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MEMORANDUM

To: Brett Kavanaugh
cc: John Bates

From: Craig Lerner

Re: Section 594(h)(2) of the Ethics in Government Act

Date: January 24, 1997

The Ethics in Government Act (Act) provides:

The division of the court may release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the division of the court considers appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a final report filed under paragraph (1)(B)¹ available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may, in the discretion of the division of the court, be included as an appendix to such final report.

28 U.S.C. § 594(h)(2).

Background to section 594(h)(2)

The Act imposes a duty on all independent counsels to file a final report. See 28 U.S.C. § 594(h)(1)(B). This duty distinguishes the independent counsel from all other prosecutors. As the Special Division has observed,

[c]onsistent with the power and responsibility of their office, prosecutors do not issue reports, and they do not pronounce persons guilty of crimes who have not been indicted, tried, and convicted. The filing of reports by Independent Counsels is "a complete departure from the

¹ Paragraph 1(B) provides that an independent counsel shall, before the termination of his office, "file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought."

authority of a United States Attorney" and is "contrary to the practice in federal grand jury investigations."

In re North (Omnibus Order), 16 F.3d 1234, 1238 (D.C. Cir. Spec. Div. 1994) (quoting In re Sealed Motion, 880 F.2d 1367, 1369-70 (D.C. Cir. Spec. Div. 1989)). In the Omnibus Order, a number of parties objected to the accusatory tone of Walsh's final report. While the special division acknowledged that Walsh's report was "rife with accusations of guilt," it held that "[u]nfortunately for movants, and perhaps for the tradition of fairness, the [Act] does require that the Independent Counsel file a report." Id. Compare with United States v. Briggs, 514 F.2d 794, 801 (5th Cir. 1975) (there is "no substantial authority permitting a federal grand jury to issue a report accusing named private persons of criminal conduct").

It is worth noting, however, that, earlier versions the Act, under which Walsh operated, required the independent counsel to give a description of his work, as well as "the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel." The 1994 Act dropped the requirement that the independent counsel explain his decision not to prosecute. Senator Dole, who had proposed this amendment, explained that this "amendment narrows the permissible scope of the final report." 139 Cong.Rec. S15971-04, S15972 (Nov. 18 1993).

Analysis of section 594(h)(2)

1. The first sentence of section (h)(2) is couched in discretionary terms: "The division of the court may release to Congress, the public, or any appropriate person, such portions of a report ... as the division of the court considers appropriate." How should the special division exercise its discretion in determining whether to disclose the IC's special report?

After Walsh² had prepared his final report, and a number of parties had filed comments, several individuals moved the special division to withhold the release of the report in toto, or to withhold those parts that contained grand jury materials. Omnibus Order, 16 F.3d at 1235-36. The court clearly had some misgivings about the accusatory tone of Walsh's final report. See id. at 1240 ("we find the objections of those movants who seek to have us rescind the release of the Report weighty"). Nonetheless, the court consented to the report's release, though it emphasized that "the Court places no imprimatur upon it." Id.

² The relevant section of the Act for the Walsh investigation was 28 U.S.C. § 595(b)(3)(1982). That section was later recodified in its present form as section 594(h)(2). See Omnibus Order, 16 F.3d at 1235 & n.1.

"The Independent Counsel does not operate under our supervision and his acts, including the writing of the Report, do not bear our aegis." Id. at 1239. See also Morrison v. Olson, 487 U.S. 654, 680-84 (1988) (had the special division been invested with supervisory powers over the independent counsel, the Act would have been constitutionally suspect); In re North (Walsh Show Cause Order), 10 F.3d 831, 836 (D.C. Cir. Spec. Div. 1993) (Butzner, J., dissenting) ("The Act confers very limited powers on the court with respect to the Independent Counsel. Adherence to these limitations is essential to preserve the constitutionality of the Act."). Cf. In re Charge of Judicial Misconduct or Disability, 85 F.3d 135, 138 (D.C. Cir. 1996) (en banc) (the special division does not "adjudicat[e] the merits of a controversy between opposing parties"). But cf. id. at 140 (Tatel, J., concurring) (the opportunity for judicial impropriety on the part of the Special Division exists "because the special panel exercises some degree of discretion").

In deciding to release the Walsh report, the special division sought guidance from an unenacted 1987 Senate report, which stated:

In considering whether to release court filings, it is intended that the court balance the right of the subjects of the investigation to be shielded form [sic] publicity about unfounded or unfair allegations with the right of the public to inquire about prosecutions under this Act. In balancing these concerns, the court should weigh such factors as [1] whether the subjects of the investigations have already disclosed to the public; [2] whether the subjects do not object to the filings being released to the public; [3] whether the filings contain information which is already publicly known; and [4] whether the filings consist of legal or factual rulings in a case which should be publicly available to understand the court's rules and precedents or to follow the developments in a particular matter.

