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Memorandum

ATTORNEY GENERAL/DEPUTY ATTORNEY GENERAL ACTION

Subject	Date
In Re: Theodore Olson	APR 02 1987 WFW:JCK:emc

To The Attorney General
The Deputy Attorney General
The Associate Attorney General

From
William F. Weld
Assistant Attorney General
Criminal Division

Action Required: NONE - INFORMATION ONLY

Final Action By: **Due Date:** _____

Attorney General ☐

Deputy Attorney General ☐

Previous Background Provided:

Summary: Attached for your information is a copy of a memo filed by the Independent Counsel in the Theodore Olson matter agreeing with the limitation on disclosure of internal Departmental materials as proposed by the Criminal Division in its letter of March 18. Also attached is a letter by the Independent Counsel responding to a memo filed on behalf of Ed Schmults and Carol Dinkins.

Comments:

Concurrences:

	DAG	AAG	OLC	OLP	OLA	PAO	JMD					
Initials			N/A	N/A	N/A	N/A	N/A					
Date												

See Reverse For Instruction

UNITED STATES GOVERNMENT
OFFICE OF INDEPENDENT COUNSEL
2600 Virginia Avenue, N.W. Suite 1112
Washington, D.C. 20037

March 20, 1987

~~CONFIDENTIAL~~

The Honorable George E. MacKinnon
Senior Circuit Judge
United States Court of Appeals
for the District of Columbia Circuit
Division for the Purpose of Appointing
Independent Counsels
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: Theodore B. Olson
Division No. 86-1

Dear Judge MacKinnon:

On January 13, 1987, the undersigned Independent Counsel filed with the Division in the above-referenced matter an Application of the Independent Counsel for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) ("Application"). On March 18, 1987, Edward C. Schmults ("Schmults"), through his counsel, filed with the Division papers opposing the Application entitled Opposition of Edward C. Schmults to Application of the Independent Counsel for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) ("Schmults Opposition"). On that same date, Carol E. Dinkins ("Dinkins"), through her counsel, filed similar papers with the Division entitled Carol E. Dinkins' Opposition to Independent Counsel's Application for Referral of Related Matters ("Dinkins Opposition").

The Substance of the Oppositions

Read together, the Schmults and Dinkins Oppositions in substance contend:

1. that the Ethics in government Act (28 U.S.C. §§ 591-598) ("Act") is for various reasons unconstitutional;

2. that the Division has no authority to refer related matters to the Independent Counsel pursuant to § 594(e) because the Attorney General has not, pursuant to § 592(b), recommended appointment of an independent counsel to investigate those matters;

3. that the Division should deny the Independent Counsel's Motion to Unseal Portions of Record Pursuant to 28 U.S.C. § 592(d)(2) ("Motion to Unseal"), filed February 27, 1987;

4. that the Division should grant Schmults' and Dinkins' Conditional Motion to Intervene ("Motion to Intervene"), filed December 30, 1986; and

5. that the Independent Counsel was improperly appointed because she has previously held a position in the United States government.

No Need For Response to Points One through Four

This is to inform the Division that the Independent Counsel will not file a formal pleading responsive to the Schmults and Dinkins Oppositions. With one exception, recent judicial decisions, the Application itself, and other papers which the Independent Counsel has filed in this matter obviate extensive discussion of the contentions raised in the Oppositions. Last week and earlier this week, the United States District Court, the Court of Appeals for this Circuit, and the Supreme Court have all decided in connection with two other ongoing Independent Counsel investigations that the constitutionality of the Act is ripe for adjudication at the behest of a target only after an indictment has been returned. Schmults, therefore, clearly may not raise the constitutionality of the Act at this stage in the Independent Counsel's investigation.

We have discussed extensively the relationship between § 592(b) and § 594(e) in our Application and nothing in the Schmults or Dinkins Opposition is sufficiently convincing on this issue to necessitate additional comment from us. On January 13, 1987, we filed an opposition to Schmults' and Dinkins' Motion to Intervene and we will today file an opposition to Dinkins' Motion for an Order Enjoining Independent Counsel from Publicly Releasing Certain Documents. We request that the Division

consider that opposition in connection with the section of the Schmults Opposition which suggests that the Division should deny the Independent Counsel's Motion to Unseal.

Independent Counsel Was Properly Appointed

As to Schmults' contention that the Independent Counsel was improperly appointed, little discussion is necessary. 28 U.S.C. § 593(d) provides:

> The division of the court may not appoint as a[n] independent counsel any person who holds or recently held any office of profit or trust under the United States.

Congress' intent in enacting that Section is clear from the legislative history.

> Subsection (d) of section 593 states that the division of the court may not appoint as a special prosecutor any person who holds or recently held any office of profit or trust under the United States. The entire purpose of appointing a temporary special prosecutor is to get someone who is independent, both in reality and in appearance, from the President and the Attorney General. Obviously, an employee of the Justice Department, including a United States attorney, could not satisfy that goal. Such an employee would have been appointed by the President or the Attorney General, could be removed by the President or the Attorney General, and would be under the day-to-day supervision of the Attorney General and, less directly, the President. Similar problems would be presented if the individual were an employee of the legislative or judicial branches. Therefore, the Committee feels that subsection (d) is essential so that a person is appointed special prosecutor who, in both appearance and reality, is not connected with the United States government. For that very reason, subsection (d) also covers people who recently held a position with the United States government. No time period was specified in this section; however, the Committee felt that it would defeat the purposes of this title if, for example, someone could resign their

> position as United States attorney or a member of the Justice Department one day, and be appointed a special prosecutor the next.

Senate Report 95-170, 95th Cong., 2d Sess., reprinted in U.S. Code Cong. & Ad. News 4281.

This discussion in the legislative history makes clear that Congress enacted § 593 to ensure that persons appointed as independent counsels do not have ties to the government which would undermine their credibility as investigators of allegations against government officials. The Independent Counsel clearly has no such ties. The position she held -- Chief Litigation Counsel for the Securities and Exchange Commission -- was neither a Presidential nor any other political appointment. Moreover, the Independent Counsel left that position in September, 1985, some eight months before her appointment at the end of May, 1986. Congress certainly did not intend that no person who had served in the government could ever be appointed independent counsel. Rather, Congress intended that

> [a] person appointed special prosecutor who formerly was an employee of the United States Government should have left the government a long enough period of time prior to being appointed a special prosecutor so that there is the reality and the appearance that such individual is totally independent from that government.

Id. at 4282. Both the nature of the Independent Counsel's prior government position and the time that passed before her appointment in this matter ensure both the reality and the appearance of complete independence, as Congress intended. Indeed, the Division considered this question at the time of the Independent Counsel's appointment and determined that the Independent Counsel's prior position with the government did not disqualify her under § 593(d).

Conclusion
And Request for Expedition

We have elected to respond only summarily to the Schmults and Dinkins Oppositions not only because they merit no additional comment from us but also out of a desire to facilitate prompt resolution of a matter which has been the subject of disagreement with the Department of Justice and related proceedings before the Division for the past four months. The delay has obviously not served the Independent Counsel's investigation well. In order to

hasten a resolution, we have decided to forego an extensive discussion of the Oppositions, which is unnecessary on the merits in any event. Accordingly, we respectfully request that the Division afford the matter the most expeditious consideration possible.

Respectfully submitted,

Richard C. Otto

Richard C. Otto
Deputy Independent Counsel

cc: Brendan V. Sullivan, Jr., Esq.
Jacob A. Stein, Esq.
William F. Weld, Esq.
Samuel A. Alito, Esq.

RO/sg

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

In Re:	)	Division No. 86-1
	)	
	)	INDEPENDENT COUNSEL'S OPPOSITION
	)	TO CAROL E. DINKINS' MOTION FOR AN
	)	ORDER ENJOINING INDEPENDENT COUNSEL
Theodore Olson	)	FROM PUBLICLY RELEASING CERTAIN
	)	DOCUMENTS

Preliminary Statement

On March 16, 1987, Carol E. Dinkins ("Dinkins"), through her counsel, filed with the Division in the above-captioned matter a Motion for an Order Enjoining Independent Counsel from Publicly Releasing Certain Documents ("Dinkins Motion") and a memorandum of points and authorities in support thereof ("Dinkins Memorandum"). The Independent Counsel respectfully opposes the Dinkins Motion because the Dinkins Memorandum in support contains serious mischaracterizations of the record, because there is neither factual nor legal support for the relief requested, and because the relief requested is not available in this matter and is not appropriate in any event.

Procedural History of the Motion to Unseal

On January 13, 1987, the Independent Counsel filed with the Division an Application for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) ("Application"). On February 12, 1987, the Department of Justice ("Department") filed a Response of the Department of Justice to Application of the Independent Counsel

for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) ("Response"), opposing the Application, in part, on constitutional grounds. On February 24, 1987, the Independent Counsel filed a Reply to Department of Justice Response to Independent Counsel's Application for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) ("Reply"), addressing, for the most part, the constitutional arguments raised by the Department in its Response.

On February 27, 1987, the Independent Counsel filed with the Division a Motion to Unseal Portions of Record Pursuant to 28 U.S.C. § 592(d)(2) ("Motion to Unseal") in the above-captioned matter.1/ Specifically, the Independent Counsel moved to unseal the Application, the Response, and the Reply on the grounds, among others, that those documents deal with issues of legitimate and significant public interest which should not be litigated under seal.

By letter of March 6, 1987, attached hereto as Exhibit A, the Department advised the Division that it concurred with the Independent Counsel's view that disclosure of those documents is in the public interest and that it therefore joined in the Independent Counsel's Motion to Unseal. In his letter to the Division, the Assistant Attorney General for the Criminal Division stated that

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1/ On March 18, 1987, Edward C. Schmults ("Schmults"), through counsel, filed papers in opposition to the Application in which he also argues that the Division should deny the Motion to Unseal. The Independent Counsel requests that the Division consider this opposition to the Dinkins Motion in connection with Schmults' argument that the Motion to Unseal should be denied.

> [t]he Attorney General concurs in [the Independent Counsel's] motion, and requests that the Division grant that motion. The issues raised in the portions of the record requested to be disclosed are, as [the Independent Counsel] states, of public interest. As such, they should be litigated in open proceedings and not under seal. Also as [the Independent Counsel] notes, the potential negative impact of disclosure is outweighed in this case by the public interest in having the issues publicly resolved.

By letter of March 18, 1987, attached hereto as Exhibit B, the Assistant Attorney General for the Criminal Division made clear that the Department joins the Independent Counsel's Motion to Unseal only insofar as it pertains to the Application, Response, and Reply themselves and not insofar as it pertains to the Department documents which are exhibits to the Application.

There Is No Need for Any Injunction Here

The Dinkins Motion seeks an order enjoining the Independent Counsel from publicly releasing the Application, the Response, and the Reply. No injunction is, however, necessary. The Independent Counsel has never, during the course of this investigation, disclosed, or threatened to disclose, to anyone for any purpose a matter pending before the Division without its leave. On the contrary, the Independent Counsel, having determined that disclosure of the Application, the Response, and the Reply is in the public interest, has, quite properly, moved the Division for entry of an order, pursuant to Section 592(d)(2), permitting such disclosure. While the public interest

in the disclosure of those documents is clear, the Independent Counsel will, of course, not make them public without leave of the Division.There is therefore absolutely no support for Dinkins' exaggerated argument that an injunction is necessary to prevent the Independent Counsel from releasing the Application, Response, and Reply without leave of the Division.

The Dinkins' Memorandum Contains Mischaracterizations of the Record

The Dinkins Memorandum alleges that the Independent Counsel, during a chambers conference on March 11, 1987, asserted "that the documents which are the subject of the Division's order of March 9, 1987 were already in the public domain." Dinkins Memorandum at 1. Counsel for Dinkins has evidently misunderstood what the Independent Counsel said in chambers on that date. What the Independent Counsel actually said, in opposing Dinkins' request for copies of the Application, Response, and Reply, was that the allegations contained in those documents, not the documents themselves, were already a matter of extensive public record. Indeed, they are, as the Division agreed. Not surprisingly, therefore, the Dinkins Memorandum makes no showing whatever that the public disclosure of the documents would result in any more harm to Dinkins than the allegations have. The Division must, therefore, presume that there is none.2/

2/ Release of only the Application, Response, and Reply, and not the accompanying exhibits, as suggested by the Department, is acceptable to the Independent Counsel. This approach should also be acceptable to Dinkins who has argued principally that it is the release of the exhibits which will be harmful to her interests.

The Department and the Independent Counsel, Not Dinkins' Counsel, Are the Legitimate Representatives of the Public Interest in this Matter

Unable to argue credibly any real harm to Dinkins, the Dinkins Memorandum substitutes a lengthy argument that the public interest requires that the Application, Response, and Reply remain under seal. It is simply not Dinkins' place to make that argument here. It is the role of the Department and the Independent Counsel to weigh the interests of the investigation in secrecy against the public interest in disclosure. Here, the Independent Counsel and the Attorney General, both of whom are charged with maintaining the confidentiality of deliberative documents relating to their respective investigations, have agreed that disclosure of the documents is appropriate. Arguments concerning the public interest coming from counsel representing solely private interests are therefore entitled to little weight.

There is No Reason for the Division to Reverse Its Decision to Grant the Independent Counsel's Motion to Unseal

By March 9, 1987, the Division had apparently decided to grant the Independent Counsel's Motion to Unseal. Nothing in the Dinkins' Memorandum seriously suggests that the Division should now reverse itself. Having risked harm to the investigation by releasing the documents to potential additional targets of an ongoing criminal inquiry, it would be ironic indeed for the Division now to deny the Motion to Unseal and simultaneously frustrate the obvious public interest in public resolution of the important issues which those documents address.

As we noted to the Division in opposing release of the documents only to Dinkins and another potential additional target, the Independent Counsel, in addition to weighing the public interest in public resolution of the issues pending before the Division, had also to weigh the harm inherent in the release of the documents to the potential additional targets, since the documents contain summaries of evidence and theories of possible criminal liability. The Independent Counsel obviously would never voluntarily have disclosed these documents to Dinkins or another potential additional target absent a real belief that the public interest in public resolution of the issues they address overrode possible harm to the investigation. If the Division denies the Motion to Unseal after releasing the documents to the potential additional targets, then the result will be to frustrate the public interest while providing an advantage to the potential additional targets which is completely unprecedented in pre-indictment matters.

As one member of the Division has previously written,

> [j]udicial proceedings are not secret in our society. Indeed, the judiciary scrupulously requires that all participants in a judicial proceeding be given equal access to the court, and that, particularly in criminal cases, the proceedings be open to the public, with severely limited exceptions.

United States v. Hubbard, 650 F.2d 293, 329 (D.C. Cir. 1980).

While this is obviously not a routine post-indictment matter, the presumption of openness of criminal proceedings nevertheless clearly has some application where, as here, the Department and the Independent Counsel have agreed that the

matters pending before the Division should be publicly disclosed rather than litigated in secret and where there is no real harm to Dinkins from such a disclosure.

> Absent unsealing of the record, vital public information . . . involved in a serious and important judicial proceeding . . . [will be] unavailable for public inspection.

Id. The Division should therefore grant the Independent Counsel's Motion to Unseal.

Conclusion

The Independent Counsel and the Department have agreed, and have stated to the Division, that unsealing designated portions of the record in this matter is in the public interest. By March 9, 1987, the Division had reached the same conclusion but afforded Dinkins an extraordinary opportunity to be heard in opposition. Nevertheless, Dinkins has been unable to refute the Independent Counsel and the Department on the public interest issue and can cite no real harm to her from granting the Motion

to Unseal. For those reasons, and for all of the reasons stated herein, we respectfully submit that the Division should deny the Dinkins Motion and grant forthwith the Independent Counsel's Motion to Unseal.

Alexia Morrison / RCO
ALEXIA MORRISON
Independent Counsel

Richard C. Otto
RICHARD C. OTTO
Deputy Independent Counsel

Dated: March 20, 1987
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 1987, a copy of the foregoing Independent Counsel's Opposition to Carol E. Dinkins Motion for an Order Enjoining Independent Counsel From Publicly Releasing Certain Documents was served by hand on Jacob A. Stein, Esq., Stein, Mitchell & Mezines, 1800 M Street, N.W., Suite 1060-N, Washington, D.C. and on Brendan V. Sullivan, Jr., Esq., Williams and Connolly, 839 Seventeenth Street, N.W., Washington, D.C. 20006.

Richard C. Otto