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I - INDEPENDENT COUNSEL - EPA - 1987

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THE EPA/INDEPENDENT COUNSEL MATTER, WHICH IS TO BE FILED
02-12-87. FOR AG/DAG REVIEW.

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11 FEB 87



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 11, 1987

TO: The Attorney General
The Deputy Attorney General

FROM: William F. Weld *WFW*
Assistant Attorney General
Criminal Division

RE: EPA/Independent Counsel

Attached is the draft brief in the EPA/Independent Counsel matter, scheduled to be filed with the court tomorrow (Thursday, February 12, 1987).

The Constitutional argument, in which you may be interested, appears at pages 12-26 of the brief. The argument based on the removal power (pages 17-26) is undercut by some language in Myers and may well prove unappetizing to the court on "political" (read: echoes of Watergate) grounds, but OLC is strongly of the view that both Constitutional arguments should be advanced now, and that is the approach taken here.

Attachment

cc: Kenneth Cribb (w/attachment)
Steve Galebach (w/attachment)
William Bryson
Jack Keeney
Charles Cooper
Samuel Alito
Margaret Love

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
DIVISION FOR THE PURPOSE OF APPOINTING
INDEPENDENT COUNSELS

_____)	
)	
IN RE:)	
)	DIVISION NO. 86-1
THEODORE OLSON)	
)	
_____)	

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)

The Department of Justice submits the following response to the Application of the Independent Counsel for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e). The Department respectfully urges that Section 592(b)(1) of the Independent Counsel statute, 28 U.S.C. §§ 591-598, precludes the Division from granting the Independent Counsel's application.

Background

On April 10, 1986, the Attorney General filed with the Division a Report 1/ requesting the appointment of an Independent Counsel to investigate an allegation against former Assistant

1/ The report is entitled "Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in United States House Judiciary Committee Report." The full text of that Report is attached as Exhibit 5 to the Independent Counsel's application. We will refer to it simply as the Attorney General's Report.

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Attorney General Theodore B. Olson concerning certain testimony Mr. Olson gave before a congressional committee. ^{2/} The Attorney General's Report notified the Division that the Attorney General had conducted a preliminary investigation of that allegation pursuant to 28 U.S.C. § 592(a) and had concluded that there were reasonable grounds to believe that further investigation or prosecution was warranted with respect to that allegation. The report also notified the Division pursuant to 28 U.S.C. § 592(b)(1) that the Attorney General had conducted preliminary investigations of allegations against former Deputy Attorney General Edward Schmults and former Assistant Attorney General Carol Dinkins, and had concluded that there were no reasonable grounds to believe that further investigation or prosecution was warranted with respect to those allegations.

The Division appointed an Independent Counsel to investigate the allegation against Theodore Olson. The Division defined the jurisdiction of the Independent Counsel as follows:

to investigate and pursue the question whether testimony of Mr. Theodore Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law.

^{2/} The allegation against Mr. Olson was one of many contained in a report issued by the Judiciary Committee of the House of Representatives. The report, which is entitled Report on the Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-1983, was referred to the Department of Justice in December 1985 for the Department to consider whether to seek the appointment of an Independent Counsel under the Independent Counsel statute, 28 U.S.C. §§ 591-598.

. . . to investigate any other allegation or evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and the Independent Counsel shall have jurisdiction to prosecute for any such violation.

On November 14, 1986, the Independent Counsel asked the Attorney General to refer to her as "related" matters certain allegations against Mr. Schmults and Mrs. Dinkins. Application, at 1, citing 28 U.S.C. § 594(e). The allegations were among those as to which the Attorney General had already conducted a preliminary investigation and found no reasonable grounds to believe further investigation or prosecution was warranted. The Independent Counsel also requested that the Department refer to her certain allegations against Robert Perry, former General Counsel for the Environmental Protection Agency, which were then under investigation by the Department. The Attorney General agreed to refer the allegations against Mr. Perry, but he declined to refer the allegations against Mr. Schmults and Mrs. Dinkins.

The Independent Counsel has now filed an application with the Division requesting that her investigative and prosecutorial jurisdiction be expanded to include certain of the allegations against Mr. Schmults and Mrs. Dinkins as to which the Attorney General had previously found and notified the Division that there were no reasonable grounds to believe that further investigation or prosecution was warranted. In her Application, the Independent Counsel argues that 28 U.S.C. § 594(e) permits the

Division to expand her jurisdiction as she requests. On the merits of her request, she contends (1) that the Attorney General used the wrong standard in concluding that no further investigation or prosecution of the allegations against Mr. Schmults or Mrs. Dinkins was warranted; (2) that the Attorney General should have recused himself from making any decision regarding the allegations against Mr. Schmults and Mrs. Dinkins; and (3) that newly discovered evidence justifies expanding her jurisdiction.

Discussion

1. Section 594(e) Does Not Authorize the Requested Expansion of The Independent Counsel's Jurisdiction.

The Independent Counsel statute, 28 U.S.C. §§ 591-598, establishes a mechanism for the appointment of an Independent Counsel to conduct criminal investigations in lieu of the Department of Justice in certain circumstances. The statute makes it clear that the triggering event for the appointment of an Independent Counsel is the filing of an application by the Attorney General requesting the appointment. 28 U.S.C. § 593(b). The statute also provides that once the Attorney General has notified the Division that there are "no reasonable grounds to believe that further investigation or prosecution [of a person covered by the statute] is warranted," the Division "shall have no power to appoint a[n] independent counsel." 28 U.S.C. § 592(b)(1).

We submit that Section 592(b)(1) bars the Division from granting the Independent Counsel's request for jurisdiction over the allegations against Mr. Schmults and Mrs. Dinkins. The Attorney General has already conducted a preliminary investigation of those allegations and has determined that there are no reasonable grounds to believe that further investigation or prosecution is warranted. Once the Attorney General has made that determination, the statute does not authorize the Division to appoint an Independent Counsel to investigate the same allegations. Thus, Section 594(e) cannot be read, as the Independent Counsel suggests, to give the Division the authority to refer allegations to the Independent Counsel when the Attorney General has specifically determined, under Section 592(b)(1), that those allegations should not be pursued.

a. The structure of the Independent Counsel statute supports this interpretation. Section 592 grants the Attorney General the authority to perform a variety of functions: to close cases (Section 592(b)), to refer allegations to the Division (Section 592(c)(1)), to consider additional information in deciding whether to refer allegations to the Division (Section 592(c)(2)), and to ask the Independent Counsel to accept referrals of matters related to allegations already within the Independent Counsel's prosecutorial jurisdiction (Section 592(e)). The statute specifically provides that none of these functions is subject to judicial review, either in the Division or in any other court. See 28 U.S.C. §§ 592(b)(1), 592(f); see

generally Banzhaf v. Smith, 737 F.2d 1167, 1169-1170 (D.C. Cir. 1984) _/

Because Section 592 expressly prohibits court review of the Attorney General's decision to close an investigation, other provisions of the statute cannot be construed to undermine that principle by implication. For example, Section 593(b) authorizes the Division to "define [the] independent counsel's jurisdiction." Yet that Section cannot be construed to authorize the Division to define an Independent Counsel's jurisdiction to include the very same allegations and individuals that the Attorney General has determined not to refer to an Independent Counsel. To construe Section 593(b) in that fashion would permit the Division to do indirectly, by way of "defining jurisdiction," what it is specifically barred from doing directly: to refer particular allegations to an Independent Counsel in spite of the Attorney General's express finding that no further investigation or prosecution is warranted. Thus, in this case the Division could not have exercised its authority under Section 593(b) to define the Independent Counsel's jurisdiction so as to include the allegations against Mr. Schmults and Mrs. Dinkins, once the Attorney General had specifically declined to authorize the appointment of an Independent Counsel as to those allegations.

