4/10 Introductory Memo

HRC

MEETING

Memorandum **Office of the Independent Counsel**

To: All OIC Attorneys Date: 4/22/98

From: HRC Team

Subject: Preparation for HRC Meeting

FOIA(b)6
FOIA(b)7 - (C)

In this binder are four items: 1) A copy of the April 10th memorandum distributed earlier this month; 2) An evidentiary summary; 3) [redacted] To assist you in understanding the material, we suggest that you read them in that order.

We look forward to the meeting on Monday the 27th and a fruitful discussion.

Memorandum **Office of the Independent Counsel**

To: File Date: 4/24/98

From: Paul Rosenzweig

Subject: [redacted]

FOIA(b)6
FOIA(b)7 - (C)

Thoughts to keep in mind for the April 27th meeting in which [redacted] Hillary Clinton will be considered:

- [redacted] is not [redacted] rather one of the sufficiency of the evidence, most of which is circumstantial, that would establish guilt.

- In that context, the distinctions between this case and the normal run-of-the-mill case need to be kept carefully in mind:
- First, when we are confident of the ultimate ground of our case -- the factual guilt of the accused -- there is an impulse to bring the charges if there is any reasonable basis for success. Part of that impulse is the recognition that in a "typical" case, the costs of failure are low. No prosecutor has ever been criticized for being too aggressive in charging an "edgy" case against, say, a Mafia kingpin. In this instance, however, the costs -- in terms of damage to the investigation and damage to the public perception of the criminal justice system -- of failure will be much higher than normal.
- Second, OIC will not come to the circumstantial case with the advantages which typically inhere to the government in such trials. Jurors, faced with a concatenation of so-called coincidences, will often "shift the burden of proof" to defendant, so to speak. Or more accurately, accept readily that several unlikely events linked together do form a pattern proven beyond a reasonable doubt unless rebutted by the defendant. In a high profile case of this sort, however, I think that some jurors are likely to put OIC to the full measure of proof beyond a reasonable doubt and, in effect, insist that circumstantial evidence is an inferior form of evidence on which they cannot convict. Such a distinction would be "lawless" in a formal sense, as contrary to their jury instructions -- but we blink reality if we do not expect this reaction to a primarily circumstantial high-profile case.

- The Principles of Federal Prosecution counsel that probable cause is the minimum standard for commencing a prosecution. [redacted]

- The Principles of Federal Prosecution also say that we should commence or recommend

prosecution only if admissible evidence will "probably be sufficient" to obtain and sustain a conviction.

- It is the obtaining that may prove difficult. The Principles of Federal Prosecution counsel that as a matter of fundamental fairness and in the interests of efficient administration of justice, a prosecution should only be initiated if we believe that the person charged will "probably be found guilty by an unbiased trier of fact." What does this mean?

- In my view "probably" is a more likely than not/preponderance of the evidence standard. In other words, I believe that the chances of success need to be more than 50-50 to warrant prosecution.

- And what is an "unbiased" trier of fact? How is the case effected where, as here, it is nearly impossible to expect a completely unbiased and untainted venire, given the nature of the case?

- The Principles caution that if the law and facts create a sound prosecutable case, the potential that a fact finder is likely to acquit because of the unpopularity of some factor in the prosecution or the popularity of the defendant or his cause is not a factor prohibiting prosecution. "The prosecutor may . . . despite his negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts) . . . may conclude that it is necessary and desirable to commence prosecution . . . and allow the criminal process to operate in accordance with its principles." The test is whether the evidence, "viewed objectively, by an unbiased fact finder" would be sufficient to obtain and sustain a conviction.

- Several points regarding this passage need to be made:
- First, it is not mandatory. The prospect of an unjustified acquittal does not prohibit prosecution -- but it also does not mandate one and the Principles do not say it is a factor which may not be considered.
- Second, it is not clear to me that it is applicable. I do not think it is Hillary's popularity that will cause problems or OIC's unpopularity -- though these are certainly factors. Rather it is whether we think the evidence viewed objectively is more likely than not to secure a guilty verdict. Is the public nature of the defendant (which will mean a full application of the burden of proof to our case) the same as popularity of the defendant? I do not think so.

- Bottom line: We can anticipate the following: 2% = Rule 29; 18% = Acquital; 70% = Hung Jury; 10% = Conviction. Not enough in my view.

interests of fair and effective law enforcement within the district. In situations in which a modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted.

