THE WHITE HOUSE

WASHINGTON

August 10, 2001

Dear Congressman Waxman:

I was disappointed with your letter of July 17, 2001, which contains a series of factual and legal inaccuracies. The following are just a few examples:

You assert that "discussing federal policies with senior executives of companies in which [a public official] had substantial investments" is "exactly the type of conflict of interest that the ethics laws are designed to prevent." (p. 1) On the contrary, no conflict of interest law or regulation contains such a prohibition. The "exact[] type of financial conflict of interest that the ethics laws are designed to prevent" is the type they expressly proscribe: the personal and substantial participation by a government official in a particular matter that will have a direct and predictable effect upon his financial interests. 5 C.F.R. § 2635.402(a). Conversations in which a government official hears from a business executive about his company's perspective on aspects of federal policy are not in themselves prohibited. Only if the official were to participate personally and substantially in a particular matter that will have a direct and predictable effect on his financial interests would a prohibited conflict of interest exist. Your further suggestions that waivers are required when government officials (1) are given outside recommendations on personnel matters (p. 3); or (2) are given the names of persons within the environmentalist community with information or perspectives on global warming (p. 3); or (3) are merely copied on correspondence to others (p. 4) are wholly unsupported and erroneous. Were the law as you suggest, the ethics regulations would be transformed from an important safeguard of the substantive integrity of governmental decisionmaking into a needless and intrusive straitjacket that hinders beneficial communication between the government and the public.

You assert that "[a]ccording to 5 C.F.R. § 2635.502(d), an employee must seek a waiver when the employee's conduct 'would raise a question in the mind of a reasonable person about his impartiality.'" (p. 6) This misstates the regulation. Subsection (d) of Section 502 says nothing about the circumstances under which an employee should seek a waiver (or, more precisely, an authorization). That subject is governed by a different subsection of the same regulation, subsection (a). Subsection (a) contains a separate and additional requirement – which you do not cite or quote – making clear that vague and subjective questions about an employee's impartiality are not alone sufficient to trigger application of this regulation. Rather, it is only "*[w]here an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and* where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter" that the regulation applies. 5 C.F.R. § 2635.502(a) (emphasis added). Thus, your generalization that waiver is required "when the employee's

conduct 'would raise a question in the mind of a reasonable person about his partiality'" (p. 6) does not account for certain specific and indispensable elements of the rule, i.e., that in a case such as this there be both a particular matter involving specific parties and a likelihood of direct and predictable effect on a financial interest.[1]

- *You assert that "Mr. Rove's stature within the White House" in itself "trigger[s] the conflict of interest regulations." (p. 7)* In my initial letter, I explained that the National Energy Policy could not have had a "direct and predictable" impact on the value of Mr. Rove's Enron shares because, among other reasons, the Policy merely set forth a variety of proposals whose ultimate shaping and enactment into law depended on further consideration and action by other governmental actors and whose likely effect on Enron was therefore uncertain. You attempt to contradict that explanation by citing "Mr. Rove's stature within the White House" and asserting that Mr. Rove is an important and influential adviser. This is beside the point. That Mr. Rove is Senior Adviser to the President cannot transform a general policy discussion of the sort that occurred with respect to the National Energy Policy into personal and substantial involvement by Mr. Rove in a particular matter that would have a direct and predictable effect on his financial interests.

- *You assert that "it is difficult to imagine a more clear-cut example of government policy affecting the value of a company's stock" than the impact of the announcement of the National Energy Policy on Enron stock. (p. 7)* As I explained in my previous letter, the conflict of interest laws are not addressed to the potential impact of broad governmental policies upon individual companies. In any event, Enron shares traded within a narrow range both before and after the announcement and showed no obvious reaction to it.

Rather than engage in a largely repetitious point-by-point rebuttal of the many other points in your letter with which I disagree, I will focus the remainder of my response on the two principal requests made in your letter.