S.Rep. No. 123, 100th Cong., 1st Sess. 21 (1987), reprinted in 1987 U.S.C.C.A.N. 2150, 2170, quoted in Omnibus Order, 16 F.3d at 1237. In the Omnibus Order, the special division noted that the subjects of the Walsh investigation, as well as much of the information in the report, were already publicly known, 16 F.3d at 1240; and that the court filings "do not consist of either legal or factual rulings," id. at 1241. While the court acknowledged that some people mentioned in the report opposed its release, other persons expressed no opinion one way or another, and still others supported the report's release. Id. at 1240.

There may be limits to the lessons that can be drawn from the Omnibus Order, for the court emphasized that "given all of the facts and circumstances as they now prevail in this unique case, we will order release." Id. at 1241 (emphasis added).

Nevertheless, the Omnibus Order articulates at least two generally applicable principles: (1) disclosing the final report is essential "to 'ensure the accountability' of the Independent Counsel to the government and the public," id. (quoting S.Rep.No. 170, 95th Cong., 2d Sess. 70-71), and (2) the special division is wary of exercising a "supervisory power over the essentially executive functions performed" by the independent counsel, id. at 1239; cf. Morrison, 487 U.S. at 681 ("The Act simply does not give the Division the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.") The upshot is that the special division will, in most instances, order the release of the independent counsel's report.

The legislative history of the 1994 Act makes clear that, whatever misgivings Congress had with Walsh and his blistering final report, it approved of the special division's decision to release that report. The House proposed an amendment to section 594(h)(2) to "add[] language encouraging the court to release the report and associated material if the court determines it would be in the public interest and would be consistent with maximizing public disclosure, ensuring a full explanation of the independent counsel's activities and decisionmaking, and facilitating the release of information which the independent counsel had determined to be disclosed." H.Rep. No. 103-511 (May 19 1994), 1994 WL 200711 at *20. See also H.Rep. No. 103-224 (August 6, 1993), 1993 WL 302057 at *20-21.

The Senate version of the 1994 Act tracked the language of the 1987 version. The conference followed the Senate bill because it regarded the proposed House language as redundant. "The conferees agree that the standards in the 1987 law on releasing a final report to the public are not overly restrictive, as evidenced by the special court's decision to release the final report in the Iran-Contra matter despite numerous motions by persons named in the report to repress [sic] all or portions of it. For this reason, the conferees have determined that additional statutory language encouraging disclosure is unnecessary." H.Rep. No. 103-511, 1994 WL 200711 at *20 (emphasis added).

2. The second sentence of section (h)(2) provides that the special division "shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution."

As already indicated, a number of individuals appealed to the special division to withhold the release of the Walsh final report. Those individuals specifically appealed to section (h)(2), which empowers the special division to "make such orders as are appropriate to protect the rights of any individuals named" in the final report. Omnibus Order, 16 F.3d at 1235. The

special division rejected these motions, stating that, "it is in the public interest that this matter of extended national controversy be afforded as full a conclusion as possible." Id. at 1245.

3. The third sentence of section (h) (2) provides that "the division of the court may make any portion of a final report ... available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit." Three questions arise: (a) who receives a copy of the report -- only putative subjects or any persons mentioned in the report, (b) do the individuals receive the entire final report or only a relevant portion, (c) what is the time limit for comments?

a. Who receives a copy?

In determining which individuals are to receive a copy of the final report for comment, the Act is couched in discretionary terms: "the division of the court may make any portion ... available to any individual named in the final report." The special division originally submitted portions of the Iran/Contra report to all individuals mentioned in it except "[s]ome given only minor or passing mention." Omnibus Order, 16 F.3d at 1236 n.2. Soon thereafter, the special division "endeavored to provide notice and access ... for comment even as to those individuals. After the filing of comments had been closed, one individual, mentioned in a footnote, notified the Court that he had not received notice. The Court does not deem it necessary to reopen the comment period." Id.

To judge from the Walsh report, the special division will presumably try to notify nearly all individuals who are discussed in some detail in the final report, and may also endeavor to allow comments even from minor players.

b. Do individuals receive the entire report or only a portion?

