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In re Edwin MEESE III.

Division No. 87-1.

United States Court of Appeals,
District of Columbia Circuit.

(Division for the purpose of Appointing Independent
Counsel, Ethics in
Government Act of 1978, as Amended).

July 12, 1990.

United States Attorney General sought recovery of attorney fees under Independent Counsel Reauthorization Act for expenses incurred in connection with investigation by independent counsel as to whether Attorney General, as counselor to President, violated conflict of interest laws. The Court of Appeals held that Attorney General was entitled to recover attorney fees and costs.

Ordered accordingly.

[1] COSTS ⇌ 293

102k293

Right to recover attorney fees in independent counsel investigations is based on waiver of sovereign immunity of United States and that standard must be strictly construed against application and in favor of sovereign. 28 U.S.C.A. § 593(f)(1).

[2] UNITED STATES ⇌ 40

393k40

That investigative jurisdiction over additional targeted individual subject was being requested and obtained by referral to independent counsel did not eliminate necessity for compliance with requirement of Independent Counsel Reauthorization Act that there be preliminary investigation and finding of reasonable grounds to believe that further investigation or prosecution of targeted official, as subject of investigation, was warranted. 28 U.S.C.(1982 Ed.) § 592(c)(1).

[3] UNITED STATES ⇌ 40

393k40

Reasons given for referral to independent counsel of investigation of United States Attorney General as to whether, as counselor to President, Attorney

General violated conflict of interest laws were insufficient to constitute "reasonable grounds" required to justify application for further investigation by independent counsel; referral was made on basis of fragmentary and preliminary information that lacked specificity from the beginning. 28 U.S.C. (1982 Ed.) § 592(a)(1).

[4] COSTS ⇌ 308

102k308

United States Attorney General was entitled to recover attorney fees and costs incurred in connection with investigation by independent counsel as to whether Attorney General, as counselor to President, violated conflict of interest laws in assisting minority-owned corporation in its efforts to obtain government defense contracts; no indictment was brought against Attorney General upon completion of investigation and basis upon which referral was made and extreme expansion of resulting investigation subjected Attorney General to more vigorous application of criminal law than was applied to other citizens and caused him to incur legal expenses no ordinary citizen would have incurred but for independent counsel statute. 28 U.S.C.A. § 593(f)(1).

[5] COSTS ⇌ 308

102k308

Fact that United States Attorney General initially requested appointment of independent counsel had no bearing on his right to be awarded reasonable attorney fees under Independent Counsel Reauthorization Act. 28 U.S.C.A. § 593(f)(1).

[6] COSTS ⇌ 308

102k308

Reasonable attorney fees awarded under Independent Counsel Reauthorization Act are calculated according to prevailing market rates in relevant community, and applicant must produce satisfactory evidence--in addition to attorney's own affidavit--that requested rates are in line with those prevailing in community for similar services by lawyers of reasonably comparable skill, experience, and reputation. 28 U.S.C.A. § 593(f)(1).

[7] COSTS ⇌ 308

102k308

Attorney fee rates ranging from \$100 per hour to \$300 per hour were reasonable and could be recovered by United States Attorney General under

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Independent Counsel Reauthorization Act. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[8] COSTS ⇌ 308

102k308

United States Attorney General, in recovering attorney fees and costs under Independent Counsel Reauthorization Act, was not entitled to recover for paralegal and law clerk services which were purely of clerical nature. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[9] COSTS ⇌ 308

102k308

United States Attorney General, in recovering attorney fees under Independent Counsel Reauthorization Act, was not entitled to recover fees for services rendered in preparation of attorney fee applications; those fees were not for services rendered in asserting merits of Attorney General's defense to independent counsel investigation. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[10] COSTS ⇌ 308

102k308

Attorney General, in recovering attorney fees under Independent Counsel Reauthorization Act, was not entitled to recover fees incurred in preparing him for testimony in trial of another person and his testimony before congressional subcommittee inasmuch as fees were not incurred in Attorney General's defense to independent counsel investigation. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[11] COSTS ⇌ 308

102k308

United States Attorney General, in recovering attorney fees under Independent Counsel Reauthorization Act, was not entitled to recover fees incurred for responding to media inquiries which had no bearing on operation of independent counsel's investigation. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[12] COSTS ⇌ 308

102k308

Fees incurred by United States Attorney General's attorneys in reviewing press clippings concerning independent counsel investigation, because of heavy media involvement, provided useful and important information that assisted counsel in representation of subject and was therefore reasonably related to defense of investigation and were recoverable under Independent Counsel Reauthorization Act. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[13] COSTS ⇌ 308

102k308

Fees for letter written by United States Attorney General's attorneys in requesting referral of matter to independent counsel were not incurred during investigation of Attorney General nor were they incurred in his defense and could not be recovered under Independent Counsel Reauthorization Act. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[14] COSTS ⇌ 308

102k308

United States Attorney General was not entitled under Independent Counsel Reauthorization Act to recover fees for services rendered after filing of final report by independent counsel. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[15] COSTS ⇌ 314

102k314

Where there is inadequate documentation for work performed during time billed, attorney fee award under Independent Counsel Reauthorization Act must be reduced accordingly. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[16] COSTS ⇌ 308

102k308

Under Independent Counsel Reauthorization Act, hours must be excluded from attorney fee request that are excessive, redundant or otherwise unnecessary. 28 U.S.C.A. §§ 591 et seq.,

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593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[17] COSTS ⇌ 307

102k307

Expenses for business meals, support staff overtime, service fee, supplies, and photocopying were excessive or unnecessary and could not be fully recovered by United States Attorney General under Independent Counsel Reauthorization Act. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[18] COSTS ⇌ 314

102k314

Attorney fee award recoverable by United States Attorney General under Independent Counsel Reauthorization Act had to be reduced by 10% of billings due to inadequacy of documentation. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

***1194 **188** Before MacKINNON, Presiding, BUTZNER and PELL, Senior circuit judges.

PER CURIAM:

On May 11, 1987 the Acting Attorney General, by letter, referred the matter of Attorney General Edwin Meese III and his association with several individuals involved in "Welbilt Electronic Die Corporation," also known as Wedtech Corporation, to Independent Counsel James C. McKay, Esquire for investigation (hereafter "the referral"). The referral followed immediately upon a letter request by Meese dated the same date as the referral. At the time of the referral Mr. McKay was conducting an investigation into Franklyn C. Nofziger's representation of Wedtech Corporation ***1195 **189** and Comet Rice, Inc. [FN1] Giving rise to the referral for investigation of Mr. Meese were the circumstances of his official and "personal and/or financial relationships with ... [Wedtech Corporation, Franklyn C. Nofziger,] E. Robert Wallach, and W. Franklyn Chinn ..." [FN2] during the time that Meese had been serving as Counselor to the President. The referral did not request a focused investigation into any specific criminal offense but rather requested a generalized investigation into possible violations of all eleven of

the federal conflict of interest laws, i.e., 18 U.S.C. §§ 201-211.

FN1. The Special Division of the court had previously appointed Independent Counsel McKay to investigate whether Nofziger violated conflict of interest laws in connection with, inter alia, his lobbying activities on behalf of Wedtech Corporation and Comet Rice, Inc. See Order, In re Nofziger, Div. No. 87-1, at 2 (Feb. 2, 1987).

FN2. Referral letter of Acting Attorney General to Independent Counsel McKay of May 11, 1987; see also text infra pp. 1199-1200.

At the outset the independent counsel investigation centered on whether Meese as Counselor to the President violated the conflict of interest laws in assisting the minority-owned Wedtech Corporation in its efforts to obtain a government defense contract. Independent Counsel later requested the Special Division to define his prosecutorial jurisdiction with respect to Meese, and the court complied. [FN3] The resulting investigation inquired into the Wedtech matter and then expanded extensively into six non-Wedtech matters. [FN4] It became very intensive and eventually continued for fourteen months. Upon the completion of the investigation, "no indictment [was] brought" against Mr. Meese. Now, as authorized by § 593(f)(1) of the Independent Counsel Reauthorization Act of 1987, [FN5] Meese applies to the court for an award of \$575,598.01 in attorneys' fees and costs incurred as a result of the investigation to which he was subjected. The court approves an award of \$460,509.07.

FN3. See text at pp. 1200-1201, infra.

FN4. While the investigation of Meese as initially referred to Independent Counsel McKay was based on the Nofziger/Wedtech inquiry, the investigation that resulted was greatly expanded: Part I--The Involvement of Edwin Meese III with Government Matters of Concern to the Welbilt/Wedtech Corporation Part II--Financial Relationships Between Mr. Meese and Mr. Chinn Relating to Meese Partners Part III--Mr. Meese's Holdings in and Participation in Matters Relating to AT & T and the Regional Bell Operating Companies Part IV--Mr. and Mrs. Meese's Tax Reporting and Payments for 1985 Part V--Relationship Between

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and Among the Meeses, E. Robert Wallach and Howard M. Bender Part VI--Mr. Meese's Financial Disclosures; Financial Analyses; and Benefits Given and Received by Mr. Meese and Mr. Wallach Part VII--AQABA Pipeline Project Final Report of Independent Counsel, In Re Edwin Meese III, at xii-xv (July 5, 1988).

FN5. 28 U.S.C. § 591 et seq. (1988).

I.

Independent Counsel McKay began his investigation of Meese on May 11, 1987 under the terms of the Ethics in Government Act Amendments of 1982 as approved January 3, 1983 (96 Stat. 2039) (hereafter "the 1982 Act"). The 1982 Act was followed by the enactment on December 15, 1987 of the Independent Counsel Reauthorization Act of 1987 (hereafter "the 1987 Act" and "the Act") (101 Stat. 1293). It is the terms of Section 593(f)(1) of the 1987 Act that determine whether "reasonable" attorneys' fees are to be awarded in this case: [FN6]

FN6. The provisions of the 1987 Act regarding attorneys' fees apply retroactively to independent counsel proceedings pending on December 15, 1987. Independent Counsel Reauthorization Act of 1987, Pub.L. No. 100-191 § 6(b)(2)(A), 101 Stat. 1307 (1987). The 1987 Act added the "reasonable" requirement.

Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation ***1196 **190** which would not have been incurred but for the requirements of this chapter.

28 U.S.C. § 593(f)(1) (emphasis added).

[1] We have recently outlined the standards for awarding attorneys' fees in independent counsel investigations. These standards require proof that the fees are "reasonable," adequately documented, and would not have been incurred "but for" the Act. See *In re Donovan*, 877 F.2d 982, 994 (D.C.Cir.1989); *In re Olson*, 884 F.2d 1415, 1428 (D.C.Cir.1989); *In re Sealed Case*, 890 F.2d 451

(D.C.Cir.1989); *In re Olson/Perry*, 892 F.2d 1073 (D.C.Cir.1990). Satisfying the "but for" requirement is the most difficult. The right to recover attorneys' fees in such cases against the Government is based on a waiver of the sovereign immunity of the United States and that standard must be strictly construed against the application and in favor of the sovereign. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S.Ct. 3274, 3277, 77 L.Ed.2d 938 (1983); *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 26 (1951); *In re Donovan*, supra, at 994; *In re Olson*, supra, at 1428; *In re Jordan*, 745 F.2d 1574, 1576 (D.C.Cir.1984).

A. The "But For" Requirement

The Ethics in Government Act of 1978 [FN7] was amended by the 1982 Act to provide that subjects of independent counsel investigations, who are not indicted, may be reimbursed for all or part of their attorneys' fees that "would not have been incurred in the absence of the special prosecutor [now independent counsel] law." S.Rep. No. 496, 97th Cong., 2d Sess. 18 (1982), U.S.Code Cong. & Admin.News 1982, pp. 3537, 3554; 28 U.S.C. § 593(g) (1982). This provision for reimbursement was included because:

FN7. The present Independent Counsel Act has gone through two amendatory enactments: (1) Ethics in Government Act of 1978, Pub.L. No. 95-521, 92 Stat. 1867 (1978), amended by (2) Ethics in Government Act Amendments of 1982, Pub.L. No. 97-409, 96 Stat. 2039 (approved Jan. 3, 1983); and (3) then amended by the Independent Counsel Reauthorization Act of 1987 (effective Dec. 15, 1987), 101 Stat. 1293.

Congress learned that certain government officials ... had been subjected to investigations by independent counsels that the Department of Justice would not have conducted had these officials been private citizens.... Thus, these officials were subjected to a harsher standard than ordinary citizens and incurred legal expenses no ordinary citizen would have incurred, but for the independent counsel statute. In such cases, reasonable attorney fees should be awarded.

H.R.Conf.Rep. No. 452, 100th Cong., 1st Sess. 31 (1987), U.S.Code Cong. & Admin.News 1987, pp. 2150, 2197 (emphasis added).

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In addition to adding the provision for the reimbursement of attorneys' fees, Congress in the same Act raised the standards required for applications by the Attorney General to the Special Division for the appointment of independent counsels.

Prior to the 1982 Act, following a preliminary investigation, the Attorney General was required to request the appointment of an independent counsel unless the allegations were "so unsubstantiated that no further investigation or prosecution is warranted." 28 U.S.C. § 592(b)(1) (Supp. II 1978). The amendments brought by the 1982 Act, however, raised that standard to provide:

If the Attorney General, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, ... then the Attorney General shall apply to the division of the court for the appointment of a [sic] independent counsel.... 28 U.S.C. § 592(c)(1) (1982) (emphasis added). [FN8] Requiring a finding of reasonable grounds substantially changed the nature and amount of evidence required to support a request for the appointment of an independent counsel.

FN8. This standard was further amended in 1987 to eliminate "or prosecution." See 28 U.S.C. § 592(c)(1)(A) and 28 U.S.C. § 593(c)(2)(B) and (C) (1988) (101 Stat. 1293, 1296, 1299).

In adding such change, Congress further directed the Attorney General to exercise *1197 **191 the "reasonable discretion [that] is regularly practiced by the Department of Justice, U.S. Attorneys, and prosecutors throughout the federal system," and to "comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws." S.Rep. No. 496, supra, at 14, 15, U.S.Code Cong. & Admin.News 1982, pp. 3550, 3551; see also 28 U.S.C. § 592(c)(1) (1982).

This brought into play the policies of the Department of Justice, insofar as they relate to "further investigation[s]," including the following:

1. If the attorney for the government has probable cause to believe that a person has committed a federal offense within his jurisdiction, he should consider whether to:

(a) request or conduct further investigation; ...

DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, p. 5 (1980) (emphasis added).

Joining the "reasonable grounds" standard of the 1982 Act, with the Departmental policy of "probable cause" as the standard that must be satisfied before considering whether to "request or conduct [a] further [criminal] investigation," according to the latest interpretation of probable cause by the Supreme Court, requires a determination that "reasonable grounds" exist to believe that there is a "fair probability ... or substantial chance of criminal activity...." Illinois v. Gates, 462 U.S. 213, 238, 244 n. 13, 103 S.Ct. 2317, 2332, 2335 n. 13, 76 L.Ed.2d 527 (1983) (emphasis added). The "reasonable grounds" need not be as strong as the showing required to support an arrest or search, but traditionally cannot be based on mere association, casual rumor, speculation or mere suspicion. It appears to the court that, taking all the applicable requirements into consideration, before an independent counsel investigation could be initiated, Congress was requiring a showing that there was a fair probability or substantial chance that the subject engaged in some criminal activity.

The Meese fee application in substance contends that the "but for" requirement is satisfied because the referral of his investigation to the Independent Counsel, in asserted compliance with 28 U.S.C. § 592(e) and § 594(e) (1982), did not fully comply with the statutory standards that Congress had prescribed. The authorization of the investigation did not follow the normal procedure; it did not originally begin following an application to, and order by the Special Division of the court. And there is nothing in the court record to indicate that the normal preliminary investigation had been completed from which it was concluded that there were "reasonable grounds to believe that further investigation or prosecution is warranted." 28 U.S.C. § 592(c)(1) (1982).

[2] Rather, the addition of Edwin Meese III as a new targeted subject of an existing independent counsel investigation began as a result of a referral by letter to Independent Counsel McKay who was already investigating Nofziger's role in Wedtech. That investigative jurisdiction over an additional targeted individual subject was being requested and obtained by referral, however, did not eliminate the

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necessity for compliance with the requirement of § 592(c)(1) that there be a preliminary investigation and finding of reasonable grounds to believe that further investigation or prosecution of the targeted official, as a subject of the investigation, was warranted. Otherwise, once an independent counsel was appointed to investigate one official, additional officials could be targeted as subjects by a mere letter of referral without a finding of the basic "reasonable grounds" protections the statute affords. As we interpret the statute, there must be a determination by the Attorney General that the "reasonable grounds" requirement is satisfied before a valid investigation of an added official can be referred to an existing independent counsel.

1. The Referral

[3] As indicated above, the independent counsel investigation of Mr. Meese began when the Attorney General (Acting), following the receipt on May 11, 1987 of a letter from Meese's counsel requesting *1198 **192 such investigation, immediately, by letter, referred the Meese matter to Independent Counsel McKay who had previously been appointed with investigative and prosecutorial jurisdiction over Franklyn C. Nofziger and his lobbying relationship to Welbilt Electronic Die Corporation (Wedtech) and Comet Rice, Inc. [FN9] Under the 1982 Act, given the proper findings, referral could be a proper procedure; [FN10] it was granted the same day as the Meese request and without any finding in the record of "reasonable grounds."

FN9. See Order, In re Nofziger, Div. No. 87-1, at 2 (Feb. 2, 1987).

FN10. § 592(e) The Attorney General may ask a [sic] independent counsel to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction. § 594(e) ... [A] [sic] independent counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

The letter of referral was limited to a request to Independent Counsel to investigate Meese's conduct

involving Wedtech and his association with individuals involved in Wedtech:

I hereby request that you accept referral of the question whether the federal conflict of interest law, 18 U.S.Code §§ 201-211, or any other provision of federal criminal law, was violated by Mr. Meese's relationship or dealings at any time from 1981 to the present with any of the following: Welbilt Electronic Die Corporation/Wedtech Corporation (including any of its contracts with the U.S. Government or efforts to obtain same); Franklyn C. Nofziger; E. Robert Wallach; W. Franklyn Chinn; and/or Financial Management International, Inc.

Referral letter of May 11, 1987 of Attorney General (Acting) to Independent Counsel McKay at 3:

2. Grounds Urged Upon Independent Counsel to Accept Referral

At this point we note two significant extracts from the letter of referral of May 11, 1987 urging Independent Counsel to accept the referral, and upon which the Independent Counsel immediately accepted the Meese matter for investigation:

In fairness to Mr. Meese, I should state that the reports we have received concerning Mr. Meese's relationships with Wedtech-associated individuals and entities are only fragmentary, and do not show that Mr. Meese ever received any compensation from Welbilt/Wedtech, nor that he ever invested in the securities of Welbilt/Wedtech. While I believe the Public Integrity Section is in possession of all relevant information developed to date by the U.S. Attorneys' offices in New York and Baltimore and by your office, it may well be that further investigation will be able to resolve definitively the questions raised by Mr. Meese's relationship to the Welbilt/Wedtech contract and to associates of the Welbilt/Wedtech Company.

* * * * *

Finally, while as indicated above the information concerning Mr. Meese himself is fragmentary and preliminary, the present situation is somewhat unusual in that the various investigations have developed substantial evidence of Wedtech-related criminal conduct on the part of individuals other than Mr. Meese.

Letter of May 11, 1987, pp. 2, 3 (emphasis added).

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The above extracts from the letter of referral, the remainder of the letter, and Independent Counsel's notification to the Special Division, indicate that referral of the investigative cause and the acceptance by Independent Counsel was made on the basis of "fragmentary" and "preliminary" information that lacked "specificity" from the beginning. See 28 U.S.C. § 592(a)(1) (1982). This information, despite the substantial amount of evidence that had been accumulated from official investigations by two grand juries in New York and Baltimore, the independent counsel investigation of Nofziger/Wedtech, the *1199 **193 investigation by the Public Integrity Section of the Department of Justice, and undoubtedly some FBI investigation, included:

[no] show[ing] that Mr. Meese ever received any compensation from Welbilt/Wedtech, [or Wedtech associated individuals,] nor that he ever invested in the securities of Welbilt/Wedtech.... [And the letter stated] the present situation [was considered to be] somewhat unusual in that the various investigations have developed substantial evidence of Wedtech-related criminal conduct on the part of individuals other than Mr. Meese.

Referral Letter of May 11, 1987, *supra*, pp. 1195 (emphasis added). It rather appears that it is the characterization of the failures of numerous official investigations to discover any evidence of "criminal conduct" by Mr. Meese as "unusual" that is "unusual." [FN11]

FN11. It thus comes as no surprise that the extensive investigation by Independent Counsel exonerated Mr. Meese on all Wedtech related allegations.

Nevertheless, despite the deficiency of inculpatory information, Independent Counsel was urged to accept the referral: (1) because the Independent Counsel was already investigating certain Wedtech related matters; (2) because the Department did not wish to "interfere with or otherwise burden" the Nofziger investigation; (3) because the Department of Justice considered that "public confidence in the administration of justice [would] be better served if these matters are resolved by an investigation conducted independently of the Department of Justice, which is headed by Mr. Meese;" (4) because the Department considered "that the most appropriate course [was] for ... [Independent Counsel McKay] to accept referral of this matter...."