9-27.150 Non-Litigability

A. The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

B. Comment

This statement of principles has been developed purely as a matter of internal Departmental policy and is being provided to federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices pursuant hereto creates any rights or benefits. By setting forth this fact explicitly, [*DOJ Manual 9-27.150*], supra, is intended to foreclose efforts to litigate the validity of prosecutorial actions alleged to be at variance with these principles or not in compliance with internal office procedures that may be adopted pursuant hereto. In the event that an attempt is made to litigate any aspect of these principles, or to litigate any internal office procedures adopted pursuant to these materials, or to litigate the applicability of such principles or procedures to a particular case, the U.S. Attorney concerned should oppose the attempt and should notify the Department immediately.

9-27.200 INITIATING AND DECLINING PROSECUTION

9-27.210 Generally: Probable Cause Requirement

A. If the attorney for the government has probable cause to believe that a person has committed a federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;
2. Commence or recommend prosecution;
3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;

NW: 1

4. Decline prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or

5. Decline prosecution without taking other action.

B. Comment

[*DOJ Manual 9-27.210*] sets forth the courses of action available to the attorneys for the government once he/she has probable cause to believe that a person has committed a federal offense within his/her jurisdiction. The probable cause standard is the same standard as that required for the issuance of an arrest warrant or a summons upon a complaint (see Rule 4(a), Federal Rules of Criminal Procedure), for a magistrate's decision to hold a defendant to answer in the district court (see Rule 5.1(a), Federal Rules of Criminal Procedure), and is the minimal requirement for indictment by a grand jury (see Branzburg v. Hayes, 408 U.S. 665, 686 (1972)). This is, of course, a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions, in deciding upon his/her course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions as well.

9-27.220 Grounds for Commencing or Declining Prosecution

A. The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial federal interest would be served by prosecution;

2. The person is subject to effective prosecution in another jurisdiction; or

3. There exists an adequate non-criminal alternative to prosecution.

B. Comment

[*DOJ Manual 9-27.220*] expresses the principle that, ordinarily, the attorney for the government should initiate or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain and sustain

NW:

a conviction. Evidence sufficient to sustain a conviction is required under Rule 29(a), Federal Rules of Criminal Procedure, to avoid a judgment of acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand all the evidence that he/she intends to rely at trial: it is sufficient that he/she have a reasonable belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence a prosecution though a key witness is out of the country, so long as the witness's presence at trial could be expected with reasonable certainty.

The potential that—despite the law and the facts that create a sound, prosecutable case—the fact-finder is likely to acquit the defendant because of the unpopularity of some factor involved in the prosecution or because of the overwhelming popularity of the defendant or his/her cause, is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.

Merely because the attorney for the government believes that a person's conduct constitutes a federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution: [*DOJ Manual 9-27.220*] notes three situations in which the prosecutor may properly decline to take action nonetheless: when no substantial federal interest would be served by prosecution; when the person is subject to effective prosecution in another jurisdiction; and when there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government whether such a situation exists. In exercising that judgment, the attorney for the government should consult [*DOJ Manual 9-27.230, 9-27.240,* or *9-27.250*], infra, as appropriate.

9-27.230 Substantial Federal Interest

A. In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

B. Comment

[*DOJ Manual 9-27.230*] lists factors that may be relevant in determining whether prosecution should be declined because no substantial federal interest would be served by prosecution in a case in which the person is believed to have committed a federal offense and the admissible evidence is expected to be sufficient to obtain and sustain a conviction. The list of relevant considerations is not intended to be all-inclusive. Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

1. Federal Law Enforcement Priorities

Federal law enforcement resources and federal judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus federal law enforcement efforts on those matters within the fedearl jurisdiction that are most deserving of federal attention and are most likely to be handled effectively at the federal level. In addition, individual U.S. Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. In weighing the federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with established priorities.

2. Nature and Seriousness of Offense

It is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature, and what the public attitude is toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute, whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

Economic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been made. Care should be taken in weighing the matter of restitution, however, to ensure against contributing to an impression that an offender can escape prosecution merely by returning the spoils of his/her crime.

3. Deterrent Effect of Prosecution

Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be

relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.

4. The Person's Culpability

Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offense, both in the abstract and in comparison with any others involved in the offense. If, for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.

5. The Person's Criminal History

If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should be considered in determining whether to initiate or recommend federal prosecution. In this connection, particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship if any to the present offense, and whether he/she previously avoided prosecution as a result of an agreement not to prosecute in return for cooperation or as a result of an order compelling his/her testimony. By the same token, a person's lack of prior criminal involvement or his/her previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.