_/ Where Congress intended to authorize judicial review of a decision by the Attorney General, it did so explicitly. See 28 U.S.C. § 596(a)(3).

The same principle applies to an Independent Counsel's request for the referral of related matters under Section 594(e). That provision authorizes the Division to refer to the Independent Counsel "matters related to the Independent Counsel's prosecutorial jurisdiction." The Independent Counsel in this case invokes that Section as authority to obtain prosecutorial jurisdiction over the allegations against Mr. Schmults and Mrs. Dinkins that the Attorney General previously declined to refer to the Division. To read Section 594(e) in that manner, however, would clash with the non-reviewability provision of Section 592(b)(1). Just as the Attorney General's decision to close an investigation cannot be reversed by the device of "defining" the Independent Counsel's jurisdiction (Section 593(b)), the Attorney General's decision likewise cannot be reversed by the device of referring a "related matter" under Section 594(e). To read Section 594(e) as the Independent Counsel proposes would enable the Independent Counsel and the Division to by-pass the Attorney General's decision simply because of the happenstance that the Independent Counsel is already investigating some matter that is assertedly related to the investigation that the Attorney General has closed under Section 592(b)(1).

b. The legislative history leading up to the enactment of the Independent Counsel legislation supports our construction of the statute. The background of the statute indicates that Congress intended one of the core executive decisions with

respect to criminal allegations against persons covered by the Act would remain vested in the Attorney General. That is, the statute was designed to ensure that the Attorney General would retain control over the decision whether, after a preliminary investigation, the allegation is sufficient to warrant further investigation. Congress considered various proposals that allowed for review of the Attorney General's decision not to initiate an investigation or not to seek the appointment of an Independent Counsel, but Congress rejected each of those proposals. See Banzhaf v. Smith, 737 F.2d 1167, 1170 (D.C. Cir. 1984). Instead, Congress chose to leave with the Attorney General the exclusive authority to determine whether an Independent Counsel should investigate particular allegations.

That decision was not lightly reached, and it was not merely an incidental feature of the statutory scheme. The Independent Counsel provisions were under consideration by Congress for several years before they were ultimately enacted in 1978, and one of the chief sources of concern to Congress was the risk of trespassing on the Executive Branch's monopoly over the enforcement of the criminal laws. The statutory scheme on which Congress settled was a compromise between having no independent counsel at all and having an independent counsel with complete control over the decision whether to initiate criminal investigations and prosecutions.

Several of the comments on the early versions of the independent counsel legislation are enlightening on this score. For

example, a 1976 bill, S. 495, contained a "triggering mechanism" similar to the one adopted in the statute that was ultimately enacted: if the Attorney General found that the investigation should not be pursued, that finding was final and nonreviewable. The Senate Committee on Government Operations explained the reason for making the Attorney General's decision final:

[The statute] gives the Attorney General the authority to make a finding which is not reviewable by the court as to whether the information, allegations, and evidence . . . are clearly frivolous and therefore do not justify any further investigation [or] prosecution. Thus, in light of the doctrine of "prosecutorial discretion" as enunciated in United States v. Cox, 342 F.2d 167 (5th Cir. 1965), the court cannot review the decision of the Attorney General to the extent that a court in general cannot review the exercise of a prosecutor's discretion whether or not to commence any prosecution.

S. Rep. No. 94-823, 94th Cong., 2d Sess. 39-40 (1976). See also H.R. Rep. No. 95-1307, 95th Cong., 2d Sess. 7 n.19 (1978).

The same theme was sounded throughout the several-year process that the special prosecutor legislation was under consideration. A number of highly respected practitioners and legal scholars expressed reservations about the constitutionality of a statutory scheme that totally divested the Attorney General of any role in the enforcement of the federal criminal laws and assigned those tasks to a court or to an officer appointed by a court. See, e.g., Special Prosecutor and Watergate Grand Jury Legislation: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 251-294

(1973) (testimony of Robert H. Bork); Watergate Reorganization and Reform Act of 1975: Hearings before the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 227-255 (1975) (statement of Erwin N. Griswold); id. at 259-280 (statement of Philip A. Lacovara); id. at 284-286 (statement of Eliot L. Richardson); Provision for Special Prosecutor: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 28-51 (1976) (testimony of Edward H. Levi).

In part because of these serious constitutional objections the statute that emerged was designed as a compromise: it was intended to preserve to the Attorney General the greatest degree of prosecutorial authority, and to limit the court's role as much as possible, consistent with enabling the Independent Counsel to perform his statutory functions. In light of Congress's sensitivity to the risk of Judicial Branch incursions into the Executive Branch function of law enforcement, the statute should not be liberally construed in favor of expanding the court's role at the expense of the Attorney General's authority.

c. In addition to the language and legislative history of the statute, constitutional considerations require that the statute be read in a manner that minimizes the intrusion on the Attorney General's traditional exercise of Executive Branch functions, and at the same time minimizes the extent to which the Division is pressed into performing those functions in place of the Attorney General.

The Independent Counsel's argument in this case is, in essence, that the Attorney General's authority to define the scope of the Independent Counsel's jurisdiction evaporates altogether once an Independent Counsel is named; at that point, the Independent Counsel argues, the only restriction on the Independent Counsel's jurisdiction is the one that the Division imposes. In that setting, she argues, the Independent Counsel, with the concurrence of the Division, can entirely override the Attorney General's determination that a particular charge should not be referred to the Independent Counsel for further investigation and prosecution.

If the statute were interpreted in that way, we believe that it would be unconstitutional, for the reasons set out in detail in Section 2, infra. In order to avoid those serious constitutional problems, we submit that the Division should construe the statute, as we have suggested, by holding that once the Attorney General has made his unreviewable decision under Section 592(b)(1) to close the investigation of particular allegations, the Independent Counsel cannot revive those same allegations under the authority of Section 594(e). As Judge Bork said of a related constitutional question arising under the same statute, a severe constitutional problem "would arise if it were shown that Congress intended to create a private cause of action. That is reason in itself not to imply such a cause of action unless it is very clear that Congress intended one." Nathan v. Smith, 737 F.2d 1069, 1077 (D.C. Cir. 1984) (Bork, J., concurring). See

also United States v. Clark, 445 U.S. 23, 27 (1980); NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

2. The Independent Counsel's Construction of the Statute Would Render it Unconstitutional.

a. An Article III Court May Not Make Prosecutorial Decisions.

The Independent Counsel seeks to have the Division arbitrate a factual dispute between the Attorney General and herself regarding whether the evidence is sufficient to warrant further investigation of Mr. Schmults and Mrs. Dinkins. In effect, the Independent Counsel is asking the Division to decide whether a particular criminal investigation should be pursued further, which is a classic prosecutorial decision. If Section 594(e) were construed to permit a court to perform that function, it would be unconstitutional.

The Division is plainly an Article III court. _/ As such,

_/ The courts of appeals, including the Court of Appeals for the District of Columbia Circuit, are indisputably Article III courts. The Division is statutorily chartered as a "division" of that court, to which Article III judges and justices may be "assigned" to service by the Chief Justice. 28 U.S.C. § 49. If the Division were not an Article III tribunal, the manner of selecting its members would be constitutionally flawed. As the Supreme Court recognized in Buckley v. Valeo, 424 U.S. 1, 126 (1976), "any appointee exercising significant authority pursuant to the laws of the United States is an 'officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." The authority conferred upon the Division by statute -- for example, the appointment of (Cont'd)

its functions are confined to the exercise of "the judicial Power" of the United States, namely, the adjudication and decision of cases and controversies. See Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-76 (1982); Glidden v. Zdanok, 370 U.S. 530, 550-571 (1962). The Supreme Court has clearly and unequivocally rejected the contention that Congress could extend the jurisdiction of the Article III courts by engrafting on them duties of an executive or legislative nature. See, e.g., Gordon v. United States, 117 U.S. 697 (1864); United States v. Ferreira, 54 U.S. (13 How.) 40, 50-51 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792). / This restriction on the powers of constitutional courts stems from a desire "to safeguard the independence of the judiciary from other

an Independent Counsel (28 U.S.C. § 593(a)) and the adjudication of a civil action brought by an Independent Counsel contesting removal (28 U.S.C. § 596(a)(3)) -- unquestionably constitutes "significant authority" exercised "pursuant to the laws of the United States." Thus, the members of the Division must be appointed in accordance with the Appointments Clause. The Appointments Clause, however, does not permit appointment by the Chief Justice. See Shartel, Federal Judges -- Appointment, Supervision, and Removal -- Some Possibilities Under the Constitution, 28 Mich. L. Rev. 485 (1930).

/ These and other cases establish that the power of an Article III court to take cognizance of any matter depends upon the existence of a suit instituted according to the regular course of judicial procedure, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, Muskrat v. United States, 219 U.S. 346, 352 (1911), the absence of revisory or appellate power in any other branch of government, Hayburn's Case, supra; United States v. Ferreira, supra, and the absence of administrative or legislative issues or controversies, Keller v. Potomac Electric Co., 261 U.S. 428 (1923); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

branches," Glidden v. Zdanok, 370 U.S. at 582, as well as a concern that courts should not interfere in business "committed by the Constitution to another branch of government." Baker v. Carr, 369 U.S. 186, 211 (1962). _/ See also Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. at 74; Glidden v. Zdanok, 370 U.S. at 582.

The Constitution confers upon the Executive the exclusive responsibility for federal law enforcement, by providing in Article II, Section 3 that the President "shall take Care that the Laws be faithfully executed." In holding that a legislative body could not be given the responsibility for commencing civil lawsuits to enforce federal election law, the Supreme Court wrote in Buckley v. Valeo, 424 U.S. at 138:

A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to "take care that the Laws be faithfully executed."

See also Springer v. Phillipine Islands, 277 U.S. 189, 202 (1928) (defining enforcement of the law as an "executive function[]").

✓ What the Buckley Court affirmed with respect to the prosecution of civil enforcement actions is true a fortiori with respect to criminal prosecutions. In numerous cases, the courts

_/ In Northern Pipeline Co. v Marathon Pipe Line Co., supra, the Court emphasized the importance of "protecting against the erosion of Article III jurisdiction by the unilateral acts of the political branches." 458 U.S. at 74. The Court reaffirmed the principle that "where Article III does apply, all of the legislative powers specified in Article I and elsewhere are subject to it." Id. at 73.

have reaffirmed in the strongest terms that the investigation and
✓ prosecution of crimes are functions that are constitutionally
committed to the Executive and that cannot be usurped by the
Legislature or the Judiciary. These cases teach that "the
Executive Branch has exclusive authority and absolute discretion
to decide whether to prosecute a case." United States v. Nixon,
418 U.S. 683, 693 (1974).

Historically, courts have felt constrained, even in the
context of a concrete dispute between parties, from taking what
are essentially executive actions in connection with prosecu-
tions. For example, in United States v. Thompson, 251 U.S. 407
(1920), the Supreme Court reversed a lower court for attempting
to prevent a United States attorney from instituting a prosecu-
tion by resubmitting the matter to a grand jury. The Court's
decision was expressly based upon "the right of the Government to
initiate prosecutions for crime," a right not subject to control
by judicial decision. 251 U.S. at 412-413. See also Ex parte
United States, 287 U.S. 241 (1932) (district court had no juris-
diction to refuse to issue an arrest warrant following an indict-
ment by a grand jury).

In its much-cited decision in United States v. Cox, 342 F.2d
167, 171 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965),
the Fifth Circuit held, on separation of powers grounds, that a
district court has no power to compel the commencement of a pros-
ecution through the use of its contempt power. Subsequently, the
same court held -- again on separation of powers grounds -- that

a district court has no authority to appoint a special prosecutor to continue the prosecution of a criminal case once the Executive has declined to proceed. United States v. Cowan, 524 F.2d 504, 509 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976); see also Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.); United States v. Greater Blouse, Skirt and Neckware Contractors Ass'n, Inc., 228 F. Supp. 483, 489 (S.D.N.Y. 1964). These cases underscore the firm constitutional prohibition against permitting courts to perform functions -- such as the decision whether to continue an investigation -- that are clearly part of the investigative and prosecutorial process.

There is no merit to the argument that the authority to make such a prosecutorial decision is a proper incident of the Division's authority to appoint the Independent Counsel in the first place. We recognize that, under Ex parte Siebold, 100 U.S. 371, 398 (1879), a court of law in some circumstances may appoint an inferior executive officer. But this power of appointment cannot include the power to control the exercise of executive power by the appointee, or else the court could be assigned vast segments of executive authority. For example, if the power to appoint an Independent Counsel carried with it the power to expand the Independent Counsel's jurisdiction ^{in the manner requested here,} the Division could presumably exercise control over other prosecutorial decisions made by the Independent Counsel, such as the decision whether to seek an indictment. And if the Division could exercise such power, it is difficult to see why a district court could not do

the same as an incident of its power to appoint an interim United States Attorney. Yet either of those applications of the statutory appointment authority would be unconstitutional. _/

Settled case law, then, makes clear that the investigation and prosecution of crime are exclusively Executive Branch functions. Yet the Independent Counsel is in effect asking the Division to make an Executive decision; she is asking that this Article III court determine whether or not the allegations against Mr. Schmults and Mrs. Dinkins warrant further investigation. That determination is so close to a core Executive function that it cannot constitutionally be performed by a court. For that reason, Section 594(e) cannot constitutionally be construed to authorize the Division to grant the Independent Counsel the relief she requests.

b. The Independent Counsel's Interpretation of Section 594(e) Would Violate the Constitutional Principle That an "Inferior Officer" Must Honor Lawful Decisions Made by Superiors.

If Section 594(e) were interpreted as the Independent

_/ United States v. Solomon, 216 F. Supp. 835, 842-843 (S.D.N.Y. 1963), upheld the court's appointment of an interim United States attorney, but disclaimed anything more than the bare ability to select a qualified individual to fill the position until a permanent successor could be found. Similarly, Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967), upheld the court's power to appoint the District of Columbia Board of Education but noted that the court was not required to undertake any supervisory or administrative responsibilities that might have introduced "such incongruity in the duty required as to excuse the courts from its performance or to render acts void."

Counsel suggests, it would be unconstitutional for an additional reason. The President's responsibility under Article II, section 3 of the Constitution to "take Care that the Laws be faithfully executed" necessarily requires that the President and his delegates possess the authority to direct the manner in which all purely executive powers shall be executed. This presidential duty would be thwarted if Congress could authorize subordinate officers performing purely executive functions to countermand the lawful decisions of the President or his delegates. As interpreted by the Independent Counsel, Section 594(e) would be unconstitutional because it would allow the Independent Counsel to seek an expansion of prosecutorial jurisdiction that had been denied, pursuant to 28 U.S.C. § 592(b), by the Attorney General, the Executive Branch official who is statutorily responsible for all federal criminal law enforcement (28 U.S.C. §§ 509, 516-519).

Although the Constitution clearly contemplates that subordinate executive offices will be created by statute, the Constitution itself creates no such offices, and it does not require the creation or the continuation of any such office. For this reason, subordinate executive offices created by statute possess no constitutional power independent of the President. Any executive power exercised by such offices is the President's power and therefore must be exercised in accordance with his direction. "If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of

which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive." Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring).

This system of executive control has been explored most fully in the Supreme Court's cases involving the President's power to remove executive officers. Although the present case involves no question of removal, these Supreme Court precedents are highly instructive.

In the seminal case of Myers v. United States, 272 U.S. 52 (1926), the Court struck down a statute providing that certain postmasters could be removed only by and with the advice and consent of the Senate. Surveying the entire question of the removal of executive officers, the Court declared that the President has illimitable power to removal all principal executive officers. Although the Court drew partly upon the President's appointment power and historical evidence of the Framers' intent, the principal foundation for the analysis in Myers was the President's exclusive grant of executive power and his specific constitutional duty to execute the laws. The Court wrote (272 U.S. at 117):

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even if the absence of express words, was that as part of his execu-

tive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.

Similarly, in summing up, the Court stated (272 U.S. at 163-164 (emphasis added):

Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government -- i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers.

In short, Myers' conclusions regarding the President's removal power derived, at least in substantial part, from a theory of Presidential control over all executive actions. _/

Subsequent decisions have reaffirmed Myers. For example, just last Term in Bowsher v. Synar, 106 S. Ct. 3181 (1986), the Supreme Court relied on Myers in holding that the Comptroller

_/ See also 1 Cong. Deb. 496, 499 (1834) (remarks of James Madison:

The President is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended that he have that species of power which is necessary to accomplish that end. . . . If the President should alone possess the power of removal from office, those who are employed in the execution of the law will be in their proper situation and the chain of dependence be preserved; the lowest offices, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.

General could not be assigned executive authority because he can be removed only by a congressional joint resolution or by impeachment. To be sure, in Humphrey's Executor v. United States, 295 U.S. 602 (1935), and Weiner v. United States, 357 U.S. 349 (1958), the Court held that the President's illimitable power of removal did not apply to officers performing quasi-judicial and quasi-legislative functions. _/ But in neither case did the Court question Myers' continued validity with respect to officers performing "purely executive" functions. See, e.g., Humphrey's Executor, 295 U.S. at 631-32. Since it cannot be disputed that an Independent Counsel performs functions that are purely and quintessentially executive, Humphrey's Executor and Weiner have no application here.

The Supreme Court has thus clearly recognized that the President has unrestricted authority to remove all principal executive officers. That unfettered removal authority necessarily subsumes the lesser authority to insist that these officers honor all lawful decisions made by the President and his delegates. We now turn to the question whether the Independent Counsel enjoys greater insulation from Executive control as a result of her constitutionally subordinate status as an "inferior officer."

_/ Humphrey's Executor concerned a Federal Trade Commissioner; Weiner involved a member of the War Crimes Commission.

At the outset, it is clear that the Independent Counsel is an "inferior" officer in the eyes of the Constitution. The Appointments Clause (art. II, sec. 2), which prescribes the manner of appointing all officers of the United States, provides ✓ that principal officer^s of the United States shall be appointed by the President with the advice and consent of the Senate. The appointment of "inferior officers," the Clause provides, may be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." As the Supreme Court has explained, "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the Clause. Buckley v. Valeo, 424 U.S. 1, 132 (1976).

close ✓

There can be little question that the Independent Counsel is an officer of the United States. "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.'" Buckley, 424 U.S. at 126. The Independent Counsel indisputably meets this test. By statute, the Independent Counsel is given "full power and independent authority to exercise all investigative and prosecutorial functions of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." 28 U.S.C. § 594(a). Among other things, the Independent Counsel may conduct grand jury investigations, apply for witness immunity, prosecute criminal and civil cases, and appeal any adverse decision in a case in which the Independent

Counsel has participated in an official capacity. Ibid. _/

Since an Independent Counsel is an "officer" of the United States, appointments to this position must conform with the Appointments Clause. As previously noted, the Independent Counsel statute provides for appointment by a Special Division of the District of Columbia Circuit. 28 U.S.C. § 593. Under the Appointments Clause, only "inferior" officers may be appointed by a court of law. It therefore follows that an Independent Counsel must be an "inferior" officer under the scheme of the Appointments Clause. _/

The Supreme Court in Myers, following United States v. Perkins, 116 U.S. 483 (1886), stated that Congress may impose some restrictions on the removal of "inferior officers" appointed by the heads of departments. The Court reasoned (272 U.S. at 161) that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe inci-

_/ It would be frivolous, in our view, to argue that the Independent Counsel is not an "officer of the United States," but merely an "employee." The category "[o]fficers of the United States" does not include all employees of the United States who are "lesser functionaries subordinate to officers of the United States." Buckley, 424 U.S. at 126 n.162. The Independent Counsel quite clearly does not fall into this category. An official who may "exercise all investigative and prosecutorial functions and powers" of the Attorney General and the entire Justice Department (28 U.S.C. 594) cannot plausibly be denominated as a lesser functionary.

_/ The legislative history of the Independent Counsel statute makes clear that Congress regarded the Independent Counsel as an "inferior" officer for Appointments Clause purposes. See H.R. Rep. No. 1307, 95th Cong., 2d Sess. 5 (1976); S. Rep. No. 823, 94th Cong., 2d Sess. 24 (1976).

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dental regulations controlling and restricting the latter in the exercise of the power of removal." Assuming that similar restrictions may be placed upon the removal of inferior executive officers appointed by the courts, it would nevertheless be inconsistent with our constitutional scheme for such restrictions to be used to prevent the President and his delegates from controlling the performance of executive functions by an "inferior" officer such as the Independent Counsel. _/ Indeed, it seems anomalous to suggest that an "inferior" officer may contravene the decisions of the President and his delegates in a way that a principal officer such as a head of department could never achieve.

For purposes of illustration, let us consider a hypothetical prosecutorial decision not wholly unlike those at issue here. Let us suppose the existence of an important criminal investigation in which the Independent Counsel statute was not implicated. Suppose a question arose whether a pending indictment should be dismissed in light of newly discovered evidence, and suppose that the President, while recognizing that a reasonable case could be made for either course of action, concluded that

_/ Nothing in Perkins requires the conclusion that Congress may limit the power to remove inferior officers in such a way as to preclude the President or his agents from taking care that the laws be faithfully executed. In the Perkins case, Congress had restricted the Secretary of the Navy's ability to dismiss an inferior officer to removal by court-martial or removal for "misconduct" (116 U.S. at 485), and the "misconduct" standard could be construed to permit removal when the President believed the inferior officer not to be executing the laws faithfully.

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dismissal should not be sought. As noted above, the Constitution guarantees the President's authority to ensure that any such decision be obeyed by the principal officers of the United States -- the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General for the Criminal Division, and any United States Attorney appointed by the President with the Senate's advice and consent. In light of this presidential authority, it seems evident that the President would have sufficient authority to insist that his lawful decision be respected by an "inferior" officer appointed by the Attorney General (such as an assistant United States attorney) or by a court of law (such as a court-appointed United States attorney). The principle of presidential control and accountability embodied in Article II would not permit the lawful decisions of the President and his delegates to be reversed by such "inferior" officers simply because they disagree with their superiors' decisionmaking. On the contrary, the very concept of an "inferior" officer includes a duty to obey lawful decisions of superiors. Accordingly, we do not believe that Congress could constitutionally authorize a court-appointed United States attorney or an assistant United States Attorney to apply to a court for permission to disregard the lawful directive of a superior. Any other conclusion would be inconsistent with the scheme of Article II and with the principle underlying the Supreme Court's precedents discussed above.

The present case is no different in principle. Here, the Attorney General, pursuant to clear authority in the Independent Counsel statute itself, has decided that no further investigation of Mr. Schmults and Mrs. Dinkins is warranted. Under 28 U.S.C. § 592(b), that decision is final and unreviewable. If 28 U.S.C. § 594(e) were interpreted to permit the Independent Counsel to circumvent this lawful decision by the chief federal law enforcement officer, the statute would contravene the constitutional principle that an "inferior" officer must respect the decisions of the President and his delegates. Accordingly, 28 U.S.C. § 594(e) as so construed would be unconstitutional.

3. The Attorney General Used the Correct Standard in Deciding Whether to Refer the Allegations Against Mr. Schmults and Mrs. Dinkins to the Court.

The Independent Counsel argues that even if "some degree of judicial deference" is ordinarily due to the Attorney General's decision that no further investigation or prosecution of particular allegations is warranted, deference is inappropriate in this case because the Attorney General "applied an erroneous standard" in making that determination. There are two answers to that contention. First, the Independent Counsel statute does not give the Division the power to review the Attorney General's decision that no further investigation or prosecution is warranted. Second, even if the Division could exercise such review, the Attorney General did not apply an erroneous standard in deciding

that no further investigation or prosecution of the allegations against Mr. Schmults and Mrs. Dinkins was warranted.

a. As to the first argument, there is no procedure established by the Independent Counsel statute for anyone -- including an independent counsel or the judges of the Division -- to challenge the substantive correctness of a decision by the Attorney General that no further investigation or prosecution of an allegation is warranted. As we have noted, Section 592(b)(1) of the Act specifically states that once the Attorney General has notified the Division that no further investigation or prosecution of an allegation is warranted, the Division "shall have no power to appoint a[n] independent counsel." That provision makes clear that the Division plays no role in that setting other than to receive the Attorney General's report and to decide whether the report should be publicly disclosed. As the Court of Appeals for the District of Columbia Circuit explained, "the decision not to request appointment of independent counsel is explicitly made unreviewable in the special division of the court created in the statute." Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984) (en banc). See also Dellums v. Smith, 797 F.2d 817, 823 (9th Cir. 1986). _/

_/ In passing (Application, at 3-4 n.7), the Independent Counsel contends that the Department of Justice lost jurisdiction over the allegations against Mr. Schmults and Mrs. Dinkins because it took more than the 90-day period allotted by the statute to consider the allegations. Therefore, the Independent Counsel argues, under Section 592(c)(1) the Attorney General should have automatically forwarded those allegations to the Division. The (Cont'd)

b. Even if the Division had the power to conduct such a review, the Attorney General did not, as the Independent Counsel claims, apply the wrong standard in making his decision. The statute provides that the Attorney General shall refer particular

implication of this argument, of course, is that the Attorney General should also have referred the allegations against all of the other covered individuals who were mentioned in the Judiciary Committee Report.

Even if the Independent Counsel is correct in her interpretation of the time limitations, the statute imposes on the Attorney General the obligation to make the referral; the Division does not have the power to assume jurisdiction over the allegations on its own motion, as the Independent Counsel seems to suggest. In any event, we do not believe that the 90-day period was violated in this case. The 90-day "preliminary investigation" period begins after the Department receives "information that the Attorney General determines is sufficient to constitute grounds to investigate" one or more covered individuals. 28 U.S.C. 592(a)(1). The statute thus contemplates that the Department's inquiry will proceed in two stages: first, a determination whether the information provided is sufficient to constitute grounds to investigate a covered person; and second, a preliminary investigation to determine whether the matter should be referred for the appointment of an Independent Counsel. It is the second stage -- the "preliminary investigation" -- that must be completed within 90 days. Because some period of time is often required to complete the first stage -- determining whether the information is sufficient to trigger even a preliminary investigation -- the Department must be afforded a reasonable period of time to make that determination before the 90-day period for the preliminary investigation begins to run.

The need for such a period is well illustrated by this case. The Department received the 1284-page Report of the House Judiciary Committee on December 12, 1985. Over the next four weeks, Department attorneys studied the report. Based on the results of their review, the Attorney General subsequently determined, on January 10, 1986, that sufficient information supported the allegations against three covered individuals to require a preliminary investigation. The Department then initiated its preliminary investigation, and the matter was reported to the Division within 90 days of that date. The Attorney General's Report to the Division, which was filed within 90 days of January 10, 1986, was therefore timely.

allegations to the Division if he concludes, based on the preliminary investigation, that there are "reasonable grounds to believe that further investigation or prosecution is warranted." 28 U.S.C. § 592(c)(1). The Attorney General's Report used precisely that standard; it concluded, with respect to Mr. Schmults, that "there are no reasonable grounds to believe that further investigation or prosecution is warranted with regard to Edward Schmults' failure to inform the Committee on a timely basis that handwritten notes were not being produced for review by the Committee's staff" (Attorney General's Report, at 26). Likewise, with respect to Mrs. Dinkins, the Report concluded that "there are no reasonable grounds to believe that further investigation or prosecution is warranted with regard to the allegations against Carol Dinkins" (id. at 47-48).

In arguing that the Attorney General applied the wrong statutory standard, the Independent Counsel points to a passage in the Attorney General's Report that refers to the Department's policy against recommending criminal prosecution "if there is no reasonable prospect that an unbiased jury would return a criminal conviction" (Attorney General's Report, at 26). That policy, the Report noted, "is relevant to the determination committed to the Attorney General by the independent counsel statute" (ibid.). The Independent Counsel argues that that passage of the Report indicates that the Attorney General was improperly invoking the standards for initiating a prosecution, rather than the less stringent standards for conducting an investigation.

The portion of the Attorney General's Report to which the Independent Counsel refers does not support the interpretation she seeks to give it. The Independent Counsel statute provides that in determining whether there are reasonable grounds to warrant further investigation or prosecution, "the Attorney General is directed to "comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws." 28 U.S.C. § 592(c)(1). One of those policies is the one cited in the Attorney General's Report -- that a prosecution should not be instituted if there is no reasonable prospect of conviction. _/ The Report noted, quite correctly, that that policy is relevant to the determination whether the allegations against Mr. Schmults and Mrs. Dinkins should be referred to the Division under the Independent Counsel statute, since the statutory requirement of referral is triggered if, inter alia, the Attorney General finds there are reasonable grounds to believe that a prosecution is warranted. But the Attorney General did not simply state that, on the facts then known, a prosecutable case did not exist; he also stated that further investigation would not develop a prosecutable case against Mr. Schmults or Mrs. Dinkins.

_/ Specifically, Department policy provides that a prosecution should not be commenced unless the attorney for the government believes that the person's conduct constitutes a federal offense and the admissible evidence "will probably be sufficient to obtain and sustain a conviction." Department of Justice, Principles of Federal Prosecution 5-6 (1980).

The two-pronged finding in the Attorney General's Report is exactly the kind of finding that the Attorney General is required to make under Sections 592(b) and (c) of the Independent Counsel statute after he has conducted a preliminary investigation. The Independent Counsel's application states that these two sections "require the Attorney General to recommend appointment of an independent counsel unless no reasonable federal prosecutor, applying Department policy, would have investigated under the same circumstances." That interpretation, however, ignores the role of the preliminary investigation in the statutory scheme. The Attorney General is not limited to determining whether any investigation is warranted -- that stage is passed when the determination to conduct a preliminary investigation is made. Rather, as the statutory language makes clear, the Attorney General must decide, with the benefit of the results of the preliminary investigation, whether "further investigation" is warranted.

With respect to the allegations against Mr. Schmults, the Attorney General's Report states that the "facts of the matter are relatively clear" (Attorney General's Report at 22), and it further states that "[t]here is no reasonable ground to expect that further investigation or prosecution would produce a viable criminal case which could be maintained in keeping with the established policies applicable to federal prosecutive decisions" (id. at 26; emphasis added). Likewise, with respect to the allegation against Mrs. Dinkins regarding her withholding of a chron-

ology from Congress, the Attorney General's Report states that "on the present state of the evidence, indicia of criminal intent are lacking, and because the facts are not in dispute, it is not reasonable to expect that further investigation would develop sufficient evidence to prosecute" (*id.* at 30; emphasis added).

These conclusions are supported by the nature of the preliminary investigation that was conducted in this case. In the course of the preliminary investigation, the Department conducted an extensive factual inquiry. No witness refused to be interviewed or to provide requested documents. Moreover, the Department's investigative effort followed a lengthy fact-finding effort by the House Judiciary Committee, the published results of which were provided to the Department. The extensiveness of these investigative efforts strongly supports the reasonableness of the conclusion in the Attorney General's Report that further investigation is unwarranted.

At bottom, the Independent Counsel's argument evinces a disagreement not with the standard the Attorney General's Report applied, but with the Attorney General's conclusion that the facts relating to the allegations against Mr. Schmults and Mrs. Dinkins do not meet that standard. The Independent Counsel statute, however, makes that decision one for the Attorney General alone. Therefore, while we believe that the Attorney General applied the correct standard in assessing the allegations against Mr. Schmults and Mrs. Dinkins, the Division would not have the authority under the statute to overturn the Attorney

General's determination, even if it concluded that the Attorney General's conclusion was incorrect as a factual matter or was based on an incorrect legal ground.

4. The Application Does not Set Forth Facts Requiring the Attorney General's Recusal.

In further support of her request for the Division to refer the allegations against Mr. Schmults and Mrs. Dinkins, the Independent Counsel argues that the Attorney General should have recused himself from participation in this matter because of "an appearance of conflict of interest" (Application, at 35). Specifically, she asserts that the need for recusal arises from the Attorney General's "participation in events which gave rise to the [House Judiciary] committee's request for an independent counsel" (ibid.).

In considering this contention, it is important to focus on three preliminary points. First, the Independent Counsel has not suggested that the Division may review the Attorney General's decision whether to recuse himself in a matter arising under the Independent Counsel statute. Nor is it clear what other relevance this argument has to the Division's statutory responsibilities. If the Division has the authority to refer the allegations against Mr. Schmults and Mrs. Dinkins to the Independent Counsel -- and if the Division concludes that that is the proper course to follow -- the Attorney General's recusal decision is irrelevant. By the same token, however, if (as we submit) the

Division does not have the statutory authority to refer those allegations to the Independent Counsel, the assertion that the Attorney General should have recused himself does nothing to confer that authority on the Division. For that reason, even if the Attorney General had been incorrect in declining to recuse himself, that should not affect the nature of the Division's responsibilities in acting on the Independent Counsel's Application.