(5) because of Meese's prior association and relationship with two individuals being investigated in the Wedtech phase of the matter; (6) because two grand juries were conducting on-going related investigations of some of Meese's associates; (7) because conducting an independent investigation and thereby foregoing a duplicative investigation would serve the interests of the public and the convenience of the Department of Justice; and (8) because of the hope that additional investigation would definitively resolve unspecified circumstantial questions raised by Meese's relationship to Nofziger and his personal and business association with two individuals whose Wedtech related activities were being investigated. *Id.*

The Department of Justice also contends that the investigation was properly referred to Independent Counsel because:

Mr. Meese specifically requested that the matter be referred to Independent Counsel McKay pursuant to § 592(e).

Department of Justice Evaluation Memorandum of Meese's Request for Attorneys' Fees at 7 (April 20, 1988) (emphasis added). However, Congress in its legislative history states definitively:

[T]he desires of the possible subject of the investigation are irrelevant to the decisionmaking process [as to whether an independent counsel should be requested].

S.Rep. No. 123, 100th Cong., 1st Sess. 21 (1987), U.S.Code Cong. & Admin.News 1987, p. 2170 (emphasis added); see text at p. 1201, *infra*.

The reasons referred to above are insufficient to constitute the "reasonable grounds" the statute requires to justify the application for further investigation by an independent counsel, and there is no finding in the letter of referral, or in the court's record of this case, that such standard was satisfied. "Specificity of information" is an initial requirement for the preliminary investigation, 28 U.S.C. § 592(a)(1), and there is no justification for dropping that requirement from the "reasonable grounds" standard. If stronger cause existed it was not stated.

In addition, when the Department contends that the Meese request for appointment of independent counsel should be relied upon as one factor justifying the referral, it appears that too much reliance may have been placed on the Meese request. See text, *infra*, at p. 1201. Such reliance *1200

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****194** as a normal reaction is understandable, but irrelevant. Also, particularly objectionable is the reliance on Meese's association with some individuals who were being investigated. When suspicion is bred from association it is a doubly deficient ground.

Taken by its four corners, the letter of referral seems to admit that, although there have been several official investigations into Wedtech, actual criminal conduct by Meese is not being suggested, but that Independent Counsel should accept the broad referral and investigate Meese as a subject because of a concatenation of irrelevant facts and circumstances that at best add up to relying on: generalized suspicion based on associations of a personal and personal business nature, Meese's request for the investigation, the "unusual" nature of the investigative situation, that reasonable grounds had already been found for investigating Nofziger and they did not want to interfere with that investigation, and that the public interest and the convenience of the Department of Justice would be served by McKay's acceptance of the referral.

The court agrees with the Department that the public interest and "public confidence in the administration of justice [was] better served" by the referral of the matter to the Independent Counsel, but this and the several other ordinarily commendable reasons referred to above, that normally might justify a non-criminal administrative investigation, do not constitute the "reasonable grounds" that the Congress required before a high ranking government official could be subjected to an extraordinary criminal investigation by an independent counsel. To do so, as was the case here, violated the intent that Congress expressed in enacting the "reasonable grounds" (probable cause) standard to better protect those covered officials from the severe intrusion of an extensive criminal investigation by an independent counsel. S.Rep. No. 496, supra, at 19; see also 28 U.S.C. § 592(c)(1) (1982).

3. The Acceptance of the Referral and the Resulting Investigation

[4] Independent Counsel McKay immediately accepted the referral and in accordance with § 594(e) did "notify" the Special Division on May 11, 1987 as follows:

Independent Counsel has accepted the referral as a matter related to the jurisdiction mandated by the February 2, 1987 Order of the Special Division of the United States Court of Appeals for the District of Columbia Circuit, In re Franklyn C. Nofziger. Notice by Independent Counsel of Acceptance of Referral, In re Nofziger, Div. No. 87-1 (May 11, 1987). Upon receipt of McKay's notice, the Special Division immediately granted Independent Counsel leave to disclose his Acceptance of the Referral. [FN12] Thus, an extensive independent counsel investigation of Meese/Wedtech was publicly launched on the basis of the letter of referral to an existing Independent Counsel.

FN12. Order, In re Nofziger, Div. No. 87-1 (May 11, 1987).

It was not until three months later on August 6, 1987 that Independent Counsel McKay applied to the Special Division to define his necessary additional prosecutorial jurisdiction. Application to Define the Jurisdiction of the Independent Counsel, In re Nofziger/Meese, Div. No. 87-1 (Aug. 6, 1987). That complete authority to investigate and prosecute Meese was not acquired by virtue of the referral of the matter for investigation to Independent Counsel McKay was recognized in his delayed application to the Special Division for prosecutorial jurisdiction, which, after describing the referral, stated:

It does not appear [under the Act], however, that the Acting Attorney General has the power to define the prosecutorial jurisdiction of an independent counsel, See 28 U.S.C. § 593(c) [FN13] That power *1201 **195 is vested only in this court, which has not formalized a definition of Independent Counsel McKay's prosecutorial jurisdiction in the Meese matter.

FN13. 28 U.S.C. § 593(c) provides that the Special Division, upon application of the Attorney General, may expand the prosecutorial jurisdiction of an existing independent counsel: The division of the court, upon the request of the Attorney General ... may expand the prosecutorial jurisdiction of an existing independent counsel, and such expansion may be in lieu of the appointment of additional independent counsel. 28 U.S.C. § 593(c) (1982). But prior to August 6, 1987 no application was made to the court by the Attorney General (Acting).

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Application to Define Jurisdiction of Independent Counsel, In re Nofziger/Meese, Div. No. 87-1 (Aug. 6, 1987). In response to the application by the Independent Counsel, the Special Division issued an order expanding his prosecutorial jurisdiction to include Mr. Meese as a subject of investigation. [FN14]

FN14. See Order, In re Nofziger/Meese, Div. No. 87-1 (Aug. 18, 1987).

The investigation continued for 14 months and was broadened far beyond any investigation contemplated by the initial referral. [FN15] Following completion of the Wedtech investigation six additional matters were thoroughly investigated. [FN16] The Final Report of Independent Counsel covered 814 pages. It thus clearly appears that the basis upon which the referral was made and the extreme expansion of the resulting investigation subjected Meese to a "more rigorous application of the criminal law than is applied to other citizens." S.Rep. No. 496, supra, at 19, U.S.Code Cong. & Admin.News 1982, p. 3555, and see supra n. 4.

FN15. See supra note 4.

FN16. Extraordinary thoroughness of investigation is to be expected in some independent counsel investigations because of the "institution of the independent counsel," and the extensive nature of the investigation and report required by Congress. Morrison v. Olson, 487 U.S. 654, 713-14, 108 S.Ct. 2597, 2630-31, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting).

For all of the above reasons, the court finds that the reasonable attorneys' fees Meese subsequently incurred in his defense, to the extent we find their payment to be authorized, "would not have been incurred but for the requirements of [the Independent Counsel] chapter." 28 U.S.C. § 593(f)(1) (1988).

B. The Meese Request for an Independent Counsel Investigation

[5] As previously stated, on May 11, 1987 Meese formally requested the Acting Attorney General to refer the matter of his alleged involvement in Welbilt/Wedtech to Independent Counsel McKay.

The fact that Meese initially requested appointment of an independent counsel has no bearing on Meese's right to be awarded his reasonable attorneys' fees. The legislative history of the Act clearly states that such request is "irrelevant" to the court's decision to award attorneys' fees incurred by the subject in the resulting investigation:

It has sometimes been suggested that, when considering whether to award attorney fees under the statute, the special court should take into consideration whether the subject of the investigation requested an independent counsel. This factor should not play any role in the decision to award attorney fees. The statute specifies that the Attorney General must request an independent counsel whenever there are reasonable grounds to believe further investigation is warranted in a case; the desires of the possible subject of the investigation are irrelevant to the decisionmaking process.

S.Rep. No. 123, 100th Cong., 1st Sess. 21 (1987), U.S.Code Cong. & Admin.News 1987, p. 2170 (emphasis added).

C. Compliance with the Reasonable Fee Requirement

Having found that Meese satisfies the "but for" requirement, it must next be determined whether the attorneys charged a reasonable hourly rate, whether the time expended by the attorneys on the case was reasonable, and whether the foregoing requirements are adequately documented. In re Donovan, 877 F.2d at 990, 994; In re Olson, 884 F.2d at 1422, 1428.

1. Hourly Rates

[6] The Conference Committee Report accompanying the Act provides the following *1202 **196 standard for use in determining the reasonableness of the hourly rates charged by attorneys:

[T]he hourly rate is left to the judgment of the special court using the standard of reasonableness. In determining the proper rate, the special court should consider the prevailing community standards and any helpful case law.

H.R.Conf.Rep. No. 452, 100th Cong., 1st Sess. 31 (1987), U.S.Code Cong. & Admin.News 1987, p. 2197 (emphasis added). Reasonable fees are

(Cite as: 907 F.2d 1192, *1202, 285 U.S.App.D.C. 186, **196)

"calculated according to the prevailing market rates in the relevant community" and the applicant must "produce satisfactory evidence--in addition to the attorney's own affidavit--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." In re Donovan, supra, at 992 & n. 19 (quoting Blum v. Stenson, 465 U.S. 886, 895, 896 n. 11, 104 S.Ct. 1541, 1547, 1547 n. 11, 79 L.Ed.2d 891 (1984)); see also In re Olson, supra, at 1423.

[7] Applying these standards to the Meese application, we find the rates charged by Meese's attorneys conform to local standards and hence must be held to be reasonable. Meese was represented throughout the investigation by the Washington, D.C. firm of Miller, Cassidy, Larroca & Lewin. His principal attorneys and their corresponding hourly rates were: Nathan Lewin--\$300/hr.; James Rocap III--\$140/hr.; and Nicki Kuckes--\$100/hr. In support of these rates, the application includes a supporting affidavit dated February 1, 1989 of a qualified attorney stating that the rates are reasonable and consistent with the rates usually charged by attorneys of comparable ability in Washington, D.C. A recent survey of billing rates for partners and associates at the nation's largest firms was also filed. The affidavit and survey discharge Meese's burden of demonstrating through independent evidence that the Miller, Cassidy rates are in line with community standards. [FN17]

FN17. In approving a rate of \$300 per hour the court has some reservations. But given the Supreme Court's opinion in Blum v. Stenson, 465 U.S. 886, 892-896, 104 S.Ct. 1541, 1545-47, 79 L.Ed.2d 891 (1984) and Missouri v. Jenkins, supra, upholding "market rates," and Meese's documentary support for his request, the court has no option. The attorney's extraordinary qualifications and supporting documentation support a finding that the rate is in line with community standards.

[8] We also find the rates billed for the services of several paralegals and law clerks to be reasonable. Such rates ranged from \$45 to \$75 per hour. However, in light of the Supreme Court's recent decision in Missouri v. Jenkins, --- U.S. ---, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), which we have previously applied to the Act, In re Sealed

Case, 890 F.2d 451, 454 (D.C.Cir.1989) we deduct \$4253.75 for services billed at these rates that were of a purely clerical nature. In Missouri, the Court held, inter alia, that "reasonable attorney's fee," under the Civil Rights Attorneys' Fees Awards Act, included work performed by paralegals and law clerks. Missouri, 109 S.Ct. at 2470. However, the court stated:

It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks ... that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence.... Of course purely clerical or secretarial tasks should not be billed at a paralegal rate regardless of who performs them. What the court in Johnson v. Georgia Highway Express Inc., 488 F.2d 714, 717 (CA5 1974) said in regard to the work of attorneys is applicable by analogy to paralegals: "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work ... and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal *1203 **197 work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."

Id. 110 S.Ct. at 2471 n. 10 (emphasis added). The court therefore deducts those charges by both paralegals and law clerks for such tasks as "delivering" or "picking up" various documents as well as photocopying. In our view, such tasks are "purely clerical or secretarial" and thus cannot be billed at paralegal or law clerk rates. [FN18]

FN18. The charges for these tasks have not been eliminated entirely. Rather, the rate has been reduced to \$10 per hour which we find to be reasonable for such services.

2. Reasonable Amount of Time Expended by Attorneys

In evaluating the reasonableness of the hours billed by Meese's attorneys, we are required to examine the application in light of the specific provisions of the Act as well as general case law on what constitutes hours reasonably incurred. In re

Donovan, *supra*, at 993; *In re Olson*, *supra*, at 1427-28.

[9] The Act provides only for the reimbursement of those attorneys' fees incurred "during [the] investigation." 28 U.S.C. 593(f)(1) (emphasis added). This provision permits recovery only for those fees "rendered in asserting the merits of the subject's defense against the criminal charges being investigated." *In re Olson*, *supra*, at 1427; see also, *In re Donovan*, *supra*, at 993; *In re Olson/Perry*, 892 F.2d 1073, 1074 (D.C.Cir.1990). Therefore, as with prior fee applications, we disallow \$7,585 in fees claimed for the preparation of the fee application. Such fees were not for services rendered in asserting the merits of Meese's defense to the investigation. *In re Olson*, *supra*, at 1427-28; *In re Olson/Perry*, *supra*, at 1074.

[10] Similarly excluded is \$5,170 in fees incurred preparing Meese for his testimony in the trial of Nofziger and his testimony before a congressional subcommittee. Such fees were not incurred in Meese's defense to the investigation by Independent Counsel McKay as both proceedings were separate and distinct from the independent counsel investigation.

[11][12] Also excluded is \$16,652 in fees incurred for responding to media inquiries. [FN19] As stated in *In re Donovan*, "[m]edia related activity has no bearing on the operation of an independent counsel's investigation and thus is not reasonably related to a defense to such investigation." *Id.* at 994.

FN19. While fees incurred responding to media inquiries have been excluded, no deduction is made for fees incurred by Meese's attorneys reviewing press clippings concerning the investigation. We believe that such activity in this case, because of the heavy media involvement, provided useful and important information that assisted counsel in their representation of the subject and is therefore "reasonably related to a defense to [this] investigation."

[13] Additionally, we shall exclude \$220 in fees for the letter written on May 11, 1987 by Meese's attorneys to the Acting Attorney General, requesting referral of the Meese matter to Independent Counsel McKay. Such fees were not incurred during the investigation nor were they incurred in Meese's

defense.

[14] We also deduct \$6335 for fees incurred by Meese after the filing of his response to the Independent Counsel Report on July 14, 1988. Upon the filing of the Final Report by the Independent Counsel, the investigation terminates and only those fees incurred responding to the Final Report are thereafter compensable under the Act. See *In re Donovan*, *supra*, at 994.

3. Adequacy of Documentation

[15][16] Turning to an examination of the fee application in light of general case law concerning hours reasonably incurred, the Act requires fee requests to include "contemporaneous time records of hours worked and rates claimed, plus a detailed description of the subject matter of the work with supporting documents, if any." *In re Donovan*, *supra*, at 994 (emphasis added). Where there is inadequate documentation for the work performed during *1204 **198 the time billed the award must be reduced accordingly. *Id.* Additionally, hours must be "exclude[d] from a fee request ... that are excessive, redundant or otherwise unnecessary." *In re Olson*, *supra*, at 1428 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433-34, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983)). Adequate documentation is necessary for the court to satisfy its review requirement.

[17] Our review of Meese's application reveals several expenses we find to be excessive or unnecessary. We disallow entirely expenses for "business meals" (\$457.61), "support staff overtime" (\$11,311.25), "service fee (rental fee--National Press Club)" (\$345.60), and "supplies" (\$884.05). See *In re Olson*, *supra*, at 1429. The court also finds the \$28,523.73 in photocopying expenses to be excessive because of the absence of any supporting documentation. This amount is reduced by \$10,000. Also, for lack of documentation, we exclude the \$707 claimed as a travel expense.

[18] Finally, we find numerous instances where the billing entries are not adequately documented. The time records maintained by the attorneys, paralegals and law clerks are replete with instances where no mention is made of the subject matter of a meeting, telephone conference or the work

performed during hours billed. As such it is "impossible for the court to verify [as the statute requires] the reasonableness of the billings, either as to the necessity of the particular service or the [total] amount of time expended on a given task." In re Sealed Case, supra, at 455. Therefore, for numerous inadequately documented billings, we will reduce the award by ten percent of the billings that remain after the other deductions described above.

CONCLUSION

In sum, in accordance with the above analysis it is concluded that the award shall reflect the following:

1. Disallow expenses for "business meals," "support staff overtime," "service fee (rental fee--National Press Club)" and "supplies."

2. Disallow fees for preparing fee application.

3. Disallow expense for "Travel."

4. Reduce photocopying expenses by \$10,000.00.

5. Disallow fees incurred after the filing of the Independent Counsel Report, except fees for filing response.

6. Disallow fees incurred preparing Meese for his testimony in United States v. Nofziger and before congressional subcommittee.

7. Disallow fees incurred prior to the appointment of Independent Counsel.

8. Disallow fees for media related activity.

9. Reduce fees for clerical or secretarial work performed by paralegals and law clerks.

10. After all specific deductions are made, the remaining fees will be reduced ten percent for insufficient documentation of services rendered by attorneys, paralegals and law clerks.

For the foregoing reasons, it is Ordered that petitioner be awarded \$460,509.07 in reasonable attorneys' fees and expenses. The computation is set forth in the Appendix.

Judgment accordingly.

APPENDIX
Deductions By Subject Matter

1.	Business Meals						\$457.61	
2.	Service Fee (rental fee Nat'l Press Club)						\$345.60	
3.	Support Staff Overtime						\$11,311.-	
							25	
4.	Supplies						\$884.05	
5.	Services Rendered in Preparation of Fee Application						\$7,585.00	
6.	Travel						\$707.00	
7.	Excessive Photocopying						\$10,000.-	
							00	
8.	Fees incurred after filing of response to Independent Counsel Report:							
	Nathan	9.25	hrs.x	\$300/hr.	=		\$2,775	
	Lewin:							
	James Rocap:	16.50	hrs.x	\$140/hr.	=		\$2,310	
	Nicki	10.50	hrs.x	\$100/hr.	=		\$1,050	
	Kuckes:							
	Paralegal:	4.0	hrs.x	\$50/hr.	=		\$ 200	

							\$6,335	\$6,335.00
9.	Fees incurred preparing Meese for testimony in U.S. v. Nofziger and before congressional subcommittee:							
	Nathan	6.50	hrs.x	\$300/hr.	=		\$1,950	
	Lewin:							
	James Rocap:	23.0	hrs.x	\$140/hr.	=		\$3,220	

							\$5,170	\$5,170.00
10.	Fees incurred prior to appointment of Independent Counsel:							
	Nathan	.5 hrs.	x	\$300/hr.	=		\$150.00	
	Lewin:							
	James Rocap:	.5 hrs.	x	\$140/hr.	=		\$70.00	

							\$220.00	\$220.00
11.	Media Related Activity:							
	Nathan	28.25	hrs.x	\$300/hr.	=		\$8,475	
	Lewin:							
	James Rocap:	50.8	hrs.x	\$140/hr.	=		\$7,112	
	Nicki	9.75	hrs.x	\$100/hr.	=		\$975	
	Kuckes:							
	Pete Evans:	1.5	hrs.x	\$60/hr.	=		\$90	

							\$16,652	\$16,652.-
							00	
12.	Clerical or secretarial work performed by paralegals and law clerks						\$4,253.75	

							Items 1-12, Total--	\$63,921.26
13.	Ten percent deduction for inadequate documentation and services rendered						\$51,167.-	
							68	

							TOTAL DEDUCTION--	\$115,088.94

(Cite as: 907 F.2d 1192, *1204, 285 U.S.App.D.C. 186, **198)

AMOUNT REQUESTED	\$575,598.-
	01
AMOUNT DEDUCTED: (items 1-12):	\$63,921.26
SUBTOTAL:	\$511,676.-
	75
AMOUNT DEDUCTED (item 13):	\$51,167.68
TOTAL AWARD:	\$460,509.-
	07

END OF DOCUMENT

In re Theodore OLSON.

Division No. 86-1.

United States Court of Appeals,
District of Columbia Circuit.

Division for the Purpose of Appointing Independent
Counsels.
Ethics in Government Act of 1978, as Amended.

April 2, 1987.

As Amended May 1 and May 27, 1987.

Independent Counsel, who had been appointed to investigate alleged wrongdoing in Justice Department, applied for referral of certain matters related to her investigative jurisdiction. The Court of Appeals held that: (1) statute, providing that Independent Counsel could ask Attorney General or division of court to refer matters related to independent counsel's prosecutorial jurisdiction, did not authorize division to refer allegations of wrongdoing which Attorney General had previously determined should not be pursued; but (2) order appointing Independent Counsel, which authorized her to investigate any allegation or evidence of wrongdoing by particular individual in Department, implicitly authorized her to investigate whether this individual had conspired with, or been aided or abetted by, other persons, including persons Attorney General had previously determined should not be investigated in their own right.

Matters referred.