6. The Person's Willingness to Cooperate

A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not, by itself, relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the federal interest in prosecuting him/her. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.

7. The Person's Personal Circumstances

In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circum-

stances peculiar to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to his/her offense; other circumstances, such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.

8. The Probable Sentence

In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him/her in the future will be aware of the risk of releasing him/her on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution," depending on whether the earlier prosecution was federal or nonfederal (see [*DOJ Manual 9-2.142*]).

Just as there are factors that it is appropriate to consider in determining whether a substantial federal interest would be served by prosecution in a particular case, there are considerations that deserve no weight and should not influence the decision. These include the time and resources expended in federal investigation of the case. No amount of investigative effort warrants commencing a federal prosecution that is not fully justified on other grounds.

NW:

9-27.240 Prosecution in Another Jurisdiction

A. In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

1. The strength of the other jurisdiction's interest in prosecution;
2. The other jurisdiction's ability and willingness to prosecute effectively; and
3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

B. Comment

In many instances, it may be possible to prosecute criminal conduct in more than one jurisdiction. Although there may be instances in which a federal prosecutor may wish to consider deferring to prosecution in another federal district, in most instances the choice will probably be between federal prosecution and prosecution by state or local authorities. [*DOJ Manual 9-27.240*] sets forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: the strength of the jurisdiction's interest in prosecution; its ability and willingness to prosecute effectively; and the probable sentence or other consequences if the person is convicted. As indicated with respect to the considerations listed in paragraph 3, these factors are illustrative only, and the attorney for the government should also consider any others that appear relevant to him/her in a particular case.

1. The Strength of the Jurisdiction's Interest

The attorney for the government should consider the relative federal and state characteristics of the criminal conduct involved. Some offenses, even though in violation of federal law, are of particularly strong interest to the authorities of the state or local jurisdiction in which they occur, either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by state or local investigators, or some other circumstance. Whatever the reason, when it appears that the federal interest in prosecution is less substantial than the interest of state or local authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a federal prosecution.

2. Ability and Willingness to Prosecute Effectively

In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the

authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.

3. Probable Sentence Upon Conviction

The ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. In considering this factor, the attorney for the government should bear in mind not only the statutory penalties in the jurisdiction and sentencing patterns in similar cases, but also the particular characteristics of the offense or of the offender that might be relevant to sentencing. He/she should also be alert to the particular characteristics of the offense or of the offender that might be relevant to sentencing. He/she should also be alert to the possibility that a conviction under state law may in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under federal law.

9-27.250 Non-Criminal Alternatives to Prosecution

A. In determining whether prosecution should be declined because there exists an adequate non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

1. The sanctions available under the alternative means of disposition;
2. The likelihood that an effective sanction will be imposed; and
3. The effect of non-criminal disposition on federal law enforcement interests.

B. Comment

When a person has committed a federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to

licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases in pretrial diversion (see 9-22.000).

Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests. It should be noted that referrals for non-criminal disposition, other than to Civil Division attorneys or other attorneys for the government, may not include the transfer of grand jury material unless an order under Rule 6(e), Federal Rules of Criminal Procedure, has been obtained.

9-27.260 Impermissible Considerations

A. In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person's race, religion, sex, national origin, or political association, activities or beliefs;

2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or

3. The possible effect of the decision on the attorney's own professional or personal circumstances.

[*DOJ Manual 9-27.260*] sets forth various matters that plainly should not influence the determination whether to initiate or recommend prosecution or take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his/her judgment, but in order to make clear that federal prosecutors will not be influenced by such improper considerations. Of course, in the case in which a particular characteristic listed in subparagraph (1) is pertinent to the offense (for example, in an immigration case the fact that the offender is not a United States national, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering it for the purpose intended by the Congress.

9-27.270 Records of Prosecutions Declined

A. Whenever the attorney for the government declines to commence or recommend federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files.

B. Comment

[*DOJ Manual 9-27.270*] is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up.

9-27.300 SELECTING CHARGES

9-27.310 Charging Most Serious Offenses

A. Except as hereafter provided, once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. The "most serious" offense is generally that which yields the highest range under the sentencing guidelines. If mandatory minimum sentences are also involved, their effect must be considered, keeping in mind the fact that a mandatory minimum is statutory and generally overrules a guidelines.

B. Comment

Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute.