney General that the Department of Justice and the F.B.I. conduct a full investigation.

d. Judge Cudahy made some comment to the effect that we shouldn't make too big a deal about it and he had doubts about asking for an investigation.

e. Judge Sentelle and Judge Fay made strong statements that we were going to ask for an investigation and that if Judge Cudahy did not want to agree, we were going to do it as a two judge majority.

f. Judge Cudahy then made a statement indicating that he may have been the source of the problem. He told us that he had been talking to some reporters about the fact that he had concurred in our panel order to continue IC Ray's office when earlier he had dissented from a panel order continuing IC Starr's office. He said they wanted him to explain so he did. He stated he told them that there were still active matters going on and that IC Ray had empaneled a grand jury to investigate further into the Monica Lewinsky matter and that is why he did what he did. He said he was sorry, that it was inadvertent and he wasn't sure there was anything wrong with what he did.

g. Judge Sentelle then expressed his opinion that Judge Cudahy had disclosed information protected by Rule 6(e) of the F.R.Crim.P. and he simply didn't understand why Judge Cudahy continues to talk to the press. He reminded Judge Cudahy that we had discussed this before when Judge Cudahy had apparently conducted some sort of a press conference and referred to the three judge panel as an administrative body.

h. IC Ray expressed surprise and dismay at what Judge Cudahy had just revealed as did Judge Fay.

i. Judge Sentelle then asked Judge Cudahy what he intended to do about it. Judge Cudahy again stated that he didn't think it was a big deal. Judge Sentelle stated that it was a big deal to him and that if Judge Cudahy was not willing to release a public statement immediately acknowledging that he was the source of the leak, that he and Judge Fay would go forward with a formal request for a full and complete investigation.

The Honorable Henry J. Hyde
October 19, 2000
Page 4

j. Judge Cudahy stated that he would issue a statement if that would eliminate the need for an investigation. He stated again that he thought we were blowing it out of proportion but he would release a public statement outlining what had happened.

k. The conference call ended with all of us advising Judge Cudahy that we were awaiting his statement.

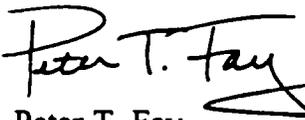
l. The statement was released shortly thereafter. It speaks for itself.

1. D. Judge Cudahy told us during the conference call that he had disclosed the empaneling of a new grand jury to investigate additional matters related to the Monica Lewinsky affair.

2. The Department of Justice has not contacted me regarding this matter. The only action I know of is that the matter was reported to the Chief Justice.

3. I have no records concerning this matter and the information in this letter is based upon my best recollection.

Sincerely,



Peter T. Fay

PTF/mz

cc: Judge Sentelle
Judge Cudahy
Independent Counsel Robert Ray
The Honorable John Conyers, Jr.
Mr. Leonidas Ralph Mecham



Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

October 27, 2000

BY HAND DELIVERY

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

RECEIVED
OCT 27 2000
Committee on the Judiciary

Dear Chairman Hyde:

I have received and carefully reviewed your letter, dated October 13, 2000, and now am prepared to respond to your request for information relevant to the Judiciary Committee's inquiry concerning Judge Richard D. Cudahy's August 17, 2000 disclosure that a new grand jury was empaneled to consider evidence concerning the President's conduct In re: Monica Lewinsky.

The matter about which you inquire represents, in my judgment, a serious breach of confidentiality within the Special Division of the Court. Judge Cudahy has acknowledged that he "made a serious mistake." In reviewing this matter, the Committee, pursuant to its oversight authority, has requested further information concerning the circumstances of Judge Cudahy's acknowledgment of responsibility for the disclosure of information provided by my Office to the Court in confidence and under seal.

The Judiciary Committee has "oversight jurisdiction" over this Office, and as Independent Counsel I have the statutory "duty to cooperate with the exercise of such oversight jurisdiction." 28 U.S.C. § 595(a)(1). Accordingly, notwithstanding my own concerns that this matter be handled confidentially and similar concerns previously expressed by members of the Court that appointed me, I will respond to you and the Committee fully at this time, consistent with my obligations and professional responsibilities as Independent Counsel.