[1] ATTORNEY GENERAL ⇌ 6
46k6

Ninety-day period within which Justice Department had to complete its preliminary investigation of alleged wrongdoing within Department did not begin to run, for purpose of deciding whether Department's preliminary report was timely filed or whether all of allegations in House Committee report should have been automatically referred to Independent Counsel for investigation, until Department had been given "reasonable time" within which to evaluate House Committee's 3,000 page report on wrongdoing. 28 U.S.C.A. § 592(c)(1).

[2] ATTORNEY GENERAL ⇌ 6
46k6

Thirty days was not unreasonable period of time for Justice Department to evaluate 3,000 page report being prepared by judiciary committee of House of Representatives, to determine whether there was sufficient evidence of wrongdoing by Department officials to warrant even preliminary investigation; accordingly, this 30-day period was properly excluded from 90-day period during which Department had to complete its preliminary investigation or turn investigation over to Independent Counsel. 28 U.S.C.A. § 592(c)(1).

[3] CONSTITUTIONAL LAW ⇌ 74
92k74

Statute authorizing court to appoint an Independent Counsel to prosecute violations of criminal law involving high government officials was fully consistent with separation of powers doctrine. U.S.C.A. Const. Art. 2, § 2,

cl. 2; 28 U.S.C.A. § 591 et seq.

[3] CRIMINAL LAW ⇌ 639.2
110k639.2
Formerly 110k639(2)

Statute authorizing court to appoint an Independent Counsel to prosecute violations of criminal law involving high government officials was fully consistent with separation of powers doctrine. U.S.C.A. Const. Art. 2, § 2, cl. 2; 28 U.S.C.A. § 591 et seq.

[4] CONSTITUTIONAL LAW ⇌ 50
92k50

Responsibility imposed on Congress by Article II empowers it to enact laws to guard against evils of massive conflicts of interest involved in enforcement of federal criminal law against highest officials of government and to vest in courts the appointment of inferior officers to carry out this responsibility. U.S.C.A. Const. Art. 2, § 2, cl. 2; 28 U.S.C.A. § 591 et seq.

[5] CONSTITUTIONAL LAW ⇌ 58
92k58

Section of Constitution, requiring that president "take care that the laws be faithfully executed," does not require that president or his delegate execute laws, so that Congress may entrust power of execution to some other officer, as long as president or his delegate has right to remove officer for impropriety. U.S.C.A. Const. Art. 2, § 3.

[6] UNITED STATES ⇔ 40

393k40

Statute, providing that Independent Counsel may ask Attorney General or division of court to refer matters related to Independent Counsel's prosecutorial jurisdiction, did not give division authority to refer to Independent Counsel allegations of wrongdoing which Attorney General had specifically determined should not be pursued. 28 U.S.C.A. §§ 592(b)(1), 594(e).

[7] UNITED STATES ⇔ 40

393k40

Order appointing Independent Counsel to investigate alleged wrongdoing in Justice Department, which authorized her to investigate any allegation or evidence of wrongdoing by particular individual in Department, implicitly authorized her to investigate whether this individual had conspired with, or been aided or abetted by, any other person, including persons whom Attorney General had previously determined should not be investigated in their own right. 28 U.S.C.A. §§ 592(b)(1), 594(e).

[8] CRIMINAL LAW ⇔ 1224(1)

110k1224(1)

Members of Justice Department, who challenged authority or propriety of Independent Counsel's investigation into alleged illegal activity in Department, could do so only after indictment, if any, was returned by grand jury. 28 U.S.C.A. §§ 592(b)(1), 594(e).

***35 **169** Before MacKINNON, Presiding, MORGAN and PELL, Senior Circuit judges.

PER CURIAM.

Pursuant to 28 U.S.C. § 594(e), the Independent Counsel has applied for referral of certain matters related to the investigative jurisdiction granted previously in our Orders dated April 23, 1986, and May 29, 1986. Specifically, the Independent Counsel in her Application for Referral of Related Matters ("Independent Counsel Application") seeks investigative and prosecutorial jurisdiction over "certain allegations against two former Department of Justice ("Department") officials, Edward C. Schmults ("Schmults") and Carol E. Dinkins ("Dinkins"), in a report of the Judiciary Committee of the House of Representatives ("Committee") entitled Report on the Investigation of the Role of

the Department of Justice in the Withholding of Environmental Protection Agency Documents in 1982-83 ("Committee Report")." Independent Counsel Application at 1-2. The Department of Justice has responded to the Independent Counsel's application for referral of related matters, urging that 28 U.S.C. § 592(b)(1) precludes the Division from granting the request of Independent Counsel. ("Department of Justice Response"). The Independent Counsel has in turn replied to the objections of the Department of Justice. ("Independent Counsel Reply"). We agree generally with the Department of Justice that the applicable statute requires us to deny the Application because the Attorney General has twice denied such request.

I
Background

The House of Representatives in the 97th Congress conducted two separate investigations [FN1] into the administration by the Environmental Protection Agency of the Hazardous Substance Response Fund ("Superfund"). In the course of those investigations the Committees requested and subpoenaed a number of documents. Acting on advice from the Department of Justice, the EPA promptly acceded to some of these requests, but the EPA initially opposed other requests, asserting claims of executive privilege and that the documents were "enforcement sensitive" or "deliberative." However, it was eventually agreed that the Committees would have access to the requested documents except "enforcement sensitive" documents, the release of which it was felt could hamper law enforcement efforts. It was also agreed that the Department would not shield documents containing evidence of criminal or unethical conduct by agency officials.

FN1. One investigation was by the Subcommittee on Investigations and Oversight (the Levitas Subcommittee) of the Committee on Public Works and Transportation, and the other investigation was by the Subcommittee on Investigations and Oversight (the Dingell Subcommittee) of the Committee on Energy and Commerce.

In the next Congress, the House Judiciary Committee decided to investigate the ***36 **170** conduct, during the prior investigation, of certain individuals in the Justice Department. As a

(Cite as: 818 F.2d 34, *36, 260 U.S.App.D.C. 168, **170)

consequence, the Committee initiated an investigation and compiled a report in excess of 3,000 pages, entitled Report on the Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Investigative Documents from Congress 1982-83.

Upon completion of this follow-up investigation, the House Judiciary Committee directed its Chairman to transmit the Committee Report to the Attorney General. In his December 12, 1985, letter transmitting the Report, the Chairman of the House Judiciary Committee requested the Attorney General to conduct an independent determination and to consider the Chairman's letter as "an official request of the Committee on the Judiciary that you apply for the appointment of an independent counsel under the provisions of 28 U.S.C. § 591, et seq." The letter from the Committee also stated that among other possible issues raised by the report, it would appear appropriate that the Executive Branch examine whether, during the Superfund Investigation in the prior Congress, there had been any violations of 18 U.S.C. §§ 1001, 1505, 1621-23, 371, "or any other provision of federal law."

After studying the Committee Report, the Attorney General determined that it contained sufficient information to warrant "preliminary investigations," within the meaning of 28 U.S.C. § 592 as to:

(A) Whether the conduct of former Assistant Attorney General Theodore Olson in giving testimony at a hearing of the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee on March 10, 1983, and later revising that testimony, regarding the completeness of the Office of Legal Counsel's response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U.S.C. § 1505, § 1001, or any other provision of federal criminal law;

(B) Whether the conduct of former Deputy Attorney General Edward Schmults, resulting in the undisclosed withholding of documents from the House Judiciary Committee from March, 1983, through April, 1984, violated 18 U.S.C. § 1505, § 1001, § 1512 or any other provision of federal criminal law;

(C)(1) Whether the conduct of former Assistant

Attorney General Carol Dinkins, resulting in the undisclosed withholding of documents from the Judiciary Committee during its investigation, violated 18 U.S.C. § 1505, § 1001, § 1512, or any other provision of federal criminal law; and (2) whether the conduct of Mrs. Dinkins in preparing and submitting a declaration in the case captioned United States v. United States House of Representatives, Civil No. 82-3583 (D.D.C.), violated 18 U.S.C. § 1503, § 1621, § 1623, § 401, § 1001, § 1512, or any other provision of federal criminal law.

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 ("Report of Attorney General") at 3-5.

Following the foregoing determination, the Attorney General directed the Public Integrity Section of the Department to conduct the preliminary investigation into the allegations contained in the Committee Report. Thereafter, the Public Integrity Section, as well as John C. Keeney, Deputy Assistant Attorney General for the Criminal Division, and William F. Weld, United States Attorney for Massachusetts, designated by the Attorney General to be his Special Assistant in the matter, made recommendations to the Attorney General as to whether any allegations in the Committee Report warranted further investigation by an independent counsel.

After considering all these recommendations, the Attorney General on April 10, 1986, requested the Division to appoint an Independent Counsel to investigate the allegation against Olson set out in section A above, "and any other matter related to that allegation." Report of Attorney General *37 **171 at 11 (emphasis added). The Attorney General also stated in his report to the Division that he had determined, pursuant to § 592(b)(1), that there were no reasonable grounds to believe that further investigation or prosecution was warranted with respect to the allegations against Schmults and Dinkins. Id. at 26 & 47-48.

Acting upon the Attorney General's report, the Division for the Purpose of Appointing Independent Counsels on April 23, 1986, filed an order appointing independent counsel and defining his jurisdiction. [FN2] In re: Theodore Olson,

(Cite as: 818 F.2d 34, *37, 260 U.S.App.D.C. 168, **171)

D.C.Cir., Division No. 86-1. In response to the request of the Attorney General, Independent Counsel was ordered

FN2. The independent counsel appointed by the Division on April 23, 1986, Mr. James C. McKay, resigned due to the possible appearance of a conflict of interest created by the activity of one of his many partners. Ms. Alexia Morrison was appointed to succeed Mr. McKay on May 29, 1986, without alteration of the Division's original jurisdictional order.

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 [FN3] or § 1001, [FN4] or any other provision of federal law.

FN3. The relevant provisions of 18 U.S.C. § 1505 provide: Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede ... the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

FN4. 18 U.S.C. § 1001 provides: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

In addition to this authority the Division further ORDERED, ... that the Independent Counsel shall have jurisdiction to investigate any other allegation of evidence or 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.

The jurisdictional order also noted that the Independent Counsel would have "all the powers and authority provided by the Ethics in Government Act of 1978, as amended, and specifically by 28 U.S.C. § 594." This section provides an independent counsel with very broad investigative and prosecutorial powers. The Independent Counsel then proceeded to conduct an investigation of Theodore Olson as authorized by her appointment.

By letter of November 14, 1986 ("Independent Counsel letter"), the Independent Counsel requested the Attorney General to refer to the Independent Counsel the allegations in the Committee Report against Schmults and Dinkins and the criminal investigation being conducted by the Department of Justice of former General Counsel to the Environmental Protection Agency, Robert M. Perry. This request was made pursuant to 28 U.S.C. § 594(e) [FN5] on the claim that under the statute, the allegations were "related matters" to the investigation of Olson that she was then conducting.

FN5. 28 U.S.C. § 594(e) provides: A[n] independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction. A[n] independent counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

After reciting the incidents of her investigation of Olson to date, the Independent *38 **172 Counsel concluded in her application to the Attorney General that:

no reasonable, fair, impartial and complete investigation can be conducted without examining the conduct of Mr. Schmults and Ms. Dinkins.

Independent Counsel letter at 3. The Independent Counsel stated that this conclusion was rooted in the following:

(1) standing in isolation, as framed by [the Attorney General's] report, Mr. Olson's testimony of March 10, 1983, probably does not constitute a prosecutable violation of any federal criminal law, based on my present understanding

of the evidence;

(2) Mr. Olson's testimony cannot properly be viewed in such isolation, because there are at a minimum "reasonable grounds to believe that further investigation ... is warranted" with respect to whether Mr. Olson's testimony was part of a larger, concerted plan, including Mr. Schmults, Ms. Dinkins, or others, to obstruct or impede the Committee's investigation into the Department's discharge of its responsibilities in the EPA documents dispute, possibly in violation of federal criminal law;

(3) wholly apart from any participation by Mr. Olson in a scheme to obstruct or impede the Committee's investigation, there are at a minimum "reasonable grounds to believe that further investigation ... is warranted" with respect to the conduct of Mr. Schmults and Ms. Dinkins, whose active and apparently admitted roles in the withholding of documents from the Committee seem to merit further scrutiny at least as much as Mr. Olson's testimony at the very threshold of the inquiry; and

(4) my inquiry has turned up new information which justifies referral to me of the allegations as to Mr. Schmults and Ms. Dinkins.

It is, therefore, necessary that I request, pursuant to 28 U.S.C. § 594(e) and for the reasons set out below, that you refer to me, as matters related to my present jurisdiction over specific aspects of Mr. Olson's March 10, 1983 testimony, the allegations made against Mr. Schmults and Ms. Dinkins in the Committee Report, as well as the investigation, which is now being conducted by Public Integrity, of possible perjury charges against Robert M. Perry, EPA's General Counsel during the interbranch controversy over the Superfund documents. I also request that you refrain from personal consideration of the requests made herein on grounds explained below.

Id. at 3-4 (emphasis added).

Deputy Attorney General Burns, in a letter dated December 17, 1986 ("Burns letter"), informed the Independent Counsel that the Attorney General had, as authorized by 28 U.S.C. § 594(e), referred to the Independent Counsel the Department's ongoing investigation of Robert M. Perry (not a person covered by the Independent Counsel provisions of the Ethics in Government Act). The Attorney General had, however, denied granting the Independent Counsel authority to investigate

Schmults or Dinkins. Deputy Attorney General Burns' letter emphasized that the Attorney General had already determined there were no reasonable grounds warranting further investigation or prosecution of the allegations against Schmults and Dinkins. In addition, the letter stated that although the Independent Counsel claimed that "newly discovered" evidence (not available to the Justice Department at the time of its April 10, 1986, report to the Division) warranted further investigation, the Attorney General either had already considered the evidence when he reported to the Division on April 10, 1986, or had considered the Independent Counsel's request for referral and determined that the evidence would not "alter [his] conclusion." Burns Letter at 3.

[1][2] The Independent Counsel thereafter applied to this Division for referral of the allegations against Schmults and Dinkins on the ground that they were "related *39 **173 matters" under 28 U.S.C. § 594(e), [FN6] and that the Division had authority to refer them for investigation.

FN6. In addition to arguing that the Attorney General's determination pursuant to § 592(b) does not limit the Division's authority under § 594(e) to refer to the Independent Counsel the allegations against Schmults and Dinkins, the Independent Counsel charges that the Attorney General's determination under 592(b) was tainted because he "applied an erroneous standard in concluding that no further scrutiny by an independent counsel of the allegations against Schmults and Dinkins was warranted" and "made his determination under the disability of at least an apparent--if not actual--conflict of interest which should have led to his recusal." Independent Counsel Application at 20. The most specific fact relied upon to support the Independent Counsel's charge is that Meese, when Counselor to the President, had expressed opposition to a Presidential pardon for former EPA Administrator Anne Gorsuch Burford. Id. at 37-38. This action, however, does not demonstrate any conflict of interest that would disqualify the Attorney General from evaluating the Schmults and Dinkins matters. The Independent Counsel also urges that the Attorney General should have automatically forwarded to the Division the allegations contained in the House Committee Report, because the Attorney General did not comply with the ninety-day limitation imposed by §

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592(c)(1). Independent Counsel Application at 3 n. 7. Section 592(c)(1) provides in part: if ninety days elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General shall apply to the division of the court for the appointment of a[n] independent counsel. The Department received the extensive Committee Report on December 12, 1985. Based on the results of the review of the Report conducted by Department attorneys, the Attorney General determined on January 10, 1986, that a preliminary investigation was warranted as to the allegations against Olson, Schmults, and Dinkins. This action was expeditious. The Attorney General's Report to the Division was filed on April 10, 1986. Section 592(a)(1) compels the conclusion that the Attorney General's Report was timely filed. Section 592(a)(1) provides in part: Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate. We agree with the Department that "some period of time is often required to ... determin[e] whether the information is sufficient to trigger even a preliminary investigation [and thus] 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." Department Response at 27 n. 14. In our opinion, thirty days is not an unreasonable period of time to properly evaluate a 3,000 page investigatory report.

II

The Independent Counsel Provisions of the Ethics in Government Act

Before addressing the Independent Counsel's request, we discuss briefly the independent counsel provisions of the Ethics in Government Act and their historical background.

A.

Historical Background of the Independent Counsel Provisions

The Ethics in Government Act of 1978, Pub.L. No. 95-521, 92 Stat. 1824, as amended Pub.L. No. 97-409, 96 Stat. 2039 (1982), provides inter alia for the appointment of an independent counsel to investigate and prosecute (1) certain designated high-ranking government officials, and (2) other persons if the Attorney General determines that their investigation by the Attorney General or other officer of the Department may result in a personal, financial, or political conflict of interest. 28 U.S.C. § 591 et seq. The statute is designed to ensure that violations of federal criminal law by high-ranking government officials (particularly those who are of the same party as the Administration in power) will be fairly and impartially investigated and prosecuted.

The need for a special counsel who is to some extent independent of the Justice Department and free of the conflicts of interest that exist when an Administration investigates the alleged wrongdoing of its own high officials has been demonstrated several times this century.

(1) Teapot Dome Scandal

During the Teapot Dome scandal of the Harding Administration, Congress found *40 **174 normal federal prosecution authority to be flawed [FN7] and deemed it necessary after investigating the leases of certain naval oil reserves to pass a special act appropriating money:

FN7. Public confidence was lacking in Attorney General Harry Daugherty. In matters unrelated to Teapot Dome, he was indicted and acquitted of conspiracy involving violations of the prohibition statutes and graft in the Veteran's Administration.

to be expended by the President for the purpose of employing the necessary attorneys and agents ... in instituting and carrying on any suits or other proceedings, either civil or criminal, which he may cause to be instituted or which may be instituted, or to take any other steps deemed necessary to be taken in relation to the cancellation of any leases on oil lands in former naval reserves, in the prosecution of any person or persons guilty of any infraction of the laws of the United States in connection with said leases or in any other measures which he may take to protect the interests of the United States and the people

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thereof in connection therewith. Any counsel employed by the President under the authority of this resolution shall be appointed by, and with the advice and consent of the Senate and shall have full power and authority to carry on said proceedings, any law to the contrary notwithstanding.

H.J.Res. 160, 43 Stat. 16 (1924) (emphasis added).

Pursuant to this statutory authority, former Senator Atlee Pomerene of Ohio was appointed by President Coolidge and on February 16, 1924, confirmed by the Senate as "Special Counsel to have charge and control of the prosecution ..." 68 Cong.Rec. 2566 (1924). Mr. Owen J. Roberts, a private attorney from Philadelphia and later an Associate Justice of the Supreme Court, was subsequently appointed by the President and confirmed by the Senate to assist Senator Pomerene in the prosecution of the "oil cases." These lawyers then conducted the "oil cases" including the criminal prosecution of the former Secretary of the Interior, Albert B. Fall. See *United States v. Fall*, 10 F.2d 648 (D.C.Cir.1925). Secretary Fall was convicted of bribery and, being a sick man, was sentenced to one year in prison and fined \$100,000. See *Fall v. United States*, 49 F.2d 506 (D.C.Cir.1931). Henry F. Sinclair and Edward L. Doheny were acquitted of bribery in obtaining their oil leases, but Sinclair was sentenced to nine months in prison and a \$1,000 fine for contempt of court. The oil leases were cancelled.

(2) Corruption in the Truman Administration

During the last years of the Truman Administration, Senator John J. Williams of Delaware on numerous occasions on the Senate floor exposed widespread corruption throughout the nation in the handling of tax evasion cases. In 1951, more than one hundred and fifty Bureau of Internal Revenue officials from all over the country were discharged or forced to resign. The Assistant Attorney General of the Tax Division of the Department of Justice, T. Lamar Caudle, was forced to resign, *N.Y. Times*, Nov. 20, 1951, but was not prosecuted during the Truman Administration. Daniel A. Bolich, the Assistant Commissioner of Internal Revenue, also resigned. *Id.* No area of the nation seemed to be immune.

Acting under this public pressure, Attorney

General J. Howard McGrath on February 1, 1952, appointed former President of the New York City Council Newbold Morris, a highly respected associate of former New York Mayor Fiorello La Guardia, to lead an investigation into the alleged corruption throughout the federal government. Morris was designated Special Assistant to the Attorney General. At the time of Mr. Morris' appointment, Senator Taft complained that the investigation should be taken out of Department of Justice jurisdiction: "The President should ask Congress for a law to set up an independent agency to conduct the investigation." *N.Y. Times*, Feb. 3, 1952. Mr. Morris, replying to Senator Taft's suggestion stated:

I'm not under the Department of Justice. I'm completely independent. There are no strings attached. It is entirely nonpolitical. I'm designated as a special assistant *41 **175 attorney general, but I'm even going to investigate the Department of Justice itself. *Id.*

Senator Taft's reservations were subsequently borne out by the firing of Mr. Morris on April 3, 1952, by Attorney General J. Howard McGrath shortly after Special Assistant Attorney General Morris, as one of the first acts of his investigation, sent McGrath a questionnaire on his personal finances and requested access to McGrath's Attorney General files, telephone records, engagement book, diary, and other documents. President Truman immediately fired Attorney General McGrath. *N.Y. Times*, Apr. 4, 1952. [FN8] Morris told the Senate Subcommittee on April 10th that his investigation stalled when "it moved into the Attorney General's office." *Id.* During the remainder of the Truman Administration, no special counsel was appointed to succeed Morris to continue the investigation of government corruption. However, during the Eisenhower Administration, the Criminal Division of the Department of Justice under Assistant Attorney General Warren Olney prosecuted and obtained key bribery convictions of T. Lamar Caudle, the former Assistant Attorney General in charge of the Tax Division, and Matthew J. Connelly, Truman's Appointments Secretary. Both convictions were affirmed on appeal. *Connelly and Caudle v. United States*, 249 F.2d 576 (8th Cir.1957), cert. denied, 356 U.S. 921, 78 S.Ct. 700, 2 L.Ed.2d 716 (1958). Also, John D. Nunan, Jr., former Commissioner of Internal Revenue, was indicted and convicted of tax evasion of \$91,086.00

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on June 29, 1954.