Second, recusal decisions under the Independent Counsel statute are necessarily different in character from recusal decisions in other settings. The Independent Counsel statute is itself a recusal statute: the provisions of the statute are invoked precisely because of the statutory presumption that the entire Department of Justice has a conflict of interest that would require the Attorney General's disqualification in cases involving covered individuals. See S. Rep. 95-170, 95th Cong., 1st Sess. 73 (1977) ("the special prosecutor [is] appointed in the first place because of a statutory finding that the Attorney General [has] a conflict of interest"). It is because of that presumed conflict of interest that the statute restricts the role the Attorney General may play in the investigative and prosecutorial process. Because Congress has already determined that the Attorney General should be permitted to perform that limited role even in cases in which a conflict of interest is presumed, the usual principles governing appearances of conflict of interest are not as directly applicable in cases arising under the

Independent Counsel statute as they are in cases in which the Department handles all aspects of the investigation and prosecution. _/

Third, the argument against recusal in this case was particularly compelling, since virtually every other Department of Justice official with authority to act on the matter had already disqualified himself from participating in the decision whether to refer the Judiciary Committee allegations for investigation by an Independent Counsel. The courts have recognized that the rule of necessity, an "ancient" and "time-honored" principle of statutory construction (United States v. Will, 449 U.S. 200, 217 (1980)), has the effect of overriding circumstances that might otherwise call for disqualification, when an agency would otherwise be unable to carry out its statutory duties. See Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948); Loughran v. Federal Trade Commission, 143 F.2d 431, 433 (8th Cir. 1944). In this case, because so many senior Department officials had taken themselves out of the case, the Attorney General had a special responsibility to act if he could act.

In his December 17, 1986, letter to the Independent Counsel, Deputy Attorney General Arnold I. Burns advised the Independent Counsel that the Attorney General had carefully considered her

_/ Of course, allegations of potential criminal wrongdoing personally involving the Attorney General may call for his recusal even from the preliminary investigation (see S. Rep. 95-170, supra, at 63), but the Independent Counsel does not suggest that this is such a case.

request that he recuse himself from the decision whether to refer related matters to her for investigation. Deputy Attorney General Burns explained that "after careful review, and consideration of the fact that he was not part of the Department of Justice at the time of the events in question," the Attorney General had determined that he could properly continue to discharge his duties under the statute.

The facts presented in the Independent Counsel's Application do not provide a basis for questioning the Attorney General's recusal decision. The Independent Counsel relies on the Attorney General's presence at three meetings concerning various EPA-related matters in early 1983, as described in the Judiciary Committee's Report and certain congressional testimony:

(1) According to the Judiciary Committee's Report, the Attorney General -- then Counselor to the President -- was present at a meeting on January 27, 1983, at which he and several other White House officials were briefed by Justice Department personnel on the status of the EPA matter. The Judiciary Committee Report attributes no actions or statements to the Attorney General at that meeting.

(2) According to the Judiciary Committee Report, the Attorney General was present at a meeting on February 2, 1983, attended by the EPA's Chief of Staff John Daniel and former EPA Administrator Anne Burford. Again, no actions or statements are attributed to the Attorney General at that meeting, although the Judiciary Committee Report states that Ms. Burford discussed with

the Attorney General restrictions she placed on interviews of EPA employees, "perhaps after they were imposed" (Application, at 37).

(3) According to the Judiciary Committee's Report and Mr. Daniel's testimony, a meeting took place between the Attorney General and Administrator Burford on February 17, 1983, at which Ms. Burford is said to have asked the Attorney General to arrange a presidential pardon for her. According to Mr. Daniel's testimony, Ms. Burford wanted the pardon to "clothe her with immunity" from prosecution for having followed the President's instructions (Application, at 38). Both the Judiciary Committee Report and Mr. Daniel's testimony indicate that the Attorney General rejected Ms. Burford's request for a pardon.

The Independent Counsel asserts that the Attorney General's presence at those three meetings demonstrates the Attorney General's "substantial participation" in the interbranch controversy. In fact, however, there appears to be no direct connection between those meetings and the allegations against Mr. Schmults and Mrs. Dinkins. The Schmults allegations involve the withholding of Justice Department officials' handwritten notes from the Judiciary Committee, starting in March 1983, during its investigation of the Department's handling of the EPA matter. The allegation against Mrs. Dinkins at issue here involves her withholding of a chronology from the Judiciary Committee during that same investigation, beginning in March 1983.

The Independent Counsel does not suggest that there was any connection between those acts and the subjects discussed at the White House meetings in January and February of that year. Moreover, the Attorney General was not a Justice Department official at the time of the meetings or at the time of the allegedly improper acts by Mr. Schmults and Mrs. Dinkins. Finally, the withholding of the notes and the chronology occurred after the three meetings referred to by the Independent Counsel. The allegations against Mr. Schmults and Mrs. Dinkins do not refer to the initial dispute between the EPA and the Dingell and Levitas Subcommittees, but to the House Judiciary Committee's investigation of the Department's handling of those investigations. And that investigation did not begin until late February and early March 1983, when Chairman Rodino made his first requests for information from the Department. See Attorney Generals Report, at 8. The Judiciary Committee investigation therefore did not even begin until after the three meetings cited by the Independent Counsel. In short, the facts cited in the Independent Counsel's Application do not indicate a degree of involvement in the Judiciary Committee investigation that would require the Attorney General to recuse himself from any participation in the evaluation of the Judiciary Committee's allegations and the Independent Counsel's referral request. _/

_/ The factual basis advanced by the Independent Counsel would not require the Attorney General's recusal even if the Attorney General were held to the same recusal standard that is applied to (Cont'd)

5. The Asserted Newly Discovered Evidence Does Not Warrant Expansion of the Jurisdiction of the Independent Counsel.

The Independent Counsel suggests that new evidence developed in the course of her inquiry warrants referral of the previously closed allegations against Mr. Schmults and Mrs. Dinkins. The Attorney General has considered this "newly discovered evidence" and has concluded that it is not sufficient to give rise to reasonable grounds to warrant further investigation or prosecution. The Attorney General has therefore declined to make a referral of the allegations against Mr. Schmults and Mrs. Dinkins under the authority of Section 592(c)(2) of the Independent Counsel statute. As we have noted, the statute makes that determination on the Attorney General's part final and not subject to being reviewed or overridden by the Independent Counsel or the Division.

In any event, the "newly discovered evidence" is insubstantial. For the most part, the evidence cited by the Independent Counsel was already known at the conclusion of the Attorney General's preliminary investigation; to the extent that the evi-

federal judges. Courts applying the judicial recusal statute, 28 U.S.C. § 455, have found allegations of more substantial involvement on the part of judges with cases pending before them to be insufficient to compel recusal. See, e.g., In re United States, 666 F.2d 690 (1st Cir. 1981) (disqualification not required despite evidence of judge's past relationship with defendant and other evidence indicating appearance of partiality); Brody v. President & Fellows of Harvard College, 664 F.2d 10, 11 (1st Cir. 1981); see also Jarrell v. Balkcom, 735 F.2d 1242, 1258-1259 (11th Cir. 1984); Margoles v. Johns, 660 F.2d 291, 301 (7th Cir. 1981), cert. denied, 455 U.S. 909 (1982); United States v. Conforte, 624 F.2d 869, 879-881 (9th Cir. 1980).

dence is new, it is not substantial in character. The new evidence makes no significant difference in the character of the case against Mr. Schmults, and none of the new evidence appears to relate at all to the allegations against Mrs. Dinkins.

a. The principal allegation against Mr. Schmults is that he acted improperly in failing to disclose to the House Judiciary Committee the existence of certain handwritten notes in the possession of the Department that were germane to the Committee's inquiry. The Department's preliminary investigation established that in the course of discussions concerning whether the Department should provide handwritten notes of its senior officials to the Committee, some of Mrs. Dinkins' notes were shown to Mr. Schmults as examples of the type of documents in issue. The Independent Counsel suggests that Mr. Schmults might also have seen notes other than those of Mrs. Dinkins, because during a January 1985 interview by Committee investigators, he recalled information contained in those notes. The Independent Counsel further suggests that knowledge of the contents of the notes, some of which are described as "embarrassing," might be evidence of a possible motive to conceal the documents from the Committee.

This evidence is not significant enough to justify revisiting the Attorney General's earlier decision. The Attorney General's Report and the report of the Public Integrity Section's investigation both reflect that Mr. Schmults had seen at least some of the disputed notes, and that the contents of the notes allegedly contained some "embarrassing" information. See Public

Integrity Section Report at 86 & n.74; Attorney General's Report at 12-13 & n.8. Moreover, the Public Integrity Section Report specifically noted that the arguably embarrassing contents of the notes could have provided Mr. Schmults with a motive to conceal the notes from the Committee. Public Integrity Section Report at 86. The Independent Counsel's suggestion that the evidence of Mr. Schmults' knowledge of the contents of the notes alters the strength of the case against Mr. Schmults is therefore inaccurate; Mr. Schmults' possible motive to conceal the notes was taken into account during the preliminary investigation and was not found to be a sufficient factor to warrant referring the case against him for further investigation.

b. The Independent Counsel next asserts that the Attorney General's Report was inaccurate on the question of how the Judiciary Committee learned of the existence of the handwritten notes. The Attorney General's Report (at 20) states as follows:

On April 17, [1984,] the Committee learned about the handwritten notes. According to [Alan] Parker [former Chief Counsel to the House Judiciary Committee], the Committee learned about the issue from someone at EPA. Committee staff then confronted [former Deputy Assistant Attorney General] Dolan, who conceded that the handwritten notes had not be produced.

As the Attorney General's Report reflects (at 18-19), Mr. Dolan had long felt uncomfortable about the fact that the handwritten notes issue had never been resolved and that the Committee was laboring under a possible misapprehension. Faced with a direct question, he apparently decided to acknowledge that the notes

existed and had not been provided to the Committee, despite having previously been told by Deputy Attorney General Schmults not to worry about the issue, because it would be taken care of by Mr. Schmults himself. It appears that Mr. Dolan was not aware that the Committee staff already knew about the notes at the time he disclosed their existence to the Committee.

The Independent Counsel asserts that she has evidence that the Committee first learned about the notes from Mr. Dolan, not from "someone at EPA," as the Attorney General's Report stated. It is difficult to see why that fact, if it is true, is material to the issue of Mr. Schmults' culpability. The Independent Counsel focuses on three facts: (1) Mr. Dolan informed the Committee about the handwritten notes; (2) he did so not only "outside of channels," but even after being informed by Mr. Schmults that the matter would be handled at a higher level; and (3) he has repeatedly expressed his "discomfort" over the handling of the handwritten notes issue. The Independent Counsel's inference from these facts seems to be that Mr. Dolan was unlikely to have acted in that manner unless he knew or at least suspected that there was some criminality involved.

The three facts on which the Independent Counsel focuses were all known to the Department at the time the Attorney General's Report was filed with the Division. The Attorney General's Report reflects that Mr. Dolan informed the Committee about the notes, believing that the Committee did not know about them; that Mr. Dolan went outside of channels -- indeed, contrary

to his orders -- in doing so; and that a motivating factor for this unusual step appears to have been Mr. Dolan's discomfort over the lingering unresolved handwritten notes issue. The "new evidence" offered by the Independent Counsel -- that it was Mr. Dolan, rather than someone at the EPA who first advised the Committee about the notes -- does not significantly affect the question of possible criminality on Mr. Schmults' part. The Attorney General's Report noted that Mr. Dolan revealed the existence of the notes because of his discomfort with the Department's failure to do so to that point. Whatever the relevance of Mr. Dolan's state of mind, it was the same regardless of whether the Committee had previously learned about the notes from someone at the EPA. The "newly discovered evidence" cited by the Independent Counsel could therefore not possibly affect the conclusion in the Attorney General's Report that the allegations against Mr. Schmults do not warrant further investigation or prosecution.

c. The last item of "newly discovered evidence" raised by the Independent Counsel is that Mr. Schmults' own handwritten notes, along with those of Assistant Attorney General McConnell and Mr. Dolan were produced for the Committee during the initial document production in the Spring of 1983. This evidence is not new. The Attorney General's Report specifically noted that fact in the course of the discussion of the preliminary investigation of the allegations against Mr. Schmults (Attorney General's Report, at 18 n.18):

Although the presence of some handwritten notes appears to have been accidental, according to Lands Division documents, some notes were deliberately left in "as examples of thoroughness of review process." Also, Mr. Schmults', Mr. McConnell's and Mr. Dolan's notes were left in.

Because the Attorney General already had specific knowledge of the fact that Mr. Schmults' notes were included in the package provided to the Committee, that "newly discovered evidence" could not have affected the Attorney General's assessment of the strength of the case against Mr. Schmults.

In sum, the Independent Counsel has identified no newly discovered evidence that was unknown to the Department of Justice at the time of the preliminary investigation and that would be reasonably likely to alter the judgment that was made at that time regarding the need for further investigation or prosecution of the allegations against Mr. Schmults or Mrs. Dinkins.

It is important to emphasize that the Department has maintained an "open door" relationship with the Independent Counsel. The Department has provided full cooperation to the Independent Counsel, and we intend to continue doing so. Moreover, the Attorney General stands ready to consider any new information or factual material the Independent Counsel develops that may bear on the allegations against Mr. Schmults or Mrs. Dinkins, and to reconsider his prior determination in light of that new information, as is provided in Section 592(c)(1) of the Independent Counsel statute. In the present posture, however, the Independent Counsel is seeking to substitute her

judgment for that of the Attorney General by reinvestigating matters that the Attorney General has closed. That request is not factually or legally supported, and the Division should therefore not refer the allegations against Mr. Schmults and Mrs. Dinkins to the Independent Counsel for further investigation or prosecution.

Conclusion

The Application of the Independent Counsel for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) should be denied.

Respectfully submitted,

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