First, I must deny your request for information responding to the numerous questions posed in Part I(D) of your letter. You have asked for details relating to any "meetings, discussions, and phone conversations" Mr. Rove may have had with an extremely large potential universe of individuals, including dates, participants, and specific views expressed at the meeting. Providing such information would be inconsistent with the longstanding executive branch policy of furnishing non-public information in an oversight context only in response to an authorized request of a committee or House of Congress. Even in this situation, of course, various protections continue to apply to certain categories of information. Moreover, responding to your

[1] I note that this is only one example in a pattern of misrepresentation of legal materials in your letter. To cite another example. Section 502 does not state, as you claim, that the employee "must" seek an authorization; instead, it says only that the employee "should" seek an authorization before participating in a matter. 5 C.F.R. § 2635.502(a). Your letter also claims that "[t]he regulations specifically state that a 'health care bill limiting the amount that can be charged for prescription drugs is sufficiently focused on the interest of pharmaceutical companies that it would be a particular matter' for purposes of the regulations." (p. 6) (citing 5 C.F.R. § 2640.103(a)(1) (example 8)). In fact, the actual text of the regulation provides that "*consideration and implementation, through regulations, of a section of a* health care bill limiting the amount that can be charged for prescription drugs is sufficiently focused on the interest of pharmaceutical companies that it would be a particular matter." *Id.* (emphasis added). The omitted language is quite significant.

request would appear to require a comprehensive audit of the hundreds of meetings and thousands of "discussions or phone conversations" that Mr. Rove undoubtedly participated in since the beginning of the Administration. Preparing such a response would be extraordinarily burdensome, if not impossible.

Second, I must decline to comment on your request that a referral be made to the Department of Justice pursuant to 28 U.S.C. § 535(b). As a matter of policy, the executive branch generally will not disclose information relating to law enforcement matters, which would include the existence or non-existence of investigative referrals to the Department of Justice. Notwithstanding your letter's public disclosure of the heretofore confidential investigation of a named former White House staffer, I am sure you understand the importance of, and share the executive branch's commitment to, protecting the privacy and reputation of individuals who may become the subject of an official investigation but are later determined to have done nothing wrong. Without commenting on Mr. Rove's situation, I can, however, assure you that I will not hesitate in appropriate circumstances to make referrals to the Department of Justice, should the need ever arise. I am constrained to point out, however, that, here again, your discussion of the relevant law is inaccurate. Even assuming that 28 U.S.C. § 535(b) applies to the White House,[2] your understanding of that statute would appear to require referrals to the Department of Justice of even frivolous complaints or irresponsible or poorly-informed accusations. This understanding is not supported by the text of Section 535(b), interpretations of that provision during the past 25 years, or by the sound considerations of public policy that underlie it.

Finally, the Sandy Berger and Tony Lake cases you cite are not analogous to Mr. Rove's situation. Neither Mr. Berger nor Mr. Lake was charged with anything so amorphous (or innocuous) as performing "duties [that] affected federal energy policy" (p. 6).[3] In the Factual Stipulations filed with their Settlement Agreements, both Mr. Berger and Mr. Lake formally *admitted* that they had in fact "personally and substantially participated" in one or more "particular matters" that may have had a "direct and predictable effect" on the companies in which they held an interest. As I explained in my original letter, the general policy discussions and non-substantive interactions in which Mr. Rove engaged are plainly not in the same category.[4] See 5 C.F.R. §§ 2635.402(b)(1), (b)(3), (b)(4). In addition, both Mr. Berger and Mr. Lake violated express instructions from the White House Counsel to sell their stockholdings. In Mr. Berger's case, he retained his shares for more than 15 months after the Counsel's Office had instructed him to divest. In Mr. Lake's case, he retained his shares for more than 20 months after receiving such an instruction. By contrast, Mr. Rove followed the advice he received from transition counsel and White House Counsel and sold his shares promptly after he received his certificates of divestiture.

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[2] This is, of course, far from clear. See *In re Lindsey*, 148 F.3d 1100, 1110 (D.C. Cir. 1998) ("The statute does not clearly apply to the Office of the President.").

[3] Each was charged with having "knowingly participated personally and substantially as a government officer or employee in a particular matter in which he had a financial interest." Complaint, *United States* v. *Berger*, No. 97 CV02679 (filed D.D.C. 11/10/97); Complaint, *United States* v. *Lake*, No. 97 CV 00268 (filed D.D.C. 2/7/97).

[4] As for the mid-level Clinton staffer named in your letter, since that matter had not, to my knowledge, been made public before your letter and I have no knowledge of the facts, I cannot comment. From your description of that matter, however, it appears that the Department of Justice determined that there was no basis on which to proceed.

In closing, it is important to note that no one has suggested that any of Mr. Rove's conduct actually undermined executive branch policymaking or personally enriched Mr. Rove. Indeed, Mr. Rove actually suffered considerable financial losses because of his inability to sell his stockholdings at the beginning of the Administration, as he had wished. We understand your role as a member of Congress and we hope that any further pursuit of this matter is motivated solely by a reasonable concern over Mr. Rove's conduct. Please let me know if I can provide additional help.

Sincerely,

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cc: The Honorable Dan Burton