FN8. Thus it was incorrect for Assistant Attorney General John R. Bolton at the March 19, 1987, hearing of the Senate Governmental Affairs Subcommittee to testify with respect to the firing of a special prosecutor: "It happened only once before [Watergate] ..." and the President "paid a price for it." Wash.Post, Mar. 20, 1987, at A15, col. 1. As shown above, a special counsel was fired in 1952 and the President did not "pay a price for it."

(3) Watergate Scandal

During the Watergate scandal of the Nixon Administration, Attorney General Richard Kleindienst determined, shortly after taking office in 1973, that there was the appearance of conflicts of interest requiring his resignation. His voluntary resignation letter stated:

persons with whom I have had close personal and professional associations could be involved in conduct violative of the laws of the United States. Fair and impartial enforcement of the law requires that a person who has not had such intimate relationships be the Attorney General of the United States.

9 Weekly Comp.Pres.Doc. 431-32 (May 5, 1973). The Honorable Elliot Richardson was appointed Attorney General and a special prosecutor's office was established on May 25, 1973. [FN9] Professor Archibald Cox was then appointed by President Nixon as special prosecutor to lead the Watergate investigations. When Cox threatened to secure a judicial ruling that President Nixon was violating the order of the United States Court of Appeals for the District of Columbia Circuit to deliver certain presidential tapes to Chief Judge Sirica of the United States District Court, the President ordered him fired. The Attorney General refused to execute the President's order and resigned. Immediately thereafter the Deputy Attorney General was fired for the same reason. Cox was then discharged as special prosecutor by the Solicitor General, in his capacity as Acting Attorney General. The President also abolished the special prosecutor's office; the Watergate investigations were transferred back to the Department of Justice. A few days later President Nixon reversed his decision to abolish the special prosecutor's office and announced that a new special prosecutor would be named. Acting Attorney General Bork, by formal order, established

"The Office of Watergate Special Prosecution Force." 38 Fed.Reg. 30738, 32805 (1973). Shortly thereafter, Leon Jaworski, a private attorney from Houston, Texas, was appointed by Acting Attorney General Bork to be the new Watergate Special Prosecutor. Jaworski continued to act in *42 **176 that capacity until a number of convictions were obtained and most of the principal cases were disposed of. The vacancy in the office of Attorney General was not filled until Congress passed a special act to authorize the appointment of Senator William B. Saxbe. Pub.L. No. 93-178, 87 Stat. 697 (1973). The special act was necessary in light of his prior vote to increase the salary of the office which would otherwise have disqualified him under art. I, § 6, cl. 2 of the Constitution.

FN9. 38 Fed.Reg. 14688, and amendments, 18877, 21404 (1973).

Thus, fifty years of the nation's history involving the Teapot Dome, Truman Administration, and Watergate scandals, has demonstrated a generally recognized inability of the Department of Justice and the Attorney General to function impartially with full public confidence in investigating criminal wrongdoing of high-ranking government officials of the same political party. In each of these events, extraordinary steps were deemed necessary to ensure fair investigation and in each instance, special prosecutors were appointed. The examples of the firings of special prosecutors Morris (1952) and Cox (1973), and the fact that Congress found it necessary to pass a special act requiring the appointment of special counsel outside government in the Teapot Dome cases (1924), and the act for Senator Saxbe in 1973, made it obvious to Congress that if special prosecution counsel were necessary in the future, such counsel would have to enjoy some measure of independence from the Executive Branch. Accordingly, Congress in 1978, acting to regularize the manner of handling such major conflict of interest problems, enacted the Special Prosecutor provisions of the Ethics in Government Act.

(4) Application of the Independent Counsel Provisions: The Iran Weapons Sale and the Alleged Diversion of Funds

The best evidence that the independent counsel provisions are "necessary" and reasonable lies in their application to the current investigation into the

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sale of weapons to Iran and the alleged diversion of the funds to the Contra rebels.

In late 1986 there was considerable political discussion about American hostages held in the Middle East and in the provision of materiel and financial aid to the insurgents in Nicaragua. A number of letters were sent from congressional committees to the Attorney General but none generated any request for the appointment of an Independent Counsel. Then suddenly out of the blue, a Middle East newspaper reported that the United States had been involved in the sale of arms to Iran. This report led Attorney General Edwin Meese III to an immediate investigation. A few days later he called a very significant press conference in which he stated there was a strong possibility that some of the proceeds from the Iran arms sale had been diverted to the Contras. The announcement shocked the nation. Then in an act which has had no parallel in the history of the Special Prosecutor (Independent Counsel) statute, the Attorney General voluntarily requested (and President Reagan publicly supported his request) that this Division appoint an Independent Counsel with the broadest investigatory powers ever requested under the Act. The violation of every federal criminal law was to be investigated. Only one person, Lieutenant Colonel Oliver L. North, U.S. Marine Corps, was designated as a subject of the investigation, and this, not because he was a high government official but because with respect to him the Attorney General had a "personal, financial, or political conflict of interest." 28 U.S.C. § 591(c) (emphasis added). The Attorney General then added every government official and every other person "acting in concert with Lieutenant Colonel North or with any other United States Government official, whether or not covered by the Independent Counsel Provisions of the Ethics in Government Act ... in connection with the sale or shipment of military arms to Iran and the transfer or diversion [without limitation] of funds realized in connection with such sale or shipment." In re Oliver L. North, et al., D.C.Cir., Division No. 86-6 (1986) (emphasis added). In response to this request, the Division appointed the Honorable Lawrence E. Walsh as Independent Counsel and ordered *43 **177 the broadest investigation ever ordered by the Division.

The voluntary action of the Attorney General, with the President's publicly voiced support,

emphasizes that the statute authorizing such investigation is "necessary and proper" whenever a conflict of interest exists in the narrow circumstances covered by the Act.

B.

Constitutional Authority for the Independent Counsel Provisions

(1) The Authority to Create the Office of Independent Counsel

[3] The statute authorizing the court to appoint independent counsel to prosecute violations of the criminal law involving high government officials is grounded in the "necessary and proper" clause and the Article II appointments clause of the Constitution. It is as fully consistent with the separation of powers doctrine of the Constitution to which we briefly allude as it is a commonplace that the Constitution does not "contemplate[] total separation of each of the three essential branches of Government." Buckley v. Valeo, 424 U.S. 1, 121, 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1976). See Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, concurring) (the Constitution ... contemplates that practise will integrate the dispersed powers into a workable government); United States v. Nixon, 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974) ("In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence."); Nixon v. Administrator of General Services, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977) (noting that "the Court [has] squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches").

[4] In authorizing by statute the appointment of independent counsel, Congress acted pursuant to its constitutional authority to create "by law" inferior officers and vest their appointment in the courts of law:

"[For] all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by

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Law ... [Congress] may by Law vest the Appointment of such inferior Officers, as [Congress] think proper, ... in the Courts of Law."

U.S. Const. art. II, § 2, cl. 2. It is noteworthy that this clear grant of authority to Congress to establish other officers "by law" and to provide "by law" for their appointment by "courts of law" is found in Article II--that part of the Constitution devoted to the Executive Department. The responsibility imposed upon Congress by Article II empowers it to enact laws to guard against the evils of massive conflicts of interest involved in the enforcement of federal criminal law against the highest officials of government and to vest in the courts the appointment of inferior officers to carry out this responsibility. Such counsel serve in the Executive Department and are constitutionally entitled to the independence that the statute provides. *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935); *Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958). Since 1863 the courts have been authorized by statute to fill temporary vacancies in the office of United States Attorneys (formerly District Attorneys). [FN10] The appointment by the Division of an independent counsel is tantamount to a court filling a vacancy created by adverse interest. For example, in *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 6 L.Ed. 314 (1825), Daniel Webster argued in a condemnation case brought by court-appointed counsel in the name of the United States when the U.S. District Attorney refused to act: "The *44 **178 discretionary power exercised by the court below, in this instance [appointing counsel], was essential to the administration of justice, whenever the district-attorney refuses to act, or is interested, or in case of his death." *Id.* at 274. The court decided the case without commenting on the propriety of the appointment, but one judge expressed "surprise." *Id.*, 300.

FN10. See Act of March 3, 1863, 12 Stat. 768; Rev.Stat. § 793 at 149 (1878); 28 U.S.C. § 546 (1982) as amended by Pub.L. No. 99-646 § 69(d), 100 Stat. 3592, 3616 (1986).

Our history, as above outlined, has thus demonstrated that it is "necessary" when high government officials are being investigated for criminal wrongdoing by officials of their own party, and that is the usual situation, that the Congress to

the extent it thinks "proper" "may by Law vest the Appointment of ... inferior Officers ... in the Courts of Law." In dealing with this problem a page of history is worth a ton of theory. The independent counsel provisions are tailor-made to meet all the requirements envisioned by the Constitution. And the Independent Counsel is clearly an "inferior officer"--he is appointed for a single task to serve for a temporary limited period.

If there were any doubt about the validity of Congress acting as it has to deal with the conflict of interest problems, which are at the heart of the independent counsel provisions, it is answered by the power set forth in the "Necessary and Proper" clause. This provision of the Constitution provides that:

The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. I, § 8, cl. 18 (emphasis added). The constitutional authority of Congress to vest appointment of inferior officers in the courts of law, conjoined with its power to enact laws that are "necessary and proper," "gives Congress a share in the responsibilities lodged in other departments." E. Corwin, *The Constitution of the United States--Analysis and Interpretation* 358 (U.S. Govt. Printing Office 1972). Thus, with the constitutional authority to establish offices to be filled by inferior officers in the Executive Department and to vest the appointment of inferior officers in "Courts of Law," the Congress is authorized to enact the laws necessary to carry into execution such powers. As Chief Justice Marshall cogently remarked in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 420, 4 L.Ed. 579 (1819):

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

Id. The Independent Counsel statute meets all these requirements.

(2) The Exercise of Power by the Attorney General in the Independent Counsel Scheme

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[5] The minimal powers conferred on Independent Counsel do not by any means constitute an assumption of the constitutional field of action of the Executive Branch in enforcing the criminal law. The highly limited duties of the Independent Counsel are "fixed according to sense and the inherent necessities of the governmental [problem]." See *Hampton & Co. v. United States*, 276 U.S. 394, 405-406, 48 S.Ct. 348, 350-351, 72 L.Ed. 624 (1928). The provision of the Constitution providing that: "[The President] ... shall take care that the laws be faithfully executed." U.S. Const. art. II, § 3, does not require the President (or his delegate) to "execute the laws." The President's responsibility may be satisfied by Congress entrusting the power of execution to some other officer while the President's obligation would be satisfied by the right of the President (or his delegate) to remove the individual officer for impropriety, which may be done here. [FN11] *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 9 L.Ed. 1181 (1838); see also, *The Jewels of the Princess of Orange*, 2 Opin.A.G. 482 (1832). A review of the Independent Counsel provisions of the Ethics in Government Act § 591 et seq., discloses that broad power and authority of the Attorney General are closely interwoven into the statutory scheme.

FN11. 28 U.S.C. § 596(a)(1) provides: A[n] independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

(a) The Attorney General conducts the investigation and determines whether the information is sufficient to constitute grounds to investigate that any person covered by the Act has committed a violation of any major "federal criminal law." § 591(a).

(b) The Attorney General also determines whether the investigation of other persons by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest. § 591(c).

(c) Even after the Attorney General determines that the evidence is sufficient to constitute grounds to investigate, he has discretion to conduct "such preliminary investigation of the matter as [he] ...

deems appropriate." § 592(a)(1).

(d) If the Attorney General upon completion of the preliminary investigation finds there are no reasonable grounds to believe that further investigation or prosecution is warranted, he notifies the Division of the Court and his decision is final. Thereafter the Division of the Court shall have "no power to appoint an independent counsel." § 592(b)(1).

(e) If the Attorney General upon completion of the preliminary investigation finds reasonable grounds to believe that further investigation or prosecution is warranted, he then applies to the Division of the Court for the appointment of an independent counsel. He merely "compl[ies] with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws." § 592(c)(1).

(f) Even if the Attorney General has initially found that an independent counsel is not warranted, he may still, on the basis of additional information, apply for appointment of an independent counsel. § 522(c)(2).

(g) The Attorney General may also set forth in an application for an independent counsel sufficient information to assist the Division in selecting an independent counsel and in defining counsel's prosecutorial jurisdiction. This gives the Attorney General the power to suggest the type of independent counsel that is necessary and the nature and extent of the jurisdiction that should be set forth in the Division's order. § 592(d)(1).

(h) The Attorney General, in his discretion, may request the independent counsel to accept referral of a matter that relates to the independent counsel's prosecutorial jurisdiction. § 592(e).

(i) The Attorney General's determination under § 592(c) to apply to the Division of the Court for the appointment of an independent counsel is not reviewable in any court. § 592(f).

(j) The Attorney General may request the Division of the Court to disclose the identity and prosecutorial jurisdiction of such independent counsel as would be in the best interests of justice. § 593(b).

(k) The Attorney General may request the Division of the Court to expand the prosecutorial jurisdiction of an existing independent counsel. § 593(c).

(l) Upon showing of good cause by the Attorney General, the Division of the Court may grant an extension of the preliminary investigation

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conducted pursuant to § 592(a) for a period not to exceed 60 days. § 593(f).

(m) The Attorney General's authority to exercise direction and control of those matters that specifically require the Attorney General's personal action under § 2516 of Title 18 (Authorization for interception of wire or oral communications) is not affected. § 594(a).

(n) The Department of Justice has discretion to assist the independent counsel at his request. This may include access to any records, files, or any other materials *46 **180 relevant to the matters within such independent counsel's prosecutorial jurisdiction and the use of the resources and personnel necessary to perform such duties of the independent counsel. § 594(d).

(o) The Attorney General may, at the request of the independent counsel, refer a matter related to the independent counsel's prosecutorial jurisdiction. § 594(e).

(p) An independent counsel, except where not possible, is required to comply with the written or other established policies of the Department of Justice respecting the enforcement of the criminal laws. § 594(f).

(q) An independent counsel may dismiss matters within his prosecutorial jurisdiction at any time prior to prosecution only upon compliance with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws. § 594(g).

(r) The majority and minority members of the Judiciary Committees of Congress separately may request in writing that the Attorney General apply for the appointment of an independent counsel. If no such application is made, the Attorney General notifies the respective committee members why such application was not made. § 595(e).

(s) The Attorney General may by "personal action" remove from office an independent counsel "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." § 596(a)(1).

(t) The Division of the Court upon suggestion of the Attorney General may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under § 594(e), and any resulting prosecutions, have been completed or so substantially completed

that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. § 596(b)(2).

(u) Whenever an independent counsel is proceeding under a jurisdictional order, he may agree in writing that such investigation or proceedings may be continued by the Department of Justice. § 597(a).

(v) The Attorney General or the Solicitor General may make a presentation as *amicus curiae* to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or in any appeal of such case or proceeding. § 597(b).

The analysis of the foregoing extracts makes it clear that Congress did not provide for a substantive intrusion by independent counsel into the Executive Department such as was found to exist in *Bowsher v. Synar*, --- U.S. ---, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986).

Upon enactment of the Judiciary Act of 1789, 1 Stat. 73, §§ 2, 35 (1789), the supervision of district attorneys came not from the Attorney General but from the Secretary of State and it remained there throughout the Federalist period. L. White, *The Federalists*, 406-11 (1948). The Attorney General was thought of as the legal advisor to the President and department heads and as an agent to whom Congress might turn for advice. It was a part-time job and the government was merely one of his clients for which he was paid half the salary of department heads. He was expected to pursue private legal work. *Id.* at 164. The District Attorneys acted in the Department of State and contacts between the two were largely fortuitous. Apart from cases of exceptional importance and difficulty, the District Attorneys operated largely on their own responsibility as matters developed within their respective districts. On occasion they employed "special counsel." *Id.* at 406-411. It was not until the Act of August 2, 1861, c. 37, 12 Stat. 285, that the "general superintendence and direction" of District Attorneys was placed with the Attorney General. This history indicates that the authority and powers of District Attorneys (now United States Attorneys) and the Attorney General are largely governed by statute.

*47 **181 III

Application of the Statutory Provisions

(Cite as: 818 F.2d 34, *47, 260 U.S.App.D.C. 168, **181)

The instant dispute between the Independent Counsel and the Department of Justice concerns only two provisions of the independent counsel statutory scheme. The relevant statutory language provides:

§ 592(b)(1) If the Attorney General, upon completion of the preliminary investigation, finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint a[n] independent counsel. (Emphasis added).

* * *

§ 594(e) A[n] independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction.

[6] We agree with the Department of Justice that "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 § 592(b)(1) that those allegations should not be pursued." Department of Justice Response at 5. The provisions of §§ 592(b)(1) and 594(e) must be read together and not in isolation. It would be highly unreasonable to interpret these statutory provisions either as requiring the Attorney General, or as authorizing the division of the court, to refer the investigation of the conduct of two officials to an independent counsel's investigatory and prosecutorial jurisdiction under § 594(c) when the Attorney General has twice determined with respect to the conduct of said two individuals, in accordance with his statutory authority under § 592(b)(1), that there were "no reasonable grounds to believe that further investigation or prosecution is warranted." That is in effect what the court would accomplish if the order appointing independent counsel to investigate Olson were amended by the court, in effect, to appoint the same counsel to investigate Schmults and Dinkins as separate subjects.

To suggest that the division of the court can bring about this result acting alone, upon the sole request of the independent counsel, would undercut the plain intent of § 592(b)(1) and permit the

accomplishment by indirect means of a result that the statute prohibits being accomplished by direct means. Section 594(e) cannot be read to achieve such an unreasonable result.

The Independent Counsel, while urging "that the allegations against Schmults and Dinkins, standing alone, warrant further investigation," Independent Counsel Application at 34, also maintains that "the known facts raise a reasonable suspicion that Olson, Schmults, and Dinkins may have acted together to frustrate the Committee's inquiry." Independent Counsel Reply at 11. See also Independent Counsel Application at 34 (noting "possibility that the actions of Schmults, Dinkins, and Olson were taken pursuant to a concert of action involving some or all of them and designed to obstruct the Committee's inquiry").

[7] Our current Order appointing the Independent Counsel authorizes her:

to investigate and pursue the question whether testimony of Mr. Theodore Olson and his revision of testimony on March 10, 1983 violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law. [The Order also further grants] jurisdiction 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.

Order of April 23, 1986 at 1-2 (emphasis added). Implicit in this jurisdictional grant to investigate possible connected violations of federal criminal law is the authority to investigate allegations and evidence that Theodore Olson was engaged in an unlawful conspiracy with others or that he aided *48 **182 and abetted any criminal offense connected to the investigation ordered. To the extent that the Independent Counsel wishes to investigate "whether Mr. Olson's testimony was part of a larger, concerted plan, including Mr. Schmults, Ms. Dinkins, or others, to obstruct or impede the Committee's investigation into the Department's discharge of its responsibility in the EPA documents dispute, possibly in violation of federal law," Independent Counsel letter at 3, the current order confers that power upon the Independent Counsel. The Attorney General's decision not to request

appointment of an independent counsel with respect to Schmults and Dinkins, or to refer certain allegations against them to the Independent Counsel investigating Olson, simply cannot impinge upon the Independent Counsel's current jurisdiction, as stated in our April 23, 1986, Order, to investigate "any other allegation or evidence of violation of any Federal criminal law by ... Olson and connected with or arising out of that investigation."

It should be pointed out, however, that while the Independent Counsel's authority to investigate the possibility that Olson was engaged in criminal conspiracy, or aided or abetted any criminal offense, a fortiori encompasses the authority to investigate the actions of others involved in the possible unlawful concert of action, the current order grants the Independent Counsel jurisdiction to prosecute only Olson. If further investigation by the Independent Counsel turns up credible evidence of federal criminal violations by others, the Department of Justice has expressed its willingness to consider such new evidence. Burns Letter at 3. ("If you have any additional information that bears on this matter please do not hesitate to bring it to our attention. In that event, the Attorney General will, of course, consider your request in the light of any additional information available.") See also Report of Attorney General at 11 (noting that "independent counsel may wish to confer with the Department concerning related matters").

