

Garland

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Correspondence Routing and Action

1.From Criminal Division	2.Date 07/24/95	3.Suspense 07/27/95
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Subject 7/21/95 MEMO RE REFERRAL OF RELATED MATTERS TO INDEPENDENT COUNSELS		
6.EXEC ASST Review Paul Fishman		7.Suspense
Instructions As appropriate. Copy sent to Merrick.		
8.From:	To:	Date
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11.To EXEC Asst to:		Date
12.Final Disposition:		Date

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079505446

DEPARTMENT OF JUSTICE
EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: HARRIS, JO ANN, AAG, CRM
To: AG.

ODD: 07-27-95

Date Received: 07-21-95 Date Due: 07-27-95 Control #: X95072120193
Subject & Date

07-21-95 MEMO REGARDING REFERRAL OF RELATED MATTERS TO
INDEPENDENT COUNSELS; THRU DAG.

	Referred To:	Date:		Referred To:	Date:	
(1)	DAG;GORELICK	07-24-95	(5)			SPEC:
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	INTERIM BY:			DATE:		OPR:
	Sig. For: DAG			Date Released:		DAN

Remarks

(1) FOR INITIALING ON THE "THRU" LINE. RETURN TO EXEC. SEC.
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95 JUL 21 10:30
OFFICE OF THE
DEPUTY
ATTORNEY GENERAL

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U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 21, 1995

RECEIVED
DEPARTMENT OF JUSTICE
JUL 21 1995 5:28

MEMORANDUM FOR ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Jo Ann Harris
Assistant Attorney General

SUBJECT: Referral of Related Matters to Independent
Counsels

PURPOSE: To provide you with the Criminal Division's
views on this subject.

TIMETABLE: None

SYNOPSIS: Provides legal analysis of 28 U.S.C.
§ 594(e), historical practice under the
referral provision, and discussion of
previous dispute within the Department over
scope of the referral power.

DISCUSSION: The Public Integrity Section has prepared the
attached memorandum explaining the legal
framework within which referrals of related
matters to independent counsels can be made,
setting out the factors that have been
considered by the Attorney General in the
past in determining that matters are related
and appropriate for referral, and explaining
the controversy that arose within the
Department in 1990 over the meaning and scope
of the referral power.

I agree with the conclusion of the
memorandum that the historical practice of
referrals based on a practical, prosecutorial
assessment of a variety of factors is soundly
based in law, and should continue.

Attachment



U. S. Department of Justice

Washington, D.C. 20530

JUL 19 1995

MEMORANDUM

TO: John C. Keeney
Deputy Assistant Attorney General
Criminal Division

Robert S. Litt
Deputy Assistant Attorney General
Criminal Division

FROM: Jo Ann Farrington
Deputy Chief
Public Integrity Section
Criminal Division

SUBJECT: Referral of related matters to Independent Counsels

Section I of this memorandum will present the Public Integrity Section's view of the purpose and meaning of 28 U.S.C. § 594(e) of the Independent Counsel Act, permitting referral of "related matters" to an independent counsel. Section II will set out the factors that the Department has looked to in the past in deciding whether particular matters were related, and whether referral was appropriate. Section III will explain a contrary and very limited view of section 594(e) that was advanced in 1990 and adopted by a previous Attorney General with respect to one referral request from a past independent counsel.

I. Statutory Analysis and Legislative History:

Although in many ways the Independent Counsel Act attempts to force the unstructured, ever changing shape of a criminal "matter" into the square corners of a rigid statutory procedure, in some ways Congress did recognize that it was dealing with a subject with a great deal of gray around the edges. Every prosecutor is familiar with the fact that even in a seemingly cut and dried investigation, the probe may have to extend into apparently remote corners in order to permit the resolution of the central question; one may have to investigate a gun theft in

Handwritten note:
N.B. LJR
7/19/95

Arkansas to advance the investigation of the Oklahoma City bombing, and to conclude a bribe investigation against a congressman one may have to bring a tax evasion case against a potential witness. Congress therefore built into the statute several areas of accommodation to permit the Department of Justice and Independent Counsels to reach agreement concerning lines of their respective authority. One of those provisions is section 594(e), which provides:

Referral of other matters to an independent counsel.--
An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

While it is not expressly articulated in the statute, the Section finds it helpful to think about an independent counsel's investigative and prosecutorial jurisdiction in the following way. An independent counsel has what might be called a core jurisdiction, which is the particular allegation involving a covered person that was the focus of the preliminary investigation that led to his or her appointment. That core jurisdiction could be very broad, as was the case with Independent Counsel Walsh (Iran/Contra) and is now the case with Independent Counsel Starr (Whitewater), involving a number of institutions and individuals and their dealings with each other over a period of time, or it could be quite narrow, as was the case in our recent referral of the Secretary Cisneros matter, involving a particular alleged event on a particular date, alleged false statements to the FBI during his background interview.