The plain language of the Act provides that only a "portion" of the final report is made available to individuals for their comments. This is how the special division has interpreted the Act. In the Iran/Contra investigation, "[e]ach named individual and/or counsel for such named individual received access to the portion or portions of the Report naming that person. In two instances, an individual named was discussed so pervasively that the full Report was provided to the individual and the individual's counsel." Omnibus Order, 16 F.3d at 1236.

c. What is the time limit for comments?

Walsh filed his final report on August 5, 1993. Omnibus Order, 16 F.3d at 1236. The special division originally granted named individuals until October 3, 1993, to provide comments, and it later extended the deadline until December 3, 1993. In re North (Emergency Motion of Society of Professional Journalists) (not reported) 1993 WL 560094, *1 (D.C. Cir. Spec. Div. 1993). In short, there was a four-month comment period. It is worth noting that the Walsh report was "lengthy and complex," In re North (Shields and Gruner Fee Applications), 53 F.3d 1305, 1308 (D.C. Cir. Spec. Div. 1995); accordingly, the special division may allow a shorter comment period for other final reports.

4. The fourth sentence of section (h)(2) provides that "comments and factual information, in whole or in part, may, in the discretion of the division of the court, be included as an appendix to such final report." Who oversees the preparation of such an appendix?

The special division has stated that "[t]he independent counsel's investigation ends when he or she files a final report 'setting forth fully and completely a description of the work of the independent counsel.'" In re North (Reagan Fee Application), 94 F.3d 685, 689 (D.C. Cir. Spec. Div. 1996) (quoting 28 U.S.C. § 594(h)(1)(B)). Even after the independent counsel files the final report, the special division has recognized that he has the residual duty of compiling an appendix consisting of comments by named persons. Walsh Show Cause Order, 10 F.3d at 833. Apparently, Walsh was charged with this duty.

Related issues

1. Does the Act's reporting requirement negate the secrecy requirements imposed by Fed.R.Crim.P. 6(e)?

No. In its Omnibus Order, the Special Division made clear that it had "nowhere" held "that the secrecy requirement of Rule 6(e) does not apply to Independent Counsels." 16 F.3d at 1243. The Special Division further held that the Act's reporting requirement did not effect a "repealer by implication" of the secrecy requirements of Rule 6(e). See id. ("we are not to construe statutes so as to work a repealer by implication unless the statutes are in irreconcilable conflict") (quotation omitted).

The special division nonetheless concluded "courts may loosen those bonds [of secrecy] under the terms of the Rule." Id. at 1244. The special division then quoted Fed.R.Crim.P. 6(e)(3)(C), which provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made -- (i) when so directed by a court preliminarily to or in connection with a judicial proceeding." The special division held that its actions in overseeing the

release of a final report "constitute a judicial proceeding," thereby implicating the above exception to the secrecy requirements otherwise imposed by Rule 6(e). Id. The court added that "[a]rguably, the Independent Counsel should have applied to us for a Rule 6(e)(3)(C) exception before fining the Report containing the grand jury material." Id.

Another reason mentioned by the special division to justify the release of the grand jury material is that much of that material had already been made public and therefore had "lost its protected character." Id. The court cautioned, however, that "[w]e do not intend to formulate a rule that once a leak of Rule 6(e) material has occurred, government attorneys are free to ignore the pre-existing bond of secrecy." Id. at 1245.

2. Can the independent counsel respond to comments filed by persons named in the final report?

No. A divided panel concluded that the independent counsel cannot respond to comments submitted by persons named in the final report. Judge Sentelle, writing for the majority, reasoned that, pursuant to Section 594(h)(1)(B), the independent counsel's office terminates upon the filing of a final report. Walsh Show Cause Order, 10 F.3d at 833. It is true that the independent counsel has the residual duty of compiling an appendix consisting of comments by named persons. Id. Nonetheless, Judge Sentelle emphasized that the independent counsel's residual duties do not "include the making of revisions or additions to his prior report." Id. at 834.

A dissenting Judge Butzner observed that "[t]he Special Division ... should not use the power of termination as a method of supervising the Independent Counsel. Id. at 837 (quotation omitted). He added that "to assume control and supervision over the Independent Counsel in the discharge of his duties to report, and to terminate the office before he has completed his report raise constitutional issues in the application of the Act that should be avoided." Id. at 838. See also Morrison, 487 U.S. at 680-84 (had the special division been invested with supervisory powers over the IC, the Act would have been constitutionally suspect).

Attachments

In re North (Omnibus Order), 16 F.3d 1234 (D.C. Cir. Spec. Div. 1994).

In re North (Walsh Show Cause Order), 10 F.3d 831 (D.C. Cir. Spec. Div. 1993).