Thus, the Independent Counsel has jurisdiction under our current jurisdictional order to investigate whether Olson conspired with or aided or abetted any person (including but not limited to Schmults or Dinkins), to frustrate the inquiry of the House Committee on Energy and Commerce, in violation of federal criminal law. Also, the investigation of EPA's Perry has been transferred by the Attorney General as a related matter from the Public Integrity Section to Independent Counsel at her request. Due to the Attorney General's prior decisions closing investigation of the distinct allegations against Schmults and Dinkins, and the preclusive effect of § 592(b)(1), the Independent Counsel has continuing jurisdiction to investigate the actions of Schmults and Dinkins only insofar as they were part of a concert of action with Olson, in violation of federal criminal law.

IV

Miscellaneous

[8] The Independent Counsel has requested the Division to publicly release the pleadings with respect to her request for jurisdiction over the alleged "related matters" discussed above and the Attorney General has agreed to such request. Schmults and Dinkins have submitted motions to intervene and have been allowed to file amicus curiae briefs in support of their request to withhold disclosure of the Independent Counsel's application, the response of the Department, and the reply of the Independent Counsel.

Courts have consistently held that a person challenging the authority or propriety of a criminal investigation can do so only after an indictment (if any) is returned by the grand jury. See, e.g., *Matter of Doe*, 546 F.2d 498 (2d Cir.1976); *Jett v. Castaneda*, 578 F.2d 842 (9th Cir.1978). The court therefore denies the motions to intervene and the requests to withhold disclosure, and in the best interests of justice grants leave of court to publicly release the application of the Independent Counsel, the briefs of the parties on the application, and *49 **183 the court's foregoing opinion in this cause. [FN12]

FN12. Prior to appointing Ms. Morrison, the Division considered whether the fact that she had eight months earlier been Chief Litigation Counsel for the Securities and Exchange Commission would disqualify her pursuant to § 593(d). That subsection provides: The division of the court may not appoint as a[n] independent counsel any person who holds or recently held any office of profit or trust under the United States. We noted that the legislative history of this provision indicates that: [a] person appointed special prosecutor who formerly was an employee of the United States Government should have left the government a long enough period of time prior to being appointed a special prosecutor so that there is the reality and the appearance that such individual is totally independent from that government. Senate Report 95-170, 95th Cong., 2d Sess., reprinted in *U.S.Code Cong. & Ad.News* 1978, 4216, 4282. The Senate report also states that: No time period was specified in this section; however, the Committee felt that it would defeat the purposes of this title if, for example, someone could resign their position as United States attorney or a member of

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the Justice Department one day, and be appointed a special prosecutor the next. Id. The Division concluded that the eight months between Ms. Morrison's departure from the SEC and her appointment as Independent Counsel in this matter was an adequate lapse of time that ensured she is "independent, both in reality and in appearance, from the President and the Attorney General." During the interval, she had been actively engaged in the private practice of law as a partner in a local law firm.

publicly released.

END OF DOCUMENT

Order Accordingly.

ORDER

Upon consideration of the request of counsel for Edward C. Schmults and Carol E. Dinkins to intervene in this cause and for the Court to withhold disclosure of the documents ordered unsealed by the Court's order of March 9, 1987, which was temporarily revoked by the Court's order of March 11, 1987, and the Court being fully advised in the premises, for reasons set forth in its accompanying opinion, it is hereby

ORDERED, by the Court, that the motions to intervene and the requests to withhold disclosure are hereby denied; and it is further

ORDERED, by the Court, that the motion of Independent Counsel, partially concurred in by the Attorney General, for leave of Court to unseal and publicly release:

(1) The Application of the Independent Counsel for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) and all exhibits thereto, filed January 13, 1987; (2) the 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), filed February 12, 1987; and (3) the Reply to Department of Justice Response to Independent Counsel's Application for Referral of Related Matters Pursuant to 28 U.S.C. § 594(e), filed February 24, 1987,

is hereby granted in the best interests of justice; and it is further

ORDERED, by the Court, in the best interests of justice, that this order and the accompanying opinion of the Court are hereby authorized to be

In re SEALED CASE.

No. 87-5247.

United States Court of Appeals,
District of Columbia Circuit.

Argued Aug. 5, 1987.

Decided Aug. 20, 1987.

On remand from the Court of Appeals, 666 F.Supp. 231, the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., Chief Judge, upheld authority of independent authority of independent counsel appointed by the Attorney General and person who had been subpoenaed by grand jury convened by the independent counsel appealed. The Court of Appeals, D.H. Ginsburg, Circuit Judge., held that: (1) appointment of independent counsel by the Attorney General was valid; (2) independent counsel had properly exercised delegated authority; and (3) issue of constitutionality of statute providing for appointment of independent counsel by special division of the Court of Appeals under the Ethics Act was not ripe for review.

Affirmed.

Williams, Circuit Judge, filed an opinion concurring in part and dissenting in part.

[1] ATTORNEY GENERAL ⇌ 2
46k2

Attorney General had statutory authority to create Office of Independent Counsel: Iran/Contra and to convey to it investigative and prosecutorial functions and powers. 5 U.S.C.A. § 301; 28 U.S.C.A. §§ 509, 510, 515.

[2] ATTORNEY GENERAL ⇌ 2
46k2

Attorney General's delegation to independent counsel whom he appointed of investigative and prosecutorial functions and powers did not violate Ethics Act requirement that Attorney General and the Department of Justice to suspend all investigations when a matter is in the prosecutorial jurisdiction of an independent counsel appointed by special division of the Court of Appeals under the Ethics Act, where person appointed independent

counsel by the Attorney General was the same person who had been appointed under the Ethics Act, so that his signing of appointment form constituted an agreement in writing that the Justice Department investigation could continue. 28 U.S.C.A. § 597(a).

[3] ATTORNEY GENERAL ⇌ 2
46k2

Because Independent Counsel: Iran/Contra appointed by Attorney General served only for so long as regulation delegating powers to him remained in force, he was charged with a performance of a duty of the Attorney General for a limited time and under special and temporary conditions and thus was an "inferior Officer" whom the Attorney General could appoint under the appointments clause without advice and consent of the Senate. U.S.C.A. Const. Art. 2, § 2. cl. 2.

See publication Words and Phrases for other judicial constructions and definitions.

[4] ATTORNEY GENERAL ⇌ 2
46k2

Although there was no evidence that associate counsel of the Independent Counsel: Iran/Contra had completed a standard affidavit of appointment and had been sworn in, their exercise of powers delegated to them by the Attorney General was proper where they had been properly sworn in as associates of the Independent Counsel appointed by special division of the Court of Appeals under the Ethics Act. 28 U.S.C.A. §§ 515(a), 596.

[5] ATTORNEY GENERAL ⇌ 2
46k2

Adequate direction had been given to Independent Counsel: Iran/Contra appointed by the Attorney General even though no letter of authority had been issued. 28 U.S.C.A. § 515(a).

[6] ATTORNEY GENERAL ⇌ 2
46k2

Attorney General may not create offices outside the Department of Justice.

[7] CONSTITUTIONAL LAW ⇌ 46(1)
92k46(1)

Issue of whether any aspect of relationship between special division of the Court of Appeals and the Independent Counsel violated Constitution was not

ripe where same individual who had been appointed as independent counsel by the special division had also been appointed as an independent counsel by the Attorney General and given the same authority. 28 U.S.C.A. § 596.

***51 **266** Appeal from the United States District Court for the District of Columbia (Misc. No. 87-00139).

Barry S. Simon, with whom Brendan V. Sullivan, Jr., Terrence O'Donnell and Nicole K. Seligman, Washington, D.C., were on brief, for appellant.

Paul L. Friedman, Washington, D.C., with whom Guy Miller Struve, New York City, Jeffrey Toobin, Washington, D.C., and James E. McCollum, Washington, D.C., were on brief, for appellee.

James M. Spears, Deputy Asst. Atty. Gen., Dept. of Justice, with whom Joseph E. diGenova, U.S. Atty., Richard K. Willard, Asst. Atty. Gen., Robert Kopp, Douglas N. Letter, Thomas Millet and Harold J. Krent, Attys., Dept. of Justice, Washington, D.C., were on brief, for amicus curiae, U.S., urging affirmance.

Before RUTH BADER GINSBURG, WILLIAMS and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge D.H. GINSBURG.

Opinion concurring in part and dissenting in part filed by Circuit Judge WILLIAMS.

D.H. GINSBURG, Circuit Judge:

Lt. Col. Oliver North appeals an order of the district court holding him in contempt for refusing to comply with a grand jury subpoena. North challenges the contempt order on the ground that it was issued by a grand jury presided over by Independent Counsel Lawrence Walsh and his associate counsel who, North contends, lack the legal authority to conduct that grand jury proceeding. North can prevail only if we find that Walsh's investigation cannot rely on either of two claimed sources of authority: (1) the December 19, 1986, appointment of Walsh as an independent counsel under the Ethics in Government Act [FN1] (Ethics Act), or (2) the Attorney General's March 5,

1987, delegation of investigative and prosecutorial authority of his own to Walsh. North raises constitutional challenges to both sources of authority as well as statutory challenges to the Attorney General's delegation.

FN1. Pub.L. 95-521, Title VI, § 601(a), 92 Stat. 1867 (1978), as amended by Pub.L. 97-409, 96 Stat. 2039 (1983); Pub.L. 98-473, 98 Stat. 2030 (1984); and Pub.L. 98-620, 98 Stat. 3359 (1984) (codified as amended in 28 U.S.C. §§ 591-98 (1982 & Supp. III)).

On remand from the previous appeal to this court, the district court upheld the authority of Walsh and his associate counsel under the Attorney General's appointment. [FN2] The district court also held that it was unnecessary to address the question of the constitutionality vel non of the independent counsel provisions of the Ethics Act. We affirm each holding as well as the district court's order of July 10, 1987, directing North to comply with the subpoena.

FN2. In re Sealed Case, 666 F.Supp. 231 (D.D.C. 1987).

I. BACKGROUND

A. Appointment by the Special Division

Pursuant to the Ethics Act, 28 U.S.C. § 592(c)(1), the Attorney General on December 4, 1986, filed an application with the Independent Counsel Division of this court (the "Special Division") seeking the appointment of an independent counsel with jurisdiction

to investigate whether violations of U.S. federal criminal law were committed by Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals acting in concert with Lieutenant Colonel North or with other United States Government officials, whether or not covered by the Independent Counsel provisions of the Ethics in Government Act, from in or around January 1985 (the exact date being unknown) to the present, in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds ***52 **267** realized in connection with such sale or shipment. The independent counsel should have jurisdiction sufficiently broad to investigate and prosecute any

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and all violations of U.S. federal criminal law which his or her investigation may establish in this matter, and any related matters over which the independent counsel may request or accept jurisdiction pursuant to 28 U.S.C. § 594(e).

On December 19, 1986, the Special Division filed an order, pursuant to its authority under 28 U.S.C. § 593(b), appointing Walsh as independent counsel, thereby conferring upon him, within the jurisdiction it prescribed, "all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department," with exceptions not here relevant, pursuant to 28 U.S.C. § 594(a). [FN3] In exercising its authority under 28 U.S.C. § 593(b) to define the prosecutorial jurisdiction of the independent counsel, the Special Division granted Walsh jurisdiction beyond that requested by the Attorney General. Most significantly, the Special Division expanded the time frame of the inquiry into arms sales to Iran to include the period "since in or about 1984," rather than "from in or around January 1985," and the Special Division granted Walsh the additional jurisdiction to investigate "the provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984." Soon after the Special Division announced Walsh's appointment, the President issued a statement saying that "Mr. Walsh has my promise of complete cooperation, and I have instructed all members of my administration to cooperate fully with the investigation in order to ensure full and prompt disclosure." [FN4]

FN3. Order, In re Oliver North, et al., Div. No. 86-6 (D.C.Cir. December 19, 1986).

FN4. 22 Weekly Comp.Pres.Doc. 1658 (1986).

B. Appointment by The Attorney General

Exercising his authority under 28 U.S.C. § 594(a)(1), Walsh empaneled a grand jury in this district on January 28, 1987. On February 24, 1987, North filed a complaint claiming that the independent counsel provisions of the Ethics Act are unconstitutional, and seeking to enjoin the grand jury proceedings. [FN5] In response to this constitutional challenge to Walsh's authority, the Attorney General on March 5, 1987, promulgated a

regulation designed "to assure the courts, Congress, and the American people that [Walsh's] investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of [North's] litigation." [FN6]

FN5. North v. Walsh and Meese, Civ. No. 87-0457 (D.D.C.).

FN6. 52 Fed.Reg. 7270 (March 10, 1987) (to be codified as 28 C.F.R. Parts 600 and 601).

In accordance with the Attorney General's expressed intent "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner," [FN7] the regulation established the "Office of Independent Counsel: Iran/Contra"--under the direction of an Independent Counsel to be appointed by the Attorney General--and delegated to that Counsel authority identical to that provided to an independent counsel by the Ethics Act. [FN8] The regulation also sets forth the jurisdiction of the "Independent Counsel: Iran/Contra" [FN9] in exactly the same terms employed by the Special Division in establishing the jurisdiction of Independent Counsel Walsh. The regulations' provisions relating to the removal of the "Independent Counsel: Iran/Contra" also largely parallel those found in the Ethics Act. [FN10] In particular, the regulation sets forth the *53 **268 same grounds for removal as does the Ethics Act, [FN11] and it provides that "an Independent Counsel originally appointed by court order shall have such rights of review as provided by said order and by section 596(a)(3) of Title 28 of the United States Code." [FN12] The provisions of the regulation concerning "reporting and congressional oversight" and "relationship with components of the Department of Justice" are also virtually identical with parallel provisions in the Ethics Act. [FN13] The regulation also includes provisions that state:

FN7. Id. at 7271.

FN8. Compare the following provisions of the Ethics Act, 28 U.S.C. §§ 594(a)-(g), with parallel provisions in the regulations, 28 C.F.R. § 600.1 (a)-(g), 52 Fed.Reg. at 7271.

FN9. 28 C.F.R. § 601, 52 Fed.Reg. at 7272-73.

FN10. Compare 28 C.F.R. § 600.3, 52 Fed.Reg. at

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7272; with 28 U.S.C. § 596.

FN11. Compare 28 C.F.R. § 600.3(a)(1), 52 Fed.Reg. at 7272; with 28 U.S.C. § 596(a)(1).

FN12. 28 C.F.R. § 600.3(a)(3), 52 Fed.Reg. at 7272.

FN13. Compare 28 C.F.R. § 600.2, 52 Fed.Reg. at 7271-72, and id. at § 600.4, 52 Fed.Reg. at 7272; with 28 U.S.C. §§ 595 and 597, respectively.

(a) Nothing in this chapter is intended to modify or impair any of the provisions of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code), or any order issued thereunder.

(b) If any provision of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code) or any provision of this chapter is held invalid for any reason, such invalidity shall not affect any other provision of this chapter, it being intended that each provision of this chapter shall be severable from the Act and from each other provision. [FN14]

FN14. 28 C.F.R. § 600.5, 52 Fed.Reg. at 7272.

On March 5, 1987, the date the Attorney General's regulation was promulgated, Independent Counsel Walsh signed an Appointment Affidavit naming him Independent Counsel: Iran/Contra.

C. North's Challenges to Walsh's Authority

In response to the Attorney General's regulation of March 5, 1987, North filed on the following day a new complaint in district court, [FN15] which was later consolidated with his previously filed petition for injunctive relief. On March 12, 1987, the district court rendered its decision in both actions. [FN16] Citing *Younger v. Harris*, 401 U.S. 37, 46, 91 S.Ct. 746, 751, 27 L.Ed.2d 669 (1970), for the proposition that "a party who seeks to enjoin a criminal investigation has a particularly heavy burden," [FN17] the district court denied North's request that it enjoin the on-going grand jury investigation, stating that "Colonel North, like any other potential criminal defendant, can raise his objections by appropriate motions, if and when an indictment is entered." [FN18]

FN15. *North v. Walsh and Meese*, Civ. No. 87-0626 (D.D.C.).

FN16. *North v. Walsh and Meese*, 656 F.Supp. 414 (D.D.C.1987), app. pending, Nos. 87-5058, 87-5059 (D.C.Cir.).

FN17. *Id.* at 421.

FN18. *Id.* at 423 (emphasis in original). This ruling was similar to one handed down by another judge and affirmed by this court, rejecting Michael Deaver's request, based on a virtually identical constitutional challenge to that presented by North, that Independent Counsel Whitney North Seymour, Jr. be enjoined from seeking Deaver's indictment from the grand jury empaneled to investigate his lobbying activities. *Deaver v. Seymour*, 656 F.Supp. 900 (D.D.C.1987), *aff'd*, 822 F.2d 66 (D.C.Cir.1987) stay denied, 55 U.S.L.W. 3641 (March 18, 1987) (Rehnquist, C.J., in chambers). See also *Deaver v. United States*, --- U.S. ---, 107 S.Ct. 3177, 3178, 97 L.Ed.2d 784 (1987) (Rehnquist, C.J., in chambers) ("There will be time enough for applicant to present his constitutional claim to the appellate courts if and when he is convicted of the charges against him.").

Subsequent to the district court's dismissal of his complaint seeking injunctive relief, the grand jury issued a subpoena to North, with which he refused to comply. The district court having thereupon held him in contempt, North appealed to this court. In support of the contempt order, Walsh and the Attorney General argued that North's challenge to the prosecutor's legal authority was no more ripe for review then than it had been when he sought civil injunctive relief raising the same challenge. We disagreed, [FN19] concluding that a recalcitrant witness' "claim that a subpoena was applied for and issued under the signature *54 **269 of unauthorized persons" [FN20] was ripe for review under *United States v. Ryan*, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971), which stated:

FN19. *In re Sealed Case*, 827 F.2d 776 (D.C.Cir. 1987).

FN20. *Id.* at 778.

If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse

(Cite as: 829 F.2d 50, *54, 264 U.S.App.D.C. 265, **269)

to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

Id. at 532, 91 S.Ct. at 1582 (footnote omitted). [FN21] The factual record was inadequate, however, for us to determine whether Walsh and his associate counsel could rely solely on the grant of authority under the Attorney General's March 5, 1987, regulation as the legal basis for the subpoena issued to North. If the regulation provided such authority--and if that authority had been exercised by Walsh and his counsel--it appeared that we might not need to reach the question of whether the Ethics Act provided an independent source of authority, a question that would have required us to address the constitutionality vel non of the appointment of an independent counsel by the Special Division pursuant to the provisions of the Ethics Act.

FN21. For additional support, we noted that "issues analogous to appellant's have been litigated, and thus treated as ripe, in the contempt setting." In re Sealed Case, 827 F.2d at 778. This was in reference to the line of cases that includes In re Persico, 522 F.2d 41 (2d Cir.1975), in which the Second Circuit reached the merits of a recalcitrant witness' contention that a subpoena was unlawful because, he argued, the "special attorney" for the Government had not been "specifically directed" by the Attorney General, in accordance with 28 U.S.C. § 515(a), to conduct the grand jury proceeding. See In re Sealed Case, supra at 778 and cases therein cited. In holding that Ryan permits a grand jury witness to challenge the legal authority of a government attorney, we withheld judgment as to whether the Court intended the language in Ryan to overrule Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919), which held that a recalcitrant grand jury witness could not challenge the constitutionality of the underlying statute violation of which the grand jury was investigating. In re Sealed Case, supra, at 778-79.

We therefore remanded the case to the district court for it to determine "whether the Attorney General had legal authority to delegate the powers which he purported to convey in the [March 5, 1987] regulation ..., and if so, whether appropriate authority has been properly vested in Mr. Walsh and his associates." [FN22] In addition, because of our

uncertainty about the precise application for this case of certain language in the Supreme Court's decision in Bowsher v. Synar, --- U.S. --- n. 5, 106 S.Ct. 3181, 3189 n. 5, 92 L.Ed.2d 583 (1986), we also directed the district court to determine "whether any aspect of the relationship between the special division of this court and the Independent Counsel requires consideration of the constitutionality of the statute even if the Attorney General's appointment is otherwise valid." [FN23]

FN22. Order, In re Sealed Case, No. 87-5168 (D.C.Cir. June 8, 1987).

FN23. Id.

After taking evidence, the district court "determined that the parallel appointment of Mr. Walsh under the Attorney General's regulation was factually and legally valid and that appropriate authority has been vested in him and his associates." [FN24] In response to our second question, the district court "also determined that the limited relationship between the Special Division ... and the Office of Independent Counsel does not require consideration of the constitutionality of the [Ethics] Act." [FN25] This appeal followed.

FN24. In re Sealed Case, supra note 2, 666 F.Supp. at 232.

FN25. Id.

II. ANALYSIS

A. Appointment by the Attorney General

As we indicated when remanding the case to the district court, North in effect claims that the subpoena was "unduly burdensome or otherwise unlawful" because it had been "applied for and issued under the *55 **270 signature of unauthorized persons." [FN26] In accordance with the "well-established principle ... that normally [a c]ourt will not decide a constitutional question if there is some other ground upon which to dispose of the case," [FN27] we address first North's contention that Walsh and his associate counsel did not derive the requisite authority from the Attorney General's parallel appointment of March 5, 1987. Because the "investigative and prosecutorial functions and powers" purportedly conveyed to the

(Cite as: 829 F.2d 50, *55, 264 U.S.App.D.C. 265, **270)

Office of Independent Counsel: Iran/Contra by the Attorney General's regulation include the power to conduct grand jury proceedings and to issue the type of subpoena in dispute here, [FN28] the only questions raised by this contention are whether the Attorney General's delegation is lawful and, if so, whether that delegated authority has in fact been exercised by Walsh and his associate counsel.

FN26. In re Sealed Case, 827 F.2d at 778.

FN27. *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 1579, 80 L.Ed.2d 36 (1984) (per curiam). See *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

FN28. See 28 C.F.R. § 600.1(a), 52 Fed.Reg. at 7271, which provides that the "investigative and prosecutorial functions and powers shall include," inter alia, "[c]onducting proceedings before grand juries and other investigations," subsection (a)(1), and "[m]aking applications to any Federal court for ... subpoenas[] or other courts orders," subsection (a)(7). We note also that the Department of Justice, amicus curiae, which is entitled to considerable deference in interpreting its own regulations, see *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), has never maintained that either the grand jury proceeding or the specific subpoena before us exceeded the scope of the authority that the Attorney General delegated in the regulation.

i. Is the Attorney General's Delegation Lawful?

[1] We have no difficulty concluding that the Attorney General possessed the statutory authority to create the Office of Independent Counsel: Iran/Contra and to convey to it the "investigative and prosecutorial functions and powers" described in 28 C.F.R. § 600.1(a) of the regulation. The statutory provisions relied upon by the Attorney General in promulgating the regulation are 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515. [FN29] While these provisions do not explicitly authorize the Attorney General to create an Office of Independent Counsel virtually free of ongoing supervision, we read them as accommodating the delegation at issue here. [FN30]

FN29. See 52 Fed.Reg. at 7270-72. Section 301 of

Title 5 of the United States Code authorizes a department head to issue regulations. Sections 509, 510, and 515 of Title 28 outline the authority of the Attorney General. Section 509 vests in the Attorney General, with four exceptions not relevant here, "all functions" of other officers, employees, and agencies of the Department of Justice. Section 510 authorizes the Attorney General to delegate this authority to "any other officer, employee, or agency of the Department of Justice." Finally, section 515(a) authorizes the Attorney General to conduct "any kind of legal proceeding, civil or criminal, including grand jury proceedings ... which United States attorneys are authorized by law to conduct," and it authorizes the Attorney General to delegate this authority to "any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law." Together, these provisions vest in the Attorney General the "investigative and prosecutorial functions and powers" described in the regulation, 28 C.F.R. § 600.1(a), and authorize him to delegate such functions and powers to others within the Department of Justice.

FN30. In *U.S. v. Nixon*, 418 U.S. 683, 694-96, 94 S.Ct. 3090, 3100-01, 41 L.Ed.2d 1039 (1974), the Supreme Court presupposed the validity of a regulation appointing the Special Prosecutor, a position indistinguishable from the one at issue here.

[2] Moreover, the Attorney General's delegation did not violate the Ethics Act, 28 U.S.C. § 597(a), which provides:

Whenever a matter is in the prosecutorial jurisdiction of a[n] independent counsel or has been accepted by a[n] independent counsel under [28 U.S.C. § 594(e)], the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter ... except insofar as such independent counsel agrees in writing that such investigation *56 **271 or proceedings may be continued by the Department of Justice.

The Attorney General's power of appointment extends only to the Department of Justice; hence the Office of Independent Counsel: Iran/Contra is "within" the Department, though free of ongoing supervision by the Attorney General. [FN31] Walsh

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has acknowledged that his signing the appointment form under the regulation constitutes an "agree[ment] in writing" within the meaning of § 597(a). The purpose of that provision--preventing investigations by the Department of Justice which would duplicate and possibly impede the work of Independent Counsel--is preserved by the present arrangement.

FN31. In his brief, Walsh disputes the district court's conclusion that--as he puts it--"under the regulation the Office of Independent Counsel is inside rather than outside the Department of Justice." Brief for Appellee Independent Counsel at 52. Walsh and his staff acknowledge that they are within, and claim the authority of, the Office of Independent Counsel: Iran/Contra established by the regulation. *Id.* at 43. They have argued, however, that the Attorney General had the authority, and used it, to locate this Office "outside" the Department of Justice. *Id.* at 52-63. Nonetheless, at oral argument they clearly stated that their arguments were made in the alternative and that if the court holds that this Office is "within" the Department of Justice, as we do, then they would not on that account abjure their authority under the regulation.

[3] North contends that the Attorney General's delegation of authority to the Independent Counsel violates the Appointments Clause of the Constitution, Art. II, § 2, which provides that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Citing *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), North contends that, given the substantial authority delegated to him, the Independent Counsel: Iran/Contra is not an "inferior Officer" but an "Officer of the United States" [FN32] who may be appointed only by the President with the advice and consent of the Senate. North raises essentially the same contention with

respect to the authority given to the independent counsel under the Ethics Act. We need not decide whether the Ethics Act creates such an "Officer of the United States," however, in order to conclude that the regulation does not. The crucial difference is that the Independent Counsel: Iran/Contra serves only for so long as the March 5, 1987, regulation remains in force. Subject to generally applicable procedural requirements, the Attorney General may rescind this regulation at any time, thereby abolishing the Office of Independent Counsel: Iran/Contra. [FN33] As a result, we must conclude that the Independent Counsel: Iran/Contra "is charged with the performance of the duty of the superior [i.e., the Attorney General] for a limited time and under special and temporary conditions." *United States v. Eaton*, *57 **272 169 U.S. 331, 343, 18 S.Ct. 374, 379, 42 L.Ed. 767 (1898). As such, "he is not thereby transformed into the superior and permanent official," *id.*, but rather remains an "inferior Officer" whom the Attorney General, as the "Head[] of [a] Department[]," may appoint under the express terms of the Appointments Clause. [FN34] See *id.* at 343-44, 18 S.Ct. at 879; *United States v. Germaine*, 99 U.S. (9 Otto) 508, 509-10, 25 L.Ed. 482 (1878). [FN35]

FN32. North consistently refers to Independent Counsel Walsh as a "superior Officer," which term is not to be found in the text of the Constitution; we prefer the words of the Framers to a tendentious neologism.

FN33. In *Nader v. Bork*, 366 F.Supp. 104, 108-09 (D.D.C.1973), the district court found arbitrary and capricious the October 23, 1973, rescission of the regulation creating the Office of Watergate Special Prosecutor, inferring from its repromulgation three weeks later that it was rescinded only to permit a result--the firing of Archibald Cox--that "could not legally have been accomplished while the regulation was in effect under the circumstances presented." *Id.* at 109. Cf. *Vitarelli v. Seaton*, 359 U.S. 535, 545-46, 79 S.Ct. 968, 975-76, 3 L.Ed.2d 1012 (1959). We are not presented with similar facts here and thus need not decide whether that analysis was correct. Nor does the Attorney General's March 5, 1987, regulation require, as a condition of its rescission, the consent of the Independent Counsel: Iran/Contra. Accordingly, we need not decide either whether the district court in *Nader v. Bork* properly relied upon the alternative ground

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that the rescission was invalid because Cox had not consented to it, as the regulation purported to require. 366 F.Supp. at 108.

FN34. Because the Attorney General created the Office of Independent Counsel: Iran/Contra and retains the authority to rescind his March 5, 1987, regulation, North's reliance on *Buckley v. Valeo*, 424 U.S. at 126, 96 S.Ct. at 685 ("any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' ") is misplaced. Unlike the Federal Election Commissioners in *Buckley*, the Independent Counsel: Iran/Contra derives his authority not by direct delegation from Congress, but rather through the Attorney General. Having been appointed by the President and confirmed by the Senate, the Attorney General was properly vested with the investigative and prosecutorial authority described in 28 U.S.C. § 509, and could delegate it to others "for a limited time and under special and temporary conditions." *United States v. Eaton*, 169 U.S. at 343, 18 S.Ct. at 379. For the same reason, North can derive no support from *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), and *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926), which involve the constitutional limitations on the authority of Congress to place restrictions on the removal power of the President. The Supreme Court has long recognized that an agency may impose limits on its own exercise of discretionary authority to remove officers and employees. See *Vitarelli v. Seaton*, 359 U.S. at 539-40, 79 S.Ct. at 972-73; *Service v. Dulles*, 354 U.S. 363, 383-89, 77 S.Ct. 1152, 1162-65, 1 L.Ed.2d 1403 (1957).

FN35. See also *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Service v. Dulles*, 354 U.S. at 366, 77 S.Ct. at 1154; and *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 265-67, 74 S.Ct. 499, 502-03, 98 L.Ed. 681 (1954), each of which implicitly recognizes that an "officer of the United States" may lawfully delegate his or her authority to an "inferior Officer."

ii. Has the Independent Counsel Properly Exercised the Authority Delegated?

North argues further that, "[e]ven assuming that the Attorney General had the authority to delegate

the powers purportedly delegated under the regulation, that authority has not been properly vested in Mr. Walsh or his associate counsel, who are therefore acting without any lawful authority whatsoever." [FN36] North argues that neither Walsh nor his associate counsel may act pursuant to the regulation because the associate counsel have not formally accepted appointments in the Office of Independent Counsel: Iran/Contra [FN37] and both they and Walsh have not been "specifically directed by the Attorney General" to conduct the grand jury investigation, as required by 28 U.S.C. § 515(a). We address each argument in turn.

FN36. Brief of Appellant at 21. Under Federal Rule of Criminal Procedure 6(d), an "[a]ttorney for the government ... may be present while the grand jury is deliberating or voting." Rule 54 then defines "attorney for the government" to include "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [or] an authorized assistant of a United States Attorney."

FN37. Walsh accepted appointment as Independent Counsel: Iran/Contra when he signed the appointment and oath form to that effect on March 5, 1987.

[4] It is less than perfectly clear whether associate counsel have formally accepted appointments under the regulation. [FN38] The Attorney General delegated to Walsh the express authority to hire associate counsel. In a March 13, 1987, letter, Assistant Attorney General Stephen Trott wrote to Walsh that, "[i]n order to effectuate the appointment of your staff, you should have each employee complete the standard 'Affidavits of Appointment' form ... and be sworn-in in the presence of a person designated in 5 U.S.C. § 2903." [FN39] The record contains no evidence that Walsh's associate counsel have taken any actions pursuant to Trott's request. North contends that the associate counsel therefore may act only in accordance with their previous appointments by the Special Division. Accordingly, North argues, any legal authority they possess proceeds from the Ethics Act, and not from the regulation.

FN38. 28 C.F.R. § 600.1(c), 52 Fed.Reg. at 7271.

FN39. Exhibit 6 to Brief of Appellant.

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***58 **273** Under the particular circumstances of this case, however, we find that appointment to the one office carries over to the other. The offices established under the Ethics Act and under the regulation have identical investigative and prosecutorial powers and jurisdiction. In addition, Walsh serves as Independent Counsel for each office, with the parallel authority to appoint associate counsel. Finally, the terms of the appointment and oath forms for the two offices are virtually identical. In sum, by previously submitting the appointment and oath forms to the Special Division, the associate counsel accepted appointments and took oaths identical to those that would have been required under the regulation, in order to perform the same jobs in a functionally indistinguishable office to that established by the regulation. Undoubtedly for these reasons, the Department of Justice accepts that the appointments and oaths made pursuant to the Ethics Act are sufficient as appointments and oaths of associate counsel within the Office of Independent Counsel: Iran/Contra. [FN40] We agree with the district court that "[n]ew appointment documents, therefore, would have served no purpose, as associate counsel had already made the necessary representations and were bound to their responsibilities under the first set of forms." [FN41]

FN40. Brief on Behalf of Amicus Curiae United States at 16 n. 7, 19-21. There is no evidence in the record that the Department ever renewed the request made in General Trott's letter of March 13, although it never received the affidavits as requested.

FN41. In re Sealed Case, supra note 2, 666 F.Supp. at 235 (footnote omitted).

North also contends that the Attorney General failed to comply with the requirement of 28 U.S.C. § 515(a) that he "specifically direct[]" Walsh and his associate counsel to conduct a grand jury investigation. In so arguing, North relies upon the lack of any "letter of authority" from the Attorney General (or his delegate) to each attorney, which is customarily provided in order to define the scope of the grand jury investigation and identify the attorneys conducting it. Although the cases concerning compliance with section 515(a) almost uniformly involve a dispute over whether a particular "letter of authority" specifically

authorized the investigation being conducted, [FN42] no court has held that section 515(a) requires that there be any "letter of authority" as such. In fact, as the Department of Justice emphasizes, the Seventh Circuit has recently held that an attorney was "specifically directed" to conduct a grand jury proceeding even though a "letter of appointment" had not been sent until after the indictment issued. *United States v. Balistreri*, 779 F.2d 1191, 1207-10 (7th Cir.), cert. denied, --- U.S. ---, 106 S.Ct. 1490, 89 L.Ed.2d 892 (1985).

FN42. See e.g., *United States v. Prueitt*, 540 F.2d 995, 999-1003 (9th Cir.), cert. denied, 429 U.S. 959, 97 S.Ct. 790, 50 L.Ed.2d 780 (1976); *United States v. Morrison*, 531 F.2d 1089, 1092 (1st Cir.), cert. denied, 429 U.S. 837, 97 S.Ct. 104, 50 L.Ed.2d 103 (1976); *Infelice v. United States*, 528 F.2d 204 (7th Cir.1975); *In re Persico*, 522 F.2d 41, 56-66 (2d Cir.1975); *United States v. Wrigley*, 520 F.2d 362 (8th Cir.), cert. denied, 423 U.S. 987, 96 S.Ct. 396, 46 L.Ed.2d 304 (1975).

[5][6] We need not determine how we would decide *Balistreri*, however, in order to resolve the case before us. In this case, no "letters of authority" were sent to Walsh and his associates, either before or after they began to act pursuant to the authority delegated by the Attorney General. What section 515(a) requires is a "specific [] direct[ion]"--not a "letter of authority." Congress imposed this requirement in order "to protect the government from abuse of discretion by a special attorney or unnecessary personnel expenditures by the Attorney General, not to limit the Attorney General's power to prosecute." [FN43] From the facts of this case, we conclude that a specific direction has been given, and that the purpose of the statute has been met.

FN43. In re *Persico*, 522 F.2d at 63.

It was the Attorney General, after all, who initially requested that the Special Division appoint an independent counsel. When the Special Division appointed ***59 **274** Walsh, it delineated the jurisdiction of his investigation with considerable specificity. The President immediately responded to this appointment by pledging the "complete cooperation" of the executive branch. [FN44] Later, when North challenged the legal authority of Walsh's investigation, the Attorney General, in order "to assure the courts, Congress, and the

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American people that [Walsh's] investigation will proceed in a clearly authorized and constitutionally valid form," [FN45] specially created the Office of Independent Counsel: Iran/Contra, provided it with the identical powers and jurisdiction employed by the independent counsel appointed by the court, and appointed Walsh as Independent Counsel: Iran/Contra. Accordingly, Walsh and his associate counsel have received, from the inception of their investigation, more than the usual and at least the necessary degree of "specific [] direct[ion]" required by statute. To find fault in the Department of Justice's failure to prepare "letters of authority" would be to demand the same duplicative effort as involved in requiring the associate counsel to submit appointment forms and take oaths, for a second time, in order to carry out their existing responsibilities within a functionally equivalent and in all material respects an actually identical office. We will not so exalt forms over substance. [FN46]

FN44. See supra note 4 and accompanying text.

FN45. 52 Fed.Reg. at 7270; see supra note 6 and accompanying text.

FN46. Finally, North contends that, even if Walsh and his associate counsel satisfied the requirements discussed in the text, their actions cannot be predicated upon that authority because, according to North, "Walsh has never purported to act pursuant to the regulation." Brief of Appellant at 21-22. We consider irrelevant Walsh's legally erroneous belief that the Attorney General may create offices outside the Department of Justice. See supra note 31. The only other evidence upon which North relies is Walsh's failure to proclaim in documents filed with the court that he was acting pursuant to authority derived from the regulation as well as from the Ethics Act. See Brief of Appellant at 34. We are persuaded, however, by Walsh's argument that "as a matter of law, because Independent Counsel has executed an appointment affidavit pursuant to the regulation as well as one pursuant to the statute, all actions taken by the Office of Independent Counsel have been taken pursuant to both the regulation and the statute." Brief for Appellee Independent Counsel at 43 (citations omitted). See *In re Sealed Case*, supra note 2, 666 F.Supp. at 235 n. 9 ("That the Independent Counsel's office chose to consistently use the label assigned to it under the [Ethics] Act does not belie the Independent

Counsel's assertion that every official action of his office was taken under both the Act and the regulation.").

iii. Summary

The Attorney General promulgated the March 5, 1987, regulation in order "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." [FN47] He possessed the legal authority, both constitutional and statutory, to create the Office of Independent Counsel: Iran/Contra. Walsh and his associate counsel have accepted appointments in that office, and their grand jury investigation complies with the "specific [] direct[ion]" they have received since December 19, 1986. As a result, the Attorney General's March 5, 1987, regulation has provided Walsh and his associate counsel with the legal authority necessary to conduct the grand jury investigation--and in particular, to issue the subpoena to North--regardless of whether they may also have such authority under the Ethics Act. Accordingly, because the subpoena North has received was "applied for and issued under the signature of [] authorized persons," [FN48] it is not "unduly burdensome or otherwise unlawful." [FN49]

FN47. 52 Fed.Reg. at 7271; see supra note 7 and accompanying text.

FN48. *In re Sealed Case*, supra note 19, 827 F.2d at 778.

FN49. *United States v. Ryan*, 402 U.S. at 532, 91 S.Ct. at 1582.

B. The Tenure Issue

[7] In remanding the case, we asked the district court to determine "whether any aspect of the relationship between the special division of this court and the Independent Counsel requires consideration of the constitutionality of the statute even if the Attorney General's appointment is otherwise *60 **275 valid." [FN50] As indicated above, we requested the district court to address this question because, upon initial inspection, we were unsure whether the Supreme Court's decision in *Bowsher v. Synar* required us to address the question of the constitutionality vel non of the

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removal provisions of the Ethics Act, [FN51] even though no one alleges that the Attorney General is likely to seek Walsh's removal in the foreseeable future. In *Bowsher* the Court

FN50. Order, *In re Sealed Case*, supra note 23 and accompanying text.

FN51. The relevant provisions are found in 28 U.S.C. § 596(a): (1) A[n] independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

* * *

(3) A[n] independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court [i.e., the Special Division] and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

reject[ed the] argument that consideration of the effect of a removal provision is not "ripe" until that provision is actually used.... "[I]t is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." The Impeachment Clause of the Constitution can hardly be thought to be undermined because of non-use.

106 S.Ct. at 3189 n. 5 (citation omitted).

In this case, the removal provisions in the Ethics Act and in the Attorney General's regulation are identical. [FN52] In general, they provide that the Attorney General may remove Walsh for cause only. What differentiates the two schemes is that the Attorney General may rescind or amend the regulation, thereby withdrawing the delegated authority or Walsh's security of tenure, whereas in order to effect the parallel result under the Ethics Act, the Congress and the President, or Congress overriding a veto, would have to legislate to repeal the statute, arguably a less likely development. North appears to argue that Walsh's more secure

status under the Ethics Act, combined with the fact that under the Act's removal provisions the court that appointed him would review his removal, creates in Walsh a "here-and-now subservience" to the Special Division and, under *Bowsher*, compels us to reach the merits of his constitutional challenge. [FN53]

FN52. Compare 28 U.S.C. § 596 with 28 C.F.R. § 600.3, 52 Fed.Reg. at 7272. In particular, the grounds for removal are identical.

FN53. Brief of Appellant at 37-38.

In *Bowsher*, the constitutional claim was "ripe" because the removal provision, by making the Comptroller General the servant of the Congress and not of the President, necessarily had an immediate and real impact on how he performed his duties. [FN54] *61 **276 Under the Balanced Budget and Emergency Deficit Control Act of 1985, the Comptroller General's duties involved the question of how to allocate scarce government monies; as illustrated by the budget controversies from which that Act emerged, it is particularly in the context of fiscal policy that "th[e] system of division and separation of powers produces conflicts, confusion, and discordance...." *Bowsher v. Synar*, 106 S.Ct. at 3187. In that context, too, one's institutional allegiance goes a long way, if not all the way, in determining how one acts: or, as is often said of such interbranch conflicts, where one stands depends upon where one sits. The three-judge district court opinion [FN55] on which *Bowsher* relied for its ripeness analysis makes the point that assertion of the authority to remove has an impact distinct from the mere possibility that an officer will in fact be removed. [FN56] "It is the prior assertion of authority to remove embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance" in making his day-to-day budgetary decisions under the Deficit Reduction Act. *Synar v. United States*, 626 F.Supp. at 1393 (emphasis added). Thus the Comptroller General--out of a "presumed desire to avoid removal by pleasing Congress"--would be significantly influenced in making decisions determining, in substantial part, whether the petitioners would receive anticipated federal benefits. *Id.* at 1392. So viewed, the Supreme Court in *Bowsher* was

virtually compelled to conclude that the separation of powers question was ripe for review even though the removal provision had not been exercised and, in fact, might never be. [FN57]

FN54. As the district court in *Synar v. United States* perceptively observed, a similar analysis applied with respect to bankruptcy judges whose terms, under the Bankruptcy Code, expired after fourteen years. In explaining why the Supreme Court reached the constitutional challenge to that provision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the district court stated that: It is true, of course, that the expiration of fourteen years was certain to occur while in the present case congressional removal is not. But that is quite irrelevant to whether the two provisions differ in their immediate impact, so that one is more "ripe" than the other. The immediate impact in *Northern Pipeline* came not from the certainty of expiration of fourteen years, but from the bankruptcy judge's awareness of the possibility of nonreappointment. It is his presumed desire to avoid that possibility by pleasing the appointing power, just as in the present case it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems. *Synar v. United States*, 626 F.Supp. 1374, 1392 (D.D.C. 1986). In a similar vein, the district court analogized the "immediate effect" that Congress' latent removal power had on the Comptroller General to the effect that "an agency's ... formal assertion (by rule) of the power" to "punish [] certain conduct" has on a party whose conduct is so regulated. *Id.* at 1393, comparing *Abbott Laboratories v. Gardner*.

FN55. *Synar v. United States*, 626 F.Supp. 1374 (D.D.C.1986).

FN56. Citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

FN57. We do not read *Bowsher*, however, to hold that the constitutionality of a statute is ripe for review any time a party raises a separation of powers claim. For example, suppose, improbably, that Congress transferred the National Weather Service from the Department of Commerce to the

Administrative Office of the United States Courts, and that this prompted someone--perhaps an employee who had hoped to move up within the Commerce Department--to bring a declaratory judgment suit challenging the move on separation of powers grounds. In terms purely of when that issue would be "ripe" for judicial review, it is difficult to see how the change in allegiances occasioned by the move would realistically have any effect on how the Service's employees perform their duties. Accordingly, it would not be unreasonable for a court to consider such a declaratory judgment action unripe until a plaintiff complains of some conduct by the newly-moved Service that would likely have been different if it had remained within the Department of Commerce.

In contrast, while North claims to suffer a harm from the removal provisions of the Ethics Act that he challenges as unconstitutional, he does not identify any way in which this "here-and-now" effect is even arguably felt by him. [FN58] We have already held that the Attorney General's parallel appointment provides Walsh with the legal authority, independent of the Ethics Act, to conduct the grand jury investigation from which this case arises. In light of this parallel source of authority, any harm to North that is a sufficiently direct and immediate consequence of the Ethics Act must involve an investigative or prosecutorial activity that Walsh would not undertake if he depended for his authority solely upon the Attorney General's regulation. In other words, North could only feel an immediate impact from the Act's removal provisions at this juncture if Walsh, without the benefit of the Act, would not take a certain action out of fear that the Attorney General would rescind or amend the regulation in order to abolish or limit his authority thereunder, but with the Act in place does so act, disregarding the risk that the Attorney General will remove him or limit *62 **277 his authority because the Special Division acts as the guarantor of his authority under the Ethics Act.

FN58. Instead, North instances various ex parte contacts between Walsh and his associates and the Special Division. He has not made it clear, however, how he thinks these contacts adversely affect him here and now; at most he could be read to imply that, if the Special Division were ever to review Walsh's removal by the Attorney General, it would so identify itself with him as to bias its

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judgment. This implication is no more a present effect, however, than the hypothetical removal to which it relates.

There is not the slightest reason to believe, however, that Walsh would not have convened the grand jury and issued the challenged subpoena to North if the Ethics Act did not exist. The Attorney General, by creating the Office of Independent Counsel: Iran/Contra in the image of the independent counsel's office under the Ethics Act, intended that Walsh would conduct his investigation just as he would pursuant to his identical authority under the Ethics Act so that, even if the Act were held unconstitutional, its absence would not in any way impair Walsh's investigation or prosecutions. In fact, the Attorney General stated as much in the preamble to the regulation. [FN59]

FN59. See 52 Fed.Reg. at 7270-71.

Furthermore, even if Walsh had acted in a manner demonstrably beyond the Attorney General's delegation of authority, during the course of this investigation but apart from issuing this subpoena, it would be of no avail to North on this appeal. In accordance with the principles we announced in *Deaver v. Seymour*, and in our opinion remanding this case to the district court, North may litigate only the lawfulness of the specific subpoena issued to him, not that of such other investigative or prosecutorial actions as Walsh may undertake. [FN60]

FN60. As we said in *Deaver v. Seymour*, see supra note 18, and as the district court said in *North v. Walsh and Meese*, see supra note 16, courts do not, except in very limited circumstances not alleged here, entertain the claim of a person subject to a criminal investigation that the investigation is unlawful and must therefore be enjoined. Courts exercise this restraint because, as Justice Frankfurter explained, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940). In previously remanding this case to the district court, we found a narrow pre-indictment exception to this rule, under which a recalcitrant grand jury witness, such as North, may raise the claim that his or her subpoena was "applied for and issued under

the signature of unauthorized persons." In *re Sealed Case*, supra note 19, 827 F.2d at 778. This exception, though, was not intended to swallow the general rule barring judicial interference with the conduct of a grand jury proceeding. As a result, in asserting that the subpoena issued to him was "unduly burdensome or otherwise unlawful," *United States v. Ryan*, 402 U.S. at 532, 91 S.Ct. at 1582, North may raise only those issues that relate to the specific subpoena with which he refused to comply. He may not rely upon the fortuitous circumstance of receiving that subpoena to effect an end run around the rule we announced in *Deaver v. Seymour* and in so doing challenge the entire investigation.

III. CONCLUSION

North appeals the district court's order holding him in contempt, challenging the legal authority of Independent Counsel Walsh and his associate counsel to conduct the grand jury that issued the subpoena with which he has refused to comply. We hold that Walsh and his associate counsel derive the necessary legal authority from the Attorney General's regulation of March 5, 1987, regardless of whether they also have this authority pursuant to their appointments under the Ethics Act. North's challenge to the subpoena does not make his constitutional challenge to the removal provisions of the Ethics Act reviewable at this time. [FN61]

FN61. *Buckley v. Valeo* does not suggest a contrary result. In that decision, which involved a suit for declaratory judgment, the Supreme Court held ripe for review a separation of powers challenge to Congress' appointment of Federal Election Commission members, 424 U.S. at 113-18, 96 S.Ct. at 679-82, to whom Congress had given "extensive rulemaking and adjudicative powers" and "direct and wide ranging" enforcement powers over the conduct of political elections. *Id.* at 110-11, 96 S.Ct. at 678. Moreover, the Court found that "the Commission ha[d] undertaken to issue rules and regulations," and that "[w]hile many of its other functions remain[ed] as yet unexercised," that exercise was nevertheless "all but certain." 424 U.S. at 116-17, 96 S.Ct. at 681. Although the politically-related nature of the Commission's duties and the present exercise of some powers and the "all but certain" exercise of others might not in themselves render "ripe" the separation of powers claim in a declaratory judgment setting, the Court

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relied heavily upon the additional consideration that "Congress was understandably most concerned with obtaining a final adjudication of as many issues as possible" as swiftly as possible. *Id.* at 117, 96 S.Ct. at 681. Cf. *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 82, 98 S.Ct. 2620, 2635, 57 L.Ed.2d 595 (1978). The configuration of factors that rendered the constitutional claim in *Buckley* ripe are not present here. Most importantly, whereas Congress expressed a desire for prompt review of the Federal Election Commission's authority, the Ethics Act contains no parallel provision. Moreover, as we have indicated, *supra* note 60, courts properly view declaratory actions such as that in *Buckley* with considerable disfavor in the criminal context; yet for the court today to reach North's constitutional claim would, as a practical matter, have the same effect as entertaining a declaratory action.

*63 **278 The judgment of the district court is therefore

Affirmed.

WILLIAMS, Circuit Judge, concurring and dissenting:

I concur in the court's opinion insofar as it upholds the authority of Independent Counsel Walsh and his subordinates under the Attorney General's regulations creating "Independent Counsel: Iran/Contra" (the "Regulations"). I write separately on that issue only to explain why I regard any revocation of the Regulations as free from judicial review, a factor that greatly facilitates my agreement with the conclusion that Walsh's appointment under the Regulations can be squared with the Appointments Clause, Art. II, § 2.

I dissent from the court's conclusion in that Counsel Walsh's regulatory authority renders North's attack on the Ethics in Government Act unripe.

I. REVOCABILITY OF THE REGULATIONS

North contends that Counsel Walsh's tenure under the Regulations violates the Appointments Clause, Art. II, § 2, by constituting him a "superior officer" whose appointment is not made pursuant to that clause, i.e., by the President with the advice and

consent of the Senate. The court responds that since the Attorney General can rescind the Regulation "at any time," Majority ("Maj.") at 56, Counsel Walsh is merely filling a part of the office of the Attorney General "for a limited time and under special and temporary conditions," *id.* (citing *United States v. Eaton*, 169 U.S. 331, 343, 18 S.Ct. 374, 379, 42 L.Ed. 767 (1898)). *Eaton* upheld the non-presidential appointment of a vice consul to temporarily wield all the powers of an ailing consul, even though Art. II, § 2 specifically identifies consuls as "superior officers." Accordingly, Walsh's similarly defeasible appointment is also valid. So far, I agree.

A premise of my sharing this conclusion is my belief that the Attorney General's revocation of the Regulations would be unreviewable. [FN1] Such revocation would, I believe, be exempt from judicial review as a decision "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982).

FN1. Of course superior officers are typically (and perhaps necessarily) dismissible by the President at will, so it may seem ironic to suggest that ease of dismissal facilitates upholding the appointment under the Regulations. But ease of dismissal by the Attorney General clearly establishes that Walsh is not a superior officer under the Regulations, thus reconciling his powers with the fact of his not having been appointed by the President.

The Supreme Court has long recognized 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, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974) (citing *Confiscation Cases*, 7 (U.S.) Wall 454, 19 L.Ed. 196 (1869)) (other citations omitted); see also *United States v. Batchelder*, 442 U.S. 114, 123-24, 99 S.Ct. 2198, 2203-04, 60 L.Ed.2d 755 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). It recently reaffirmed this principle emphatically. *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985) (agency decision not to enforce "presumptively unreviewable"); *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985) ("the Government retains 'broad discretion' as to whom to prosecute"). In both *Wayte* and *Chaney* the Court found judicial review peculiarly

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inappropriate. See *Wayte*, 470 U.S. at 607, 105 S.Ct. at 1531 ("the decision to prosecute is particularly ill-suited to judicial review"); *Chaney*, 470 U.S. at 831, 105 S.Ct. at 1656 ("the general unsuitability for judicial review *64 **279 of agency decisions to refuse enforcement").

The Court identified factors militating in favor of discretion and against review, all of which are applicable here. Assuming the existence of a "technical violation," *Chaney*, 470 U.S. at 831, 105 S.Ct. at 1656, enforcement decisions depend upon a multiplicity of concerns, all within the expertise of the agency: likelihood of success, relation to overall enforcement goals, and status within the agency's priorities. *Chaney*, 470 U.S. at 831-32, 105 S.Ct. at 1655-56; *Wayte*, 470 U.S. at 607, 105 S.Ct. at 1531. Such a decision involves an agency's comparison of expected cost and return for the particular case against the impact of deploying those resources elsewhere--a decision that can hardly be made without a grasp of the full range of enforcement possibilities before the agency. The administrator has this grasp (or should); a reviewing court does not. The Court further noted that judicial intervention into prosecutorial decisions "delays the criminal proceeding, threatens to chill law enforcement ..., and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte*, 470 U.S. at 607, 105 S.Ct. at 1531; see also *Chaney*, 470 U.S. at 834, 105 S.Ct. at 1657.

The Attorney General's issuance or revocation of regulations such as the ones in question is similarly discretionary. In substance the Regulations simply implement his organization of his department. Such decisions, like the ones in *Chaney* and *Wayte*, turn on the relationship between numerous factors as to which the Attorney General is expert, and the courts are not. Again they revolve around agency resource allocation priorities: potentialities for administrative confusion or duplication, economies of effort deriving from characteristics of the decisions being made, and--perhaps most relevant to the present case--the de facto priorities that are likely to emerge from the structure. (Streamlined, special-focus sub-agencies are likely to be relatively single-minded; commitment of an issue to such a sub-agency is an assignment of special priority to the field in question.) The traditional presumption of nonreviewability of prosecutorial decisions applies

by analogy here.

There are, to be sure, limits on the presumption of nonreviewability, but none that appears applicable to this case. Absent a claim that an agency decision was based on some impermissible factor--a belief that the agency lacked jurisdiction (or general policy amounting to total abdication), or unjustifiable criteria such as race or the accused's exercise of statutory or constitutional rights, see *Chaney*, 470 U.S. at 833 n. 4, 838, 105 S.Ct. at 1656 n. 4, *Wayte*, 470 U.S. at 608, 105 S.Ct. at 1531--the only basis for finding reviewability would be congressional provision of guidelines detailed enough to provide the courts with "law to apply," and thus a basis for review. *Chaney*, 470 U.S. at 833, 105 S.Ct. at 1659; see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971).

As in *Chaney*, the search for any "law to apply" is singularly unproductive. The sources of authority invoked by the Attorney General speak in the broadest imaginable terms: 5 U.S.C. § 301 (generally authorizing heads of departments to promulgate regulations); 28 U.S.C. § 509 (vesting in the Attorney General virtually all functions of "other officers" of the Department of Justice (i.e., officers other than those specified in immediately prior sections)); *id.* § 510 (stating that the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General"); *id.* § 515(a) (allowing the Attorney General, or any other officer of the Department, "or any attorney specially appointed by the Attorney General under law," to conduct various legal proceedings, including grand jury proceedings).

Accordingly, the revocation and promulgation of the Regulations appear committed to agency discretion by law.

This conclusion makes dismissal of North's Art. II, § 2 attack on the Regulations a comparatively simple matter. Given *65 **280 the Attorney General's complete legal freedom to dispose of Counsel Walsh by revocation of the Regulations, Walsh is no more a "superior officer" under the Regulations than was the vice consul appointed in

(Cite as: 829 F.2d 50, *65, 264 U.S.App.D.C. 265, **280)

Eaton to exercise consular duties until the executive removed him at its pleasure.

In view of my position on judicial review of revocation, I need not address the Art. II, § 2 issue that would be presented if such an act by the Attorney General were reviewable. It is plainly a more difficult case.

II. THE RIPENESS OF NORTH'S ATTACK ON THE ACT, GIVEN THE VALIDITY OF THE REGULATIONS

All members of the court agree that Walsh has valid authority under the Regulations. [FN2] The remaining question is whether, notwithstanding that authority, there is any occasion to consider North's attacks on Walsh's tenure under the Act. Under the doctrinal terminology of *Bowsher v. Synar*, --- U.S. ---, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986), the problem is whether the issue is "ripe."

FN2. At least for me, this is subject to a caveat based on possible intertwining of the Regulations with the Act. See *infra*, p. 69.

North contends that, notwithstanding any authority under the Regulations, Walsh's incremental tenure under the Act--his independence of the executive and possible subservience to the Special Court and Congress [FN3]--is so great as to affect his conduct "here-and-now." Clearly the gulf between the two forms of legal tenure is huge. The Attorney General is legally free to sweep the Regulations aside at will. Under the Act, by contrast, the Attorney General must establish "cause," and, perhaps most important, must convince the Special Court that there has been no error "of fact or law" in that finding. Thus the Special Court, which selected Walsh and might well be expected to view him as its protege, exercises effectively *de novo* review over dismissal. The Regulation affords gossamer tenure, the Act steel.

FN3. North notes that the Special Court's decision to vest in the Independent Counsel far broader jurisdiction than that proposed by the Attorney General followed communications to the Special Court from members of the then minority of the Senate Judiciary Committee, urging such an expansion. Letter from Joseph R. Biden, Jr., et al. to Special Division for Independent Counsel (Dec.

9, 1986). The episode suggests a point that should be borne in mind throughout: the label "independent" is not necessarily descriptive of true relations. Powers abhors a vacuum. Unhitching the Independent Counsel from the executive may make the office naturally prone to domination by the branch that represents its primary competitor.

That the Act's incremental tenure is likely to affect Walsh's day-to-day, "here-and-now" conduct seems indisputable. As I read the cases, this likelihood permits one against whom the distorted authority is wielded to raise separation-of-powers challenges to the legislation creating the distortion. And this is true, I believe, even though the object of the exercise of authority (here North) cannot directly trace the injuring exercise (service of a subpoena *duces tecum*) to the distorting element in Walsh's authority.

In challenges to the authority of a non-Article III court on the grounds that the challenger is entitled to a court enjoying Article III's exceptional tenure provisions, the assumption that inadequate tenure may prejudice the challenger is so automatic that it usually goes unmentioned. See, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982); *Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932); cf. *Ex parte Bakelite Corp.*, 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789 (1929). On at least one occasion, however, the Court explicitly stated that there was no need to inquire into the actual conduct of the decisionmaker, or to trace his or her rulings to influence from any institution on which, by virtue of the tenure arrangements, he or she might be dependent. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 533, 82 S.Ct. 1459, 1463, 8 L.Ed.2d 671 (1962).

*66 **281 In *Bowsher* the Court extended this principle--automatic inference of distorting effects from unconstitutional tenure--from the context of claims to an Article III tribunal to that of a general separation-of-powers attack on an officer's tenure. It treated as "ripe" the issue whether Congress's power to remove the Comptroller General invalidated its effort to vest certain executive powers in him under the Gramm-Rudman-Hollings Act (more formally, the Balanced Budget and

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Emergency Deficit Control Act of 1985, P.L. 99-177, 99 Stat. 1037, 2 U.S.C.A. § 901 et seq. (West Supp.1987)). Ripeness was created, the Court found, by the Comptroller General's "here-and-now subservience" to Congress. 106 S.Ct. at 3189 n. 5. (The footnote adopted the analysis of the district court, *Synar v. United States*, 626 F.Supp. 1374, 1392 (D.D.C.1986), which relied explicitly on one of the Article III cases, *Northern Pipeline*.)

In evaluating the *Bowsher* Court's standards for linking the tenure defect to plaintiffs' harm, one must examine the role of the Comptroller General under *Gramm-Rudman*. In each year the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") (the executive's and Congress's champions, respectively) were to prepare estimates of the deficit for the coming year. If the estimated deficit exceeded specified amounts, each director was to calculate program reductions pursuant to rules provided in the act. See *Synar*, 626 F.Supp. at 1377. They were to forward these estimates and program reductions to the Comptroller General, who was to issue his report on the same issues. He in turn was to forward that report to the President, who was bound to implement his findings. When the *Bowsher* action was brought, one round of this had occurred--through the issuance of a presidential implementing order. *Id.*

Among the plaintiffs was a union of government employees, whose cost-of-living adjustments (COLAs) had already been suspended, and were about to be canceled, pursuant to that order. *Id.* at 1380-81. Thus its members were injured by the operation of the act. But the union evidently made no effort to trace the size of the cutbacks emerging from the Comptroller General's edict to his subservience to Congress. If the CBO's deficit estimates were larger than OMB's, thus compelling more severe cutbacks, neither court bothered to mention it. If OMB and CBO split on the union members' COLAs and the Comptroller General's decision leaned unduly toward CBO's, again neither court alluded to the point. Clearly neither considered direct evidence of the distorting effect necessary to the outcome.

Another feature of *Bowsher* is directly relevant here. The Senate, defending the Comptroller General's role, noted that his removal could occur

only by means of a joint resolution, which to take legal effect would require either the President's approval or passage by two thirds of both houses. See *id.* at 1393 & n. 21. Accordingly, it argued that the court need no more consider the removal provision than it need consider the obvious and omnipresent possibility that Congress might later pass a law purporting to remove him. The district court responded that the tenure provision had "the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance." [FN4] *Id.* at 1393.

FN4. The Supreme Court, though noting that the dismissal resolution could be vetoed, merely observed that the veto could be overridden. 106 S.Ct. at 3189-90 n. 7. It did not address the similarity between Congress's asserted power to remove by resolution under the act and the underlying, inescapable possibility of its trying to do so by a new statute.

The district court opinion thus manifests great sensitivity to the likelihood that subtle variations in the quality of tenure will affect conduct. In *Bowsher*, Congress's merely signaling its ability to discharge the Comptroller General was enough, even though the ability signaled was no more than what existed anyway. And neither the district court nor the Supreme Court demanded any showing whatsoever that the alleged illegality of the tenure would *67 **282 move the Comptroller General in a direction hostile to plaintiffs' interests.

Buckley v. Valeo, 424 U.S. 1, 113-18, 96 S.Ct. 612, 679-81, 46 L.Ed.2d 659 (1976), manifests the same approach. Parties expecting their interests to be affected by future rulings of the Federal Election Commission challenged the means by which its members were to be chosen, invoking both the Appointments Clause and more general separation-of-powers principles. Even though nothing whatsoever had happened to these parties (in contrast to *North*, who faces prison for non-obedience to the subpoena), the Court found the issue ripe. The Court broadly observed:

Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights. 424 U.S. at 117-18, 96 S.Ct. at 681 (citing cases

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including traditional Article III cases, *Palmore* and *Glidden*). In *Buckley* the Court perceived the timing of the case as the primary problem and did not address the strength of the link between the defects in appointment process and the plaintiffs' expected injuries. Thus a fair reading of *Buckley* is that *Glidden*'s automatic inference of distorted conduct from defects in allegiance is of general applicability and not confined to claims to an Article III tribunal.