In addition to what is described above as the core jurisdiction, when the Court is defining the original jurisdiction of a newly appointed independent counsel, the statute directs the Court to draw his or her jurisdiction sufficiently broad to cover "related matters" sufficient to ensure that the independent counsel has "adequate authority to fully investigate and prosecute the subject matter with respect

to which the Attorney General has requested the appointment of the independent counsel." 28 U.S.C. § 593(b)(3).

Following appointment of the independent counsel, the statute also recognizes that additional "related matters" may arise that will need to be and appropriately should be handled by the independent counsel. Section 594(e), as set out above, provides the means by which such matters may be referred from the Department to the independent counsel. As the legislative history explains:

This subsection recognizes that once [an independent counsel] is appointed and actively involved in conducting a criminal investigation, the case he is pursuing may develop information with regard to related criminal matters. In addition, the [independent counsel] may conclude that it is necessary to handle a criminal investigation which the [independent counsel] has been assigned in conjunction with other ongoing criminal investigations being handled by the Department of Justice. Therefore, it is particularly appropriate that the [independent counsel] have the authority to ask the Attorney General or the division of court to assign related matters to the [independent counsel]. The Committee expects that there will have to be coordination between the [independent counsel] and the Attorney General to sort out the jurisdiction of the [independent counsel] as it relates to the ongoing investigations of the Department of Justice. If these adjustments require the referral of related matters from the Department of Justice to [an independent counsel], there is no need to involve the division of the court other than to inform the division of the court that such an arrangement has been reached.

S. 555 at 68-69. The Senate Report goes on later to point out, "As was discussed with respect to section 594(e), there will have to be a certain amount of coordination and cooperation between [an independent counsel] and the Department of Justice so that the lines of jurisdiction between the Department and the [independent counsel] are clear and adequately encompass any peripheral matters related to the [independent counsel's] jurisdiction." Id. at 76.

Two observations should be kept in mind with respect to section 594(e). The first is that the Attorney General is vested with discretion in determining whether a particular related matter should be referred to an independent counsel; the statute uses the permissive verb "may" rather than "shall," and the legislative history makes it clear that the provision is intended to permit a flexible, cooperative accommodation between an independent counsel and the Department with respect to which

federal prosecutor should handle particular matters outside the core jurisdiction of the independent counsel. The second is that we are provided with no definition of "related."

Given the discretionary nature of the section, and the lack of a limiting definition of a "related matter," it is the view of the Public Integrity Section that this section should be interpreted flexibly, in light of the clearly practical tone of the legislative history, to permit referral in a variety of situations where referral makes practical sense. In addition, decisions as to referrals pursuant to this section should be informed by two other provisions of the Act: first, as described above, section 593(b)3) directs the Court to draw the independent counsel's jurisdiction broadly enough to ensure that the independent counsel is able to "fully investigate and prosecute" his or her core jurisdiction; and second, when an independent counsel requests that the Attorney General expand his or her jurisdiction pursuant to section 593(c), the Attorney General is directed to accord "great weight to the recommendations of the independent counsel." While not directly applicable to section 594(e) referrals, these provisions suggest that when deciding whether referral of related matters is appropriate, particular attention should be paid to the views of the Independent Counsel as to whether and how referral would advance his or her ability to resolve the matters within his or her core jurisdiction.

II. Historical Practice with Respect to 594(e) Referrals

In addition to this statutory context, the Department also now has an established history of referrals of related matters to independent counsels, which provide context and guidance as to what have been considered "related matters" in the past.¹ It should be kept in mind, however, that each of these situations involved a unique set of circumstances which with slight changes could have resulted in a different decision. Furthermore, given the discretionary nature of the decision involved, the "mindset" of the decision makers, including their fundamental views toward the Independent Counsel Act and how broadly or narrowly it should be interpreted, clearly could have influenced particular decisions.

Factors that have been relied upon in the past as part of the balance to determine whether or not a matter is "related" include:

¹ This is not intended to be an exhaustive historical analysis of all section 594(e) referrals. The following discussion is intended to be by way of example, describing referrals that I recall.

