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WHITE HOUSE LITIGATION - CORRESPONDENCE w/ PARTIES



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May 5, 1997

**VIA HAND DELIVERY**

The Honorable Kenneth W. Starr  
Independent Counsel  
Office of the Independent Counsel  
1001 Pennsylvania Avenue, N.W.  
Suite 490-North  
Washington, D.C. 20004

Dear Judge Starr:

This letter responds to your letter of April 29, 1997.

I explicitly stated my willingness to explore alternatives to my proposal, so I am perplexed by your characterization of the third element of my proposal as the "linchpin" and the "sine que non" of any negotiated resolution. In any event, you appear to have misunderstood the governing law. The Supreme Court has not held, as you suggest, that appellate courts are without authority to vacate judgments upon settlement. Indeed, the Supreme Court begins its analysis in *Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), by recognizing the general authority of a federal appellate court to vacate decisions in such circumstances. *Id.* at 21. Congress has explicitly provided that, "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . ." 28 U.S.C. § 2106.

The appellee in *Bancorp*, of course, opposed the appellant's motion to vacate -- a situation quite different from my proposal where all the parties would support vacatur. The Supreme Court's limited decision was, as you correctly quoted, that "[w]here mootness results from settlement, . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim

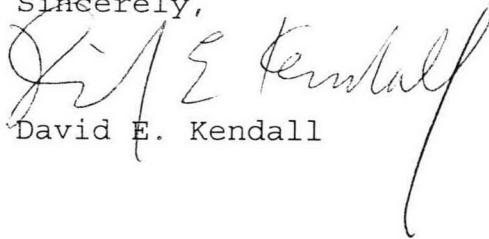
WILLIAMS & CONNOLLY

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Page 2

to the equitable remedy of vacatur." *Bancorp Mortgage Co.*, 513 U.S. at 25 (emphasis added). Federal appellate courts continue to have the authority to vacate decisions according to principles of equity even where mootness is caused by settlement. As the Supreme Court expressly noted in *Bancorp*, "[t]his is not to say that vacatur can never be granted when mootness is produced [by reason of settlement]." *Id.* at 29.

You have, however, elected to litigate the matter rather than resolve it in a way that would speedily afford you the notes. *Jacta alea est.*

Sincerely,

A handwritten signature in cursive script, appearing to read "David E. Kendall". The signature is written in dark ink and is positioned above the typed name.

David E. Kendall

**COVINGTON & BURLING**

1201 PENNSYLVANIA AVENUE, N. W.

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**BY FACSIMILE**

Brett M. Kavanaugh, Esq.  
Office of the Independent Counsel  
Washington, D.C.

Re: Office of the President v. Office of the Independent Counsel, No. 96-1783

Dear Mr. Kavanaugh:

As you know, we represent Professor Paul F. Rothstein and a number of other law professors who intend to file an *amicus curiae* brief in support of the petitioner in the above-captioned matter. As we discussed earlier this week, I am writing pursuant to Supreme Court Rule 37 to confirm that you have consented to the filing of the brief. If you do consent, please so indicate by signing below and faxing a copy of the counter-signed letter to me at (202) 778-5641.

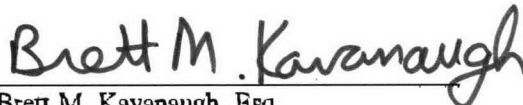
Please do not hesitate to call me if you have any questions. Thank you for your consideration.

Very truly yours,



Ivan K. Fong

I consent.



Brett M. Kavanaugh, Esq.  
Counsel for the Office of the Independent Counsel

Date:

May 28, 1997

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\*\*\* TX REPORT \*\*\*  
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DATE: May 28, 1997

TO: Brett M. Kavanaugh Esq.  
Office of the Independent Counsel

FROM: IVAN K. FONG  
ROOM: 1107B

PHONE: (202) 662-5641  
direct FAX NO.: (202) 778-5641  
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PAGES: 2 (including cover)

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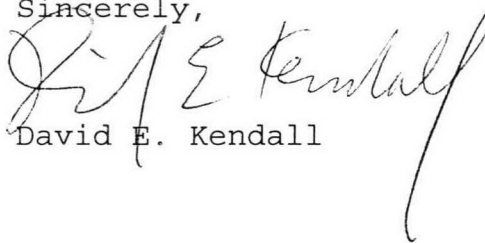
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David E. Kendall



① S. Bates →

FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury

②