Given the Committee's assurances that records provided will be handled appropriately, let me begin by explaining why it was necessary to inform the Special Division of the existence of a grand jury investigation regarding In re: Monica Lewinsky. As you know, at the end of each year following the appointment of an independent counsel, the Special Division is required to

The Honorable Henry J. Hyde

October 27, 2000

Page 2 of 5

determine "on its own motion" whether continuation of the investigation is appropriate. 28 U.S.C. § 596(b)(2). In addition, the law requires that an independent counsel submit a report to Congress annually on the "activities of the independent counsel, including a description of the progress of [the] investigation," but omitting "any matter that in the judgment of the independent counsel should be kept confidential." 28 U.S.C. § 595(a)(2).

On August 4, 2000, I submitted such a status report (the "Annual Status Report") to Congress, and at the same time forwarded copies of the Annual Status Report to the three judges of the Special Division for review in connection with the Court's determination whether to authorize continuation of the investigation begun August 9, 1994. The report noted, among other things, that "[i]n particular, the Independent Counsel has previously disclosed that the matter In re: Monica Lewinsky remains open, with decisions relating to that investigation pending the conclusion of President Clinton's term of office in January 2001." Annual Status Report to Congress, Aug. 4, 2000, p. 22. The report characterized that investigation as "active" and expressed our judgment that further disclosure was inappropriate because such matters should remain confidential.

On August 4, 2000, I was advised by Judge David B. Sentelle, the presiding member of the Court, that in an effort to achieve unanimity and avoid a 2-1 split decision (with Judge Cudahy dissenting) as had occurred in August 1999, the Court required further disclosure beyond that detailed in the Annual Status Report. As a result, on August 7, 2000, I submitted to the Court a five-sentence letter bearing the bold-faced designation "Under Seal" and "Contains Fed. R. Crim. P. 6(e) Information." The letter disclosed in relevant part the existence, subject matter, and date of empanelment of the grand jury investigating the Lewinsky matter.

I am unaware of any instance where an independent counsel was asked to notify the Court of the existence of a grand jury investigation prior to the issuance of an order authorizing continuation of his or her office. The majority decision of the Court, filed August 18, 1999, authorizing the continuation of the investigation last year, expressed the Court's concerns about requiring independent counsels to make such substantial showings.

The timing of Judge Cudahy's subsequent public disclosure of the existence of a grand jury considering evidence in the Lewinsky investigation was unfortunate. Following the Court's unanimous order, filed August 16, 2000, authorizing the continuation of the investigation this year, Judge Cudahy disclosed the existence and subject matter of the grand jury investigation to the Associated Press and thereby caused serious harm to public confidence in this Office.

In that regard, let me explain why that was so. Our immediate response to the disclosure was to state only what we knew: that we had every reason to believe that the disclosure had not been made by anyone within this Office. That, however, did not prevent an avalanche of coverage initiated by news organizations, commentators, a White House spokesman, and other government officials who erroneously concluded - - based upon the supposed "history of this office" - - that this investigation intended to improperly impact the political process. News

reports on the matter included CBS News, which characterized the disclosure as a "carefully orchestrated, politically motivated leak" and suggested that it originated from the "Republican-backed special prosecutor Robert Ray."

As then Attorney General and later Associate Justice Robert H. Jackson appropriately noted sixty years ago, a prosecutor "can have no better asset than to have [a reputation that] recognize[s] that . . . his power has been dispassionate, reasonable and just." When the public loses confidence in the prosecutor's "sensitiv[ity] to fair play . . . [which] is perhaps the best protection against the abuse of power," or comes to believe that the prosecutor is serving "factional purposes" rather than the fair execution of the law, the administration of justice suffers. See Robert H. Jackson, Attorney General of the United States, remarks delivered at the Second Annual Conference of United States Attorney, Department of Justice, Washington, D.C., Apr. 1, 1940.

In short, the damage done was to lead the public to conclude that my office had engaged in serious misconduct, undermining the country's confidence in the integrity of this investigation. In order to stem the damage, I endeavored immediately to arrange a conference call with the Court, not for the purpose of uncovering the source of the leak of the contents of my August 7, 2000 letter, but to obtain court authorization to release that letter and the August 4, 2000 letter to the Court. I did so believing that what had been leaked was limited to the contents of the August 7 letter, as reflected in the AP wire stories.

I also sought to defend the investigation against any further charges of improper disclosure of matters occurring before the grand jury, in violation of Fed. R. Crim. P. 6(e). I hoped that public release of the two letters that led to the Court's August 16, 2000 order reauthorizing the work of this Office would shed some light on what might have happened.

With those thoughts in mind, I arranged for a conference call, which began at approximately 2:00 p.m. EDT on Friday, August 18, 2000. Prior to that time, neither I nor any member of my office had any contact with Judge Cudahy about the unauthorized disclosure.¹ I am unaware of any previous contact he may have had with his colleagues on the Special Division about the matter. (The judges' letters to the Committee indicate that no such contact occurred.)

I began the discussion with a request to release both letters with an appropriate order of the Court. Judge Sentelle canvassed his colleagues, and they agreed. Judge Sentelle made it clear to me, however, that - - speaking for himself - - he was going to request that a criminal investigation be conducted by the Independent Counsel or the Department of Justice to determine

¹ During the afternoon of Thursday, August 17, 2000 -- prior to publication of the Associated Press story, but after we became aware that the story would be published -- my senior staff contacted Judge Sentelle to advise him that the story would be published, that this Office was not the source of the disclosure, and that we were considering the appropriate course of action.

The Honorable Henry J. Hyde

October 27, 2000

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the source of the leak. At that point, Judge Sentelle asked for consideration of that request. I started to answer. Judge Sentelle interrupted and said that he wanted to hear from his colleagues first. Judge Peter T. Fay immediately concurred in the request and indicated that Judge Sentelle was no longer speaking just for himself but now for the Court. Judge Cudahy opposed the request for an investigation principally (as I recall and as he later stated in his letter to the Committee) that the information constituting the leak simply was not of "extraordinary importance."

Judge Sentelle then asked for my thoughts, and I indicated that while I could understand the Court's request for an investigation, I was reluctant to agree to one. I explained that our experience had been that leak investigations were time-consuming and disruptive to the work of the Office and would require interviews and polygraph examinations of all persons who had access to the confidential information. Judge Cudahy then stated words to the effect that, "Before this goes any further, there's something I need to say. I may have been the source of the information." Upon further discussion, it was clear to me from Judge Cudahy's explanation that he had disclosed the contents of my August 7, 2000 letter to the Associated Press.

The balance of the conversation with the Court concerned the urgency of disclosing to the public what had just been revealed. I strongly urged that an appropriate opinion or statement be issued that day, before the weekend. The Court agreed, leading to the 4:00 p.m. EDT release of the order granting my application to unseal the two letters to the Special Division followed by Judge Cudahy's 4:30 p.m. EDT statement.

On Thursday, August 17, 2000 -- the day the Associated Press story was published and the day before Judge Cudahy's admission -- my deputy advised the Deputy Attorney General of this matter. Thereafter, beginning on August 23, 2000, I had discussions with the Deputy Attorney General's office about appropriate action. I requested that the Department of Justice defer action pending consideration by my office as to how best to proceed.

I then took the following steps: On August 25, 2000, I wrote Judge Cudahy and requested that he voluntarily disqualify himself from "all matters coming before the Special Division related to this Office." On September 6, 2000, Judge Cudahy informed me that he declined to do so after "careful" and "extended" consideration. On September 14, 2000, I informed the Chief Justice of the United States of my concerns "for whatever course of action" he deemed "appropriate." On October 5, 2000, the Chief Justice advised me that after looking into the matter, he "took what [he] believe[d] to be appropriate action," concluding as a result, "I now consider the matter closed."

On October 10, 2000, I met with the Attorney General, the Deputy Attorney General, and the Assistant Attorney General in charge of the Criminal Division regarding whether further action was appropriate. After careful and extended consideration of my own, I decided not to refer the matter to the Department for a determination as to whether a criminal investigation was warranted.

The Honorable Henry J. Hyde

October 27, 2000

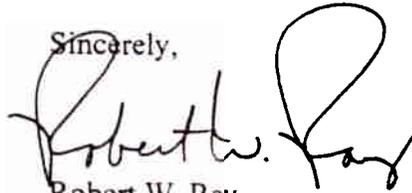
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Specifically, in my view and in the exercise of discretion, although the available evidence suggested a possible violation of Fed. R. Crim. P. 6(e), fairness dictated a recognition that Judge Cudahy was correct that the damage done here was not so much the result of the information disclosed, but the timing of the disclosure. Grand jury secrecy is intended to protect the integrity of the grand jury's investigation and the rights of witnesses and subjects, not the integrity of the prosecutor. In light of the previous publicity surrounding this matter, those concerns, while not inconsequential, are not as pronounced. For these reasons, I declined to refer the matter to the Department of Justice for a determination as to whether further action was appropriate. I communicated that decision to the Deputy Attorney General's office on October 12, 2000.

In response to your request for records related to this matter, I asked that my Office search all records. The fruits of that search and a search of my own records are being forwarded to your staff under separate cover,

Thank you and the Committee for your interest in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert W. Ray". The signature is fluid and cursive, with a large loop at the end of the last name.

Robert W. Ray
Independent Counsel

cc: Honorable John Conyers, Jr.
Honorable David B. Sentelle, Presiding
Honorable Peter T. Fay, Senior Circuit Judge
Honorable Richard D. Cudahy, Senior Circuit Judge
Honorable Leonidas Ralph Mecham, Director AOUSC

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

219 S. Dearborn Street, Room 2648
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(312) 435-5825
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RICHARD D. CUDAHY
Circuit Judge

E-mail: richard_cudahy@ca7.uscourts.gov

October 20, 2000

The Honorable Henry J. Hyde, Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Hyde:

On October 13, 2000, you wrote to Judge Sentelle expressing your concern over my inadvertent disclosure to a reporter that a new grand jury had been empaneled by Independent Counsel Robert Ray. You asked for Judge Sentelle's response to questions involving the circumstances of my self-admitted disclosure to the press and the circumstances surrounding my public confession of responsibility for the disclosure. Since Judge Sentelle and Judge Fay have responded to your letter, I think it appropriate to provide my own commentary about what happened, especially about my admission that I was the source of the information concerning a new grand jury.

The way this entire matter has developed in the accounts of my colleagues is strange. The fact that I "leaked" information has been freely admitted by me to the whole world with my apologies, but the focus now seems to be on how gracefully or ungracefully I handled the prelude to the admission. The important thing, however, is that my only motive in making the admission was concern that Robert Ray was being unfairly accused on political grounds of being the perpetrator. That had been overwhelmingly the burden of charges being made by a variety of commenters. No one has suggested any other plausible motive for my public admission. And there is none.

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In any event, here is the sequence of events:

On Thursday, August 17, the Special Division issued a unanimous *per curiam* order that had the effect of refusing to terminate the office of Independent Counsel Ray. I agreed to that order despite my decision a year earlier to dissent from a similar extension for the then Independent Counsel. This year I had access to IC Ray's Annual Report to the Congress, in which he summarized the activities of the office during his tenure as well as that of his predecessor. He also outlined in the Annual Report that he had certain remaining tasks to perform, including a determination whether to seek an indictment against the President when his term was over. In addition, by private memo to the Court, IC Ray informed us that he had, in fact, empaneled a grand jury to help with his further investigation of the President (In re: Monica Lewinsky).

On the day that order was made public by the Court, a reporter who had written on the subject the previous year called me to inquire about the "inconsistency" in my dissenting the year before but now joining the Court in the current order extending the life of the Independent Counsel. In the course of that brief discussion, I inadvertently disclosed that a reason supporting my decision was the empanelment of a new grand jury, which was an example of continuing activity by the Independent Counsel. In fact, IC Ray supplied this information at the request of Judge Sentelle to head off the possibility of the previous year's split decision. (Unfortunately, the order that prompted the reporter's inquiry was issued coincidentally with the closing night of the Democratic Convention).

My disclosure should certainly not have been made, but I did not at that time attach extraordinary importance to the information that a grand jury had been empaneled. It seemed merely to lend a little substance to IC Ray's announced intention to retain the option of seeking an indictment against the President. I certainly did not anticipate the importance the story would assume in the media, coming to light as it did in the context of Mr. Gore's speech. It was the following morning before I became aware of the media focus on the disclosure and the cacophony of political charges and countercharges about the likely

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motives of a "leaker" who would pick that particular moment to disclose the new grand jury. Most of the charges were directed at the office of IC Ray.

As I traveled to my office, I contemplated how best to respond, since I felt that the charges being reported were terribly unfair to IC Ray. Shortly after arriving at my office I was informed that Judge Sentelle's chambers was endeavoring to schedule a conference call as soon as possible (in response to IC Ray's request for such a call) to discuss the circumstances surrounding the previous day's disclosure. While I was available at that moment, apparently all the necessary parties could not participate until 1:00 p.m., CDT, that afternoon.

I contemplated that I would, during that call, inform my colleagues of my culpability in the disclosure of the empanelment. Among other things, I did not feel it collegial or otherwise appropriate to make any public admission until I had informed my colleagues of my role. I told my colleagues as soon as they could assemble and followed with a public written statement within 90 minutes. I believe that this is "immediate action."

Mr. Ray, who had requested the call, began with a statement in which he complained bitterly about the injustice of the accusations against him as the source of the disclosure. Judges Fay and Sentelle expressed sympathy and were also concerned over reports that one of them had been named as the source. They began a discussion of the need for an investigation into the disclosure. I did not support an investigation since it would certainly have been the height of hypocrisy to vote to investigate one's own "leak."

My admission was made shortly thereafter. It was entirely gratuitous, spontaneous and unforced by any other person. Until then, there had been no indication or suggestion that I was the one who had made the previous day's disclosure. There was no evidence against me other than my own word. I confessed freely and did so determined that I would then, having informed my colleagues, find a way to publicly reveal myself as the source.

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It has been suggested, quite illogically, that I had to be coerced into making my confession public. As the sole purpose of my admission was to exculpate IC Ray, it would necessarily have to be made public. To argue otherwise makes no sense. Even if I had wanted the information to be restricted, I could not reasonably have expected to withhold it once I had disclosed it to Judges Sentelle and Fay and to IC Ray. They—particularly Ray—had every reason to make such information public. The important fact is that I did go public, thereby exculpating all other putative “leakers.”

I made a serious mistake in inadvertently disclosing to the press that there was a newly-empaneled grand jury. I do not recall saying repeatedly that the “leak” was “no big deal” or words to that effect. Nor do I recall saying that there was nothing wrong with what I did. Both of those sentiments are quite inconsistent with an admission that received huge media coverage (and, therefore, was a very “big deal”) and was accompanied by “apologies to all” (and, therefore, must have been in some way “wrong”). It is most unfair to take real or imagined comments made under heavy stress and use them in ways that contradict the logic of the situation as a whole.

I apologized at the time and I continue to regret my error—but not my admission of it. The disclosure was, however, a momentary lapse, the consequences of which apparently consisted principally of setting off a bitter political dialogue. It was not so much the substance of the disclosure that caused the trouble; it was the timing.

I might add that all this information was submitted some time ago to Chief Justice Rehnquist by Judges Sentelle and Fay and by IC Ray; and the Chief Justice then took what he deemed to be appropriate action.

Sincerely,


Richard D. Cudahy

RDC/pj

cc: The Honorable Peter T. Fay
The Honorable David B. Sentelle
The Honorable John Conyers, Jr.
The Honorable Leonidas Ralph Mecham
Independent Counsel Robert W. Ray

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RICHARD D. CUDAHY
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September 18, 2000

CONFIDENTIAL

The Honorable William H. Rehnquist, Chief Justice
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543-0001

Dear Chief Justice Rehnquist:

I am taking the liberty of writing with respect to the letter, dated September 14, 2000, to you from Independent Counsel Robert Ray. It may be unnecessary for me to write, since the subject of the letter, which received widespread attention in the media after I covered it in a public statement, has also been specially reported to you in detail by Judge Sentelle, and you have responded to the facts as they have been reported. If what I am saying is redundant, therefore, please forgive me for burdening you with essentially repetitious information.

Mr. Ray's earlier letter to me of August 25, 2000 (attached to his present letter), requested my disqualification from matters involving his Office. This invokes Canon 3C(1), Code of Conduct for United States Judges, which involves the issue whether my "impartiality might reasonably be questioned . . ." In my letter of September 6, 2000 (also attached to the present letter), I pointed out that there was nothing in the events of August 17 and August 18, 2000, that would reflect unfavorably on my impartiality. In fact, Mr. Ray was the principal beneficiary of my candor in pointing the finger at myself, since he was being publicly attacked before that for the "leak," and my admission removed him as a target of criticism. In fact, this was the main purpose of the admission. Mr. Ray in his earlier letter also complained about possible future breaches of confidentiality, and I gave him what I thought were ironclad assurances on that score.

Chief Justice Rehnquist

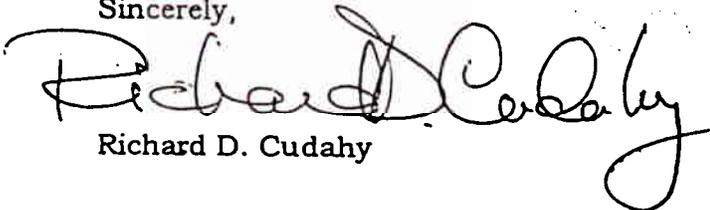
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September 18, 2000

Mr. Ray's present letter to you, dated September 14, 2000, apparently does not pursue the matter of disqualification but purports to be a professional misconduct report concerning my inadvertent disclosure of his impanelment of a new grand jury. You, of course, have abundant information about this event both from reports in the media based on my self-disclosure and from reports from Judge Sentelle to which I have responded. I would categorically deny that, in making an inadvertent public disclosure of certain information in which my involvement became known only because I voluntarily and publicly acknowledged my responsibility, I "committed a violation of applicable rules of judicial conduct that raises a substantial question as to . . . my fitness for office . . ." Rule 8.3, "Reporting Professional Misconduct," D.C. Rules of Professional Conduct, Jan. 2000. What was involved was an isolated disclosure of the impanelment of a new grand jury, which, in my opinion, does not, in and of itself, violate the strictures of Federal R.Crim. P. 6(e). This was a mistake on my part, for which I immediately and publicly took responsibility with "apologies to all." I do not believe that this incident merits the extreme characterization that Mr. Ray apparently places on it. As I have indicated to Mr. Ray, I have no doubt that I can continue to deal with his office, and others, with integrity, impartiality and competence.

I believe that you have already dealt with the event in question (and I so informed Mr. Ray when he telephoned me about his intention to bring it to your attention). However, if I may supply additional information, please call on me.

Sincerely,

A handwritten signature in black ink that reads "Richard D. Cudahy". The signature is written in a cursive, flowing style with a large, prominent initial "R".

Richard D. Cudahy

RDC/pj

cc: Hon. David B. Sentelle
Hon. Peter T. Fay
Dir. Leonidas Ralph Mecham
Robert W. Ray, Esq.