(1) **Same individual as subject or target.** Even seemingly unrelated conduct has been referred to independent counsels when the same subject or target is involved. For example, allegations that former Attorney General Meese violated the conflict of interest laws when he took official action concerning the AT&T divestiture were referred to Independent Counsel McKay, who was already investigating Meese's relationship with Wedtech Corporation.² In another example, three separate matters involving allegations against Secretary of Agriculture Espy were referred to Independent Counsel Smaltz; first, that Espy was improperly influenced by Tyson Food to intervene in a poultry producers dispute with Puerto Rico, second, that a contractor with the Agriculture Department had paid off certain debts, including an automobile loan, for Espy, and finally, that Espy had hosted a dinner at which agricultural lobbyists were solicited for donations to pay off campaign debts of Espy's brother.

(2) **Similar conduct by some of the same parties.** Allegations that there was criminal misconduct in HUD programs other than the Moderate Rehabilitation Program that was the focus of Independent Counsel Arlin Adams original jurisdictional grant, and that some of the same HUD officials were involved, were determined to be related and referred to Mr. Adams.

(3) **Overlap of witnesses, and resulting potential for interference in independent counsel's investigation.** This was one factor that was relied on in deciding to refer allegations concerning Mr. Meese's relationship with the Wedtech Corporation to Independent Counsel McKay; Mr. McKay was already investigating whether former Assistant to the President Franklyn Nofziger had committed conflict of interest violations with respect to actions taken on behalf of Wedtech and expressed concern over potential conflicts between his office and the Department should the two attempt to go over similar ground and interview the same witnesses.

In dicta, In re Meese, 907 F.2d 1192 (D.C.Cir. 1990), suggests that when making a 594(e) referral of a related matter

² Independent Counsel McKay's investigation began as an investigation of conflicts of interest allegations against former Presidential aide Lyn Nofziger, including actions taken by Nofziger on behalf of Wedtech Corporation. When allegations of impropriety were received concerning alleged actions Attorney General Meese also had taken in connection with Wedtech, those allegations were referred to McKay as a related matter. Later, allegations were made against Attorney General Meese that he had a conflict of interest in connection with his actions relating to the AT&T divestiture action. These allegations were also referred to Independent Counsel McKay.

involving an additional covered person, the Attorney General must make a specific finding that further investigation is warranted, just as she would if the related matter had arisen as a wholly separate independent counsel matter handled pursuant to sections 591 and 592. This appears to us to be largely a technicality, since by referring the matter to an independent counsel, it could be argued that the Attorney General is by her very action demonstrating her conclusion that the matter warrants investigation.³

(4) **Additional matter arising out of the same underlying facts as the original jurisdiction.** This was also the case with the Meese/Wedtech referral; both Mr. Meese's and Mr. Nofziger's involvement with Wedtech arose out of a concerted effort by Wedtech to obtain government contracts. In another example, perjury allegations against former General Counsel to the EPA Robert Perry were referred to Independent Counsel Alexia Morrison; the allegations against Perry were contained in the same Report of the House Judiciary Committee that made the allegations against former Assistant Attorney General Ted Olson that were the subject of Ms. Morrison's jurisdiction, and his alleged perjury occurred during the same underlying Executive Branch effort to withhold EPA documents from Congress that underlay the Olson testimony.

(5) **Same legal issues involved.** This was yet another factor relied upon to conclude that the Meese/Wedtech matter was related to the Nofziger investigation. Both involved similar complex conflict of interest fact patterns and raised the same difficult legal issues concerning the potential application of the conflicts statutes.

(6) **Allegations against key witnesses in the Independent Counsel's investigation.** This was a factor in the EPA General Counsel Perry matter; Perry was under investigation for perjury by the Public Integrity Section, while at the same time he was a key witness in Independent Counsel Morrison's investigation. This had the potential to complicate the Independent Counsel's efforts to obtain his cooperation. This factor was also involved in the decision to refer allegations concerning DuBois Gilliam, a

³ The criticism of the court may well have derived from the extremely cautious tone of the Meese referral letter. Keeping in mind that the Deputy Attorney General was referring allegations concerning the Attorney General to an independent counsel, it is noteworthy that the letter denigrates the substance of the allegations and relies heavily on the fact that Meese himself had requested the referral. The court was extremely troubled by the fact that the letter seems to suggest that a referral had been made of a matter that did not warrant investigation.

HUD official under Secretary Pierce, to Independent Counsel Adams, who was investigating Pierce.

Once it has been determined that a matter is related, the Attorney General has relied on a number of practical factors to conclude that the related matter should appropriately be handled by the Independent Counsel. Economy of effort, risk of interfering with the Independent Counsel's investigation, and the promotion of public confidence in the handling of the matter have all been cited as relevant factors in concluding that referral is appropriate. The Attorney General has generally given considerable deference to the views of the Independent Counsel with respect to any concern expressed over potential problems created should the matter not be referred. This practice was confirmed in correspondence with Senator Levin during the 1987 reauthorization process.

III. The Conflicting View

In 1990, Independent Counsel Arlin Adams was investigating allegations against former HUD Secretary Samuel Pierce and other HUD officials with respect to the administration of certain HUD programs. After his investigation had been underway for several months, Adams requested that the Department refer to him certain additional matters, including whether Pierce had committed perjury in 1989 testimony before Congress concerning the administration of the programs, and whether there had been criminal misconduct in the administration of additional HUD programs. The Criminal Division recommended that the requested matters be referred to Independent Counsel Adams as related matters.

Decision makers within the Department at the time were strongly opposed to the Independent Counsel Act and disposed to interpret it as narrowly and strictly as possible. When the Criminal Division's recommendation was reviewed by the Deputy Attorney General's Office, the Deputy's Office took the position that our recommendation would "place the Department and the Attorney General in the extremely uncomfortable position of publicly defending a broad interpretation" of the Act. In a proposed letter back to Adams, the Deputy's Office therefore took the position⁴ that section 594(e) only permitted the referral of matters already within the Independent Counsel's jurisdiction. For example, as we read the McBride draft, if an independent counsel were investigating whether a covered person had accepted a bribe from a defense lawyer to fix a criminal case, the Department could refer to the independent counsel new allegations

⁴ This draft was prepared by Associate Deputy Attorney General Andrew McBride, and will be described hereafter as the "McBride draft."

of obstructive conduct with respect to the same case by the same covered person, but could not refer allegations of bribes paid by other defendants to the same official to fix other cases, because that would serve to "expand" the independent counsel's jurisdiction. While the McBride draft suggests that "some support" could be put forth to support a view that the additional matters requested by Adams were already within his jurisdiction, it concludes that such an expansive view of his jurisdiction would be vulnerable to attack. The draft concluded by recommending that Adams accept a special appointment from the Attorney General to handle these matters as a departmental attorney.

In internal staff discussions, the Criminal Division argued against this view, taking the position that it was in conflict with the legislative history of the Act, previous practice with respect to referrals, and sensible, practical case management; we essentially argued the position set out in section I, supra. Nevertheless, the Department wrote to Adams adopting the positions set out in the McBride draft. Adams refused the offer of an appointment by the Attorney General, stating that such an appointment would compromise his independence.

A month later, the Attorney General wrote to Adams. He reiterated the view of the McBride draft that before matters could be referred under 594(e), they had to be "within" the jurisdiction of the Independent Counsel. However, he concluded that the matters requested by Adams were in fact within his jurisdiction, and therefore properly referable. Thus, Adams received the additional matters that he had requested.

While the immediate problem was solved, this left the Department in an awkward and somewhat ironic position. It is our view that Congress contemplated that in order to avoid "renegade" independent counsels and to minimize the intrusion on the responsibility over federal criminal law enforcement entrusted to the Attorney General, the independent counsel's initial jurisdiction should be rather strictly interpreted, but that the Department and the Independent Counsel would be free to work together cooperatively to sort out their respective jurisdictions with respect to related matters. As with the Adams request, there are numerous situations where it only makes sense for the independent counsel to handle a related matter. However, the McBride draft virtually forces the Department to take an extremely expansive -- and ultimately extremely strained -- view of the Independent Counsel's original jurisdiction, in order to conclude that appropriate "related matters" can be referred. The McBride position would also eliminate the Attorney General's discretion over whether a particular referral of a related matter is appropriate; if a matter is within the jurisdiction of the Independent Counsel, the Act bars the Department from handling it

without written permission from the Independent Counsel. 28
U.S.C. § 597(a).

It is our view that the exchange with Independent Counsel Adams should be regarded as an aberration. Indeed, it has been largely ignored since that time; we are aware of no subsequent cases in which any analysis of an Independent Counsel's jurisdictional grant was conducted in order to conclude that a requested related matter in fact was already within the Independent Counsel's jurisdiction.