Thus not only the Supreme Court's standard treatment of Article III claims, but also *Bowsher* and *Buckley* support hospitable treatment for constitutional challenges to tenure arrangements (indeed, under *Buckley*, structural defects in allegiance generally). The Court has been ready to infer the prospect of distortions in conduct from the illegality in tenure, without more. The inference is hardly a wild leap. The maxim "Where you stand depends on where you sit" (your viewpoint depends on your position or interest) suggests folk recognition of the point. And the founders' adoption of Article III's extraordinary tenure arrangements reflects it at the most sophisticated level of political thought. (Perhaps judges' sensitivity on the point stems from their being beneficiaries of Article III's unmatched tenure provisions.) What is most striking is the Court's willingness to draw the inference without specific proof--indeed without so much as a hint of connection.

But this willingness is by no means inexplicable. Despite widespread recognition of the causal link between allegiance and stance, it may rarely be susceptible of direct proof. In fact direct proof might often require embarrassing and inappropriate inquiries into thought processes, cf. *United States v. Morgan*, 313 U.S. 409, 421-22, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941) (explaining impropriety of judicial inquiry into thought processes of administrators); *Wayte v. United States*, 470 U.S. at 607, 105 S.Ct. at 1531 (explaining harm that might flow from judicial inquiry into thought processes underlying prosecutorial decisions). As a result, insistence on proof would likely put courts to a choice between permitting such dubious inquiries or denying relief to claims based on unconstitutional tenure. The Supreme Court appears to have avoided that dilemma by making the inference of distorted conduct automatic.

Nor is the logic of the automatic inference confined to claims of entitlement to an Article III court. Whenever the Constitution is construed to forbid a given arrangement of tenure (or allegiance), courts may infer that the framers believed the arrangement would distort conduct; thus *Bowsher* and *Buckley*. [FN5]

FN5. At the ripeness stage, of course, the inference of distorting effect is drawn on the basis of an assumption *arguendo* that there is a substantive illegality. Once the merits are reached, obviously, the courts may uphold the challenged arrangement. See, e.g., *Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932); *United States v. Woodley*, 751 F.2d 1008 (9th Cir.1985) (en banc), cert. denied, 475 U.S. 1048, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986). Nothing in this opinion should be understood to reflect any view on the merits of North's claim.

North's challenge to the Act is that it subjects him to coercive process by a man who is free to disregard constraints that would operate on a member of the executive *68 **283 branch. These constraints are at their core the presence of competing priorities, including not merely other possible lines of inquiry and offenses, but also the need for sensitivity to the inquiry's possible impact on foreign relations. [FN6] *Walsh's* subordinates have already, in open court, stated his position to be that in the event of any clash between his judgment on such matters, and that of the executive branch, he is the final judge. Exhibit 1 to Reply Brief for Appellant. Though North has not directly traced the subpoena to *Walsh's* utter freedom from the executive branch, the inference is more readily drawn than the similar inference in *Bowsher*, *Buckley*, or the Article III cases.

FN6. *Walsh* enjoys full prosecutorial discretion within the rather large domain confided to him under the Regulation and Act: the potential impact of constitutionally questionable allegiances is correspondingly broad. In *Bowsher*, the discretion exercised by the Comptroller General, though enough to rank as "executive," 106 S.Ct. at 3191-92, was comparatively narrow, and the potential congressional influence correspondingly so.

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The parties have not framed the issue in terms of standing, but we have an independent duty to satisfy ourselves that standing exists. Under the view taken by the Court in *Bowsher*, there can be little doubt that the three predicates of constitutional standing exist: North will suffer injury in fact either from going to prison or from being forced by that prospect to comply with the subpoena *duces tecum*; Walsh's subpoena is the direct cause of his injury; and a court order quashing the subpoena would redress his injury. See *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

It is useful, however, to explore some difficulties in this analysis, both to satisfy the standing inquiry and to derive such light as it may shed on the ripeness issue. Walsh might argue (though he hasn't) that the illegality alleged (a faulty tenure arrangement) is not the cause of North's injury, pointing to his alternative authority under the Regulations. Similarly, quashing the subpoena may be a null remedy if Walsh, abjuring his authority under the Act and explicitly invoking only the Regulations, were to issue another one. A judgment quashing the subpoena would presumably leave him free to do so, even though it explicitly held the Act unconstitutional. Thus, North's claims of causation and redressability appear suspect under the typically rigorous standing inquiry. See, e.g., *id.*; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

In *Bowsher*, however, the Court's brief standing discussion (which basically incorporated the district court's analysis) indicates that for claims of unconstitutional tenure a relaxed concept of causation applies. See *Bowsher*, 106 S.Ct. at 3186; *Synar*, 626 F.Supp. at 1380-81. The district court found injury in fact (and, implicitly, the requisite causation) in the suspension of COLAs and in the prospect of their cancellation. *Synar*, 626 F.Supp. at 1380-81. It viewed this causal connection as enough, without any suggestion that the Comptroller General's disputed tenure actually caused his decision to be any more adverse to the union than it would have been if his tenure had been constitutionally correct.

The district court's analysis can readily be applied

here: the contempt and the subpoena cause the harm, their extinction will redress it. But this does not answer the question that the district court neither posed nor answered: what is the causal link between the illegality (i.e., that part of the legislation said to render it unlawful) and the harm? The answer to that question, I believe, must lie in the same reasoning developed in the ripeness context: that in the context of a constitutional attack on tenure provisions, distorted conduct may be inferred automatically from faulty allegiances.

Redressability poses a slightly different problem. The district court found redressability in *Bowsher* in the fact that invalidation of the automatic deficit reduction process would prevent the impending cancellation *69 **284 of benefits. While under Gramm-Rudman's "fallback" provisions Congress might itself enact the cancellation, that possibility--patently a lesser risk--would not undermine the effectiveness of invalidating the provisions for automatic reduction. See *Synar*, 626 F.Supp. at 1381.

The present case is different. If quashing the subpoena and invalidating the Act were to leave Walsh completely free to proceed, would North's injury be redressed at all? The answer lies in the substantive rulings that would be possible if the court reached the merits. A court accepting North's arguments on the merits might find that the momentum of Walsh's investigation--built initially on the challenged tenure--would assuredly carry it forward to the identical point. If so, the court would have to consider whether there had been so great an intertwining of the Regulations with the Act as to call for invalidation of both. Such a remedy would, of course, leave the Attorney General free to repromulgate the Regulations (shorn, presumably, of their references to procedures under the Act). But the remedy would break the momentum, and negate the allegedly unconstitutional influence. As the panel majority finds no ripeness, and none of us has reached the merits, I need not try to resolve these issues. But I believe the analysis establishes that the selection of proper redress would turn on the conclusions reached by the court on the merits; there is no inherent obstacle to adequate redress.

* * *

Where a person is the object of the exercise of authority by one whose tenure he seeks to challenge on constitutional grounds (at least ones involving separation of powers), the courts are ready to infer that the allegedly defective tenure has played a significant role in bringing about that exercise of authority and its tendency to injure plaintiff. Here, the inference that North's predicament stems from the questioned tenure is at least as plausible as the parallel inference in *Bowsher* or the Article III cases, in my judgment far more so. See also *Buckley*, 424 U.S. at 113-18, 96 S.Ct. at 679-81. Accordingly I believe his claim to be ripe and would reach the merits.

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John L. BRADY, Petitioner,
v.
STATE OF MARYLAND.

No. 490.

Supreme Court of the United States

Argued March 18 and 19, 1963.

Decided May 13, 1963.

Proceeding for post-conviction relief. Dismissal of the petition by the trial court was affirmed by the Maryland Court of Appeals, 226 Md. 422, 174 A.2d 167, which remanded the case for retrial on the question of punishment but not the question of guilt. On certiorari, the Supreme Court, speaking through Mr. Justice Douglas, held that where the question of admissibility of evidence relating to guilt or innocence was for the court under Maryland law, and the Maryland Court of Appeals held that nothing in the suppressed confession of petitioner's confederate could have reduced petitioner's offense below murder in the first degree, the decision of that court to remand the case, because of such confession withheld by the prosecution, for retrial on the issue of punishment only did not deprive petitioner of due process.

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissented.

[1] FEDERAL COURTS ⇨ 503
170Bk503

Decision of Maryland Court of Appeals on petitioner's appeal in post-conviction proceeding, remanding case for retrial on question of punishment but not on question of guilt was "final judgment" within statute relating to federal Supreme Court review of final judgments by certiorari. Code Md.1957, art. 27, § 413; Code Supp. Md. art. 27, § 645A et seq.; 28 U.S.C.A. § 1257(3); U.S.C.A.Const Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

[2] CONSTITUTIONAL LAW ⇨ 268(5)

92k268(5)
Formerly 92k257

Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[3] CONSTITUTIONAL LAW ⇨ 268(5)
92k268(5)

Formerly 92k257
Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A.Const. Amend. 14.

[4] CRIMINAL LAW ⇨ 734
110k734

Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on issue of innocence or guilt of accused. Const. Md. art. 15, § 5.

[5] FEDERAL COURTS ⇨ 371
170Bk371

State courts, state agencies and state legislatures are final expositors of state law under our federal regime. Const. Md. art 15, § 5.

[6] CONSTITUTIONAL LAW ⇨ 271
92k271

Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; Const.Md. art. 15, § 5; U.S.C.A.Const. Amend. 14.

****1195 *84** E. Clinton Bamberger, Jr.,
Baltimore, Md., for petitioner.

Thomas W. Jamison, III, Baltimore, Md., for
respondent.

Opinion of the Court by Mr. Justice DOUGLAS,
announced by Mr. Justice BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

[1] Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland *85 Post Conviction Procedure Act. 222 Md. 442, 160 A.2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A.2d 167. The case is here on certiorari, 371 U.S. 812, 83 S.Ct. 56, 9 L.Ed.2d 54. [FN1]

FN1. Neither party suggests that the decision below is not a 'final judgment' within the meaning of 28 U.S.C. s 1257(3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that 'Final judgment in a criminal case means sentence.

The sentence is the judgment' (Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt 'that presents a serious and unsettled question' (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528) that 'is fundamental to the further conduct of the case' (United States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311). This question is 'independent of, and unaffected by' (Radio Station WOW v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See Largent v. Texas, 318 U.S. 418, 421-422, 63 S.Ct. 667, 668-669, 87 L.Ed. 873. Cf. Local No. 438 Const. and General Laborers' Union v. Curry, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514.

****1196** The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words 'without capital punishment.' 3 Md. Ann. Code, 1957, Art. 27, s 413. In Maryland, by reason of the state constitution, the jury in a criminal case are 'the Judges of Law, as well as of fact.' Art. XV, s 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

***86** [2] We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals--United States ex rel. Almeida v. Baldi, 195 F.2d 815, 33 A.L.R.2d 1407, and United States ex rel. Thompson v. Dye, 221 F.2d 763--which, we agree, state the correct constitutional rule.

This ruling is an extension of Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, where the Court ruled on what nondisclosure by a prosecutor violates due process:

'It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.'

In *Pyle v. Kansas*, 317 U.S. 213, 215--216, 63 S.Ct. 177, 178, 87 L.Ed. 214, we phrased the rule in broader terms:

'Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.'

*87 The Third Circuit in the Baldi case construed that statement in *Pyle v. Kansas* to mean that the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217, we extended the test formulated in *Mooney v. Holohan* when we said: 'The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' And see *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; *Wilde v. Wyoming*, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985. Cf. *Durley v. Mayo*, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion).

[3] We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates **1197 due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not

punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' [FN2] A prosecution that withholds evidence on demand of an accused which, if made available, *88 would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

FN2. Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954: 'The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.'

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

'There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. * * * (It would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering

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the punishment of the defendant Brady.

'Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. *

* *

'The appellant's sole claim of prejudice goes to the punishment imposed. If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree. We, therefore, see no occasion to retry that issue.' 226 Md., at 429-430, 174 A.2d, at 171. (Italics added.)

*89 If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense 'below murder in the first degree'? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

[4][5][6] But Maryland's constitutional provision making the jury in criminal **1198 cases 'the Judges of Law' does not mean precisely what it seems to say. [FN3] The present status of that provision was reviewed recently in *Giles v. State*, 229 Md. 370, 183 A.2d 359, appeal dismissed, 372 U.S. 767, 83 S.Ct. 1102, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that 'Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused.' 229 Md., at 383, 183 A.2d, at p. 365. The cases cited make up a long line going back nearly a century. *Wheeler v. State*, 42 Md. 563, 570, stated that instructions to the jury were advisory only, 'except in regard to questions as to what shall be considered as evidence.' And the court 'having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction.' *Bell v. State*, 57 Md. 108, 120. And see *Beard v. State*, 71 Md. 275, 280, 17 A. 1044, 1045, 4 L.R.A. 675; *Dick v. State*, 107 Md. 11, 21, 68 A. 286, 290. Cf. *Vogel v. State*, 163 Md. 267, 162 A. 705.

FN3. See *Dennis*, Maryland's Antique

Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39, 43; Prescott, *Juries as Judges of the Law: Should the Practice be Continued*, 60 Md.St.Bar Assn.Rept. 246, 253-254.

*90 We usually walk on treacherous ground when we explore state law, [FN4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the 'admissibility of evidence' pertinent to 'the issue of the innocence or guilt of the accused.' *Giles v. State*, supra. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession 'could have reduced the appellant Brady's offense below murder in the first degree.' We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. [FN5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprivation of this defendant of that sporting chance through the use of a *91 bifurcated trial (cf. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

FN4. For one unhappy incident of recent vintage see *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 60 S.Ct. 215, 84 L.Ed. 447, 537, that replaced an earlier opinion in the same case, 309 U.S. 703.

FN5. 'In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been

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admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?' Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39. See also Bell v. State, supra, 57 Md. at 120; Vogel v. State, 163 Md., at 272, 162 A., at 706--707.

Affirmed.

Separate opinion of Mr. Justice WHITE.

1. The Maryland Court of Appeals declared, 'The suppression or withholding by the State of material evidence exculpatory to an accused is a violation **1199 of due process' without citing the United States Constitution or the Maryland Constitution which also has a due process clause. [FN*] We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See New York City v. Central Savings Bank, 306 U.S. 661, 59 S.Ct. 790, 83 L.Ed. 1058; Minnesota v. National Tea Co., 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, *92 wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, 'The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.' After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: 'The

question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment.'

FN* Md.Const., Art. 23; Home Utilities Co., Inc., v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A.2d 109; Raymond v. State ex rel. Szydlouski, 192 Md. 602, 65 A.2d 285; County Com'rs of Anne Arundel County v. English, 182 Md. 514, 35 A.2d 135, 150 A.L.R. 842; Oursler v. Tawes, 178 Md. 471, 13 A.2d 763.

The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

Mr. Justice HARLAN, whom Mr. Justice BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection? [FN1] In my opinion an affirmative answer would *93 be required if the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

FN1. I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 1196--1197 of its opinion.

The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal

cases 'the Judges of Law, as **1200 well as of fact,' as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under s 645G of the Maryland Post Conviction Procedure Act, Md.Code, Art. 27 (1960 Cum.Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case, [FN2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. 226 Md., at 430, 174 A.2d, at 171. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is dispositive *94 of the crucial issue here. 226 Md., at 427--429, 174 A.2d, at 170. [FN3]

FN2. Section 645G provides in part: 'If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.' Rule 870 provides that the Court of Appeals 'will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended.'

FN3. It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of *Day v. State*, 196 Md. 384, 76 A.2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

Nor do I find anything in any of the other Maryland cases cited by the Court (ante, p. 1197) which bears on the admissibility vel non of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not 'overrule' the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that 'in the final analysis the jury are the judges of both the law and the facts, and the verdict in this case is entirely the jury's responsibility.' (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement would have been admissible at the trial on the issue of guilt. [FN4]

FN4. In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: 'It would have been, yes.'

In this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms *95 address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920.

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UNITED STATES of America, Appellee,
v.
David Isser GREENE, Appellant.

No. 94-2572.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 10, 1994.

Decided Nov. 29, 1994.

Defendant was convicted in the United States District Court for the District of Minnesota, David S. Doty, J., of mail fraud and providing prohibited object to federal prisoner, and he appealed. The Court of Appeals held that defendant who pled guilty to mail fraud and providing prohibited object to federal prisoner made sufficient objections to facts related in presentence report regarding amount of fraud and abuse of trust or use of special skill necessary to trigger trial court's obligation to hold evidentiary hearing.

Reversed and remanded.

[1] CRIMINAL LAW ⇨ 986.4(1)

110k986.4(1)

Defendant who pled guilty to mail fraud and providing prohibited object to federal prisoner made sufficient objections to facts related in presentence report regarding amount of fraud and abuse of trust or use of special skill necessary to trigger trial court's obligation to hold evidentiary hearing; defendant objected to presentence report in timely fashion and requested evidentiary hearing. U.S. Dist. Ct. Rules D. Minn., Rule 83.10(f); U.S.S.G. § 3B1.3, 18 U.S.C.A. App.

[2] CRIMINAL LAW ⇨ 1311

110k1311

Government bore burden of proof on disputed issues of fact where they related to factors which would enhance defendant's sentence.

[3] CRIMINAL LAW ⇨ 986.4(1)

110k986.4(1)

Once defendant objects to presentence report, court must either make finding as to whether disputed fact exists or state that it will not take the disputed fact into account; if the sentencing court chooses to

make finding with respect to disputed facts, it must do so on basis of evidence, and not presentence report.

*384 Nathan Lewin, Washington, DC, argued (Alison E. Grossman, on the brief), for appellant.

Douglas R. Peterson, Asst. U.S. Atty., argued (Jon M. Hopeman, Asst. U.S. Atty., on the brief), for appellee.

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

PER CURIAM.

David Isser Greene, an Orthodox Jewish rabbi, appeals the district court's sentence imposed under the Federal Sentencing Guidelines (hereinafter U.S.S.G.). Greene pleaded guilty to mail fraud and to providing a prohibited object to a federal prisoner, stemming from his agreement to arrange a Jewish divorce (also known as a "get") for a federal prison inmate. Greene entered into a plea agreement which, among other things, set forth the sentencing guidelines recommendations of the parties that the amount of the fraud equaled \$5,500 and that Greene did not abuse his position of trust or use a special skill.

The district court, however, rejected this sentencing guideline aspect of the plea agreement. Thereafter, the district court, without holding an evidentiary hearing and relying on and adopting the findings of the probation officer, determined that Greene intended to inflict a loss of approximately \$50,000 and abused his position of trust or used a special skill at the time he perpetrated his scheme. The district court sentenced Greene to five months of imprisonment, five months of home detention and two years of supervised release.

Greene appeals, arguing that the district court erred by determining the amount of loss he intended to inflict and that he abused his position of trust without holding an evidentiary hearing. For the reasons that follow, we reverse and remand for resentencing.

I. BACKGROUND

Since 1988, appellant David Isser Greene, a thirty-one-year-old rabbi, has served as director of the Chabad-Lubavitch Hospitality House of Rochester, Minnesota. Initially, Greene provided volunteer services for federal prison inmates at the Rochester Federal Medical Center ("FMC Rochester"). In 1990, he became a contract rabbi at a weekly salary of \$50, providing Jewish religious services to the inmates at FMC Rochester.

Samuel Dagan, an inmate at FMC Rochester, attended religious services arranged by Chabad-Lubavitch at FMC Rochester. Greene agreed to arrange a get for Dagan. A Jewish divorce requires that a document be specifically handwritten by a scribe and signed by two witnesses on the express direction of the husband.

According to Greene, Dagan independently agreed to contribute \$50,000 to the Chabad-Lubavitch organization. Andrew Reisini, a paralegal for Dagan's attorney Michael Atkin, was handling Dagan's finances and stated that Greene had called Atkin, requesting a "contribution" on behalf of Dagan in the amount of "at least \$2,000."

In February 1993, during a meeting between Dagan and Greene in the chapel at FMC Rochester, Greene confirmed Dagan's \$50,000 pledge. Dagan represented that the money would soon be available because of an imminent settlement with a Connecticut *385 bank. On May 8, 1993, Reisini met with Greene at the Holiday Inn in Rochester and gave Greene \$500 in cash. On May 23, 1993, Reisini sent Greene a \$5,000 cashier's check payable to "Chabad-Lubavitch of Rochester, Rabbi Greene, Director." An envelope containing a \$100 bill was included with the check. On May 25, 1994, Greene met with Dagan at FMC Rochester and gave him the envelope containing the \$100 bill. During the meeting, Dagan signed the purported last page of a release that would make funds available from the Connecticut bank.

Greene advised Reisini that he was going to attend his sister's wedding and see to Dagan's divorce proceedings in Israel. Greene claimed that, while in New York before traveling to Israel, he would proceed with the detailed and intricate religious procedure of procuring the get, complicated by the fact that Dagan was in jail and his wife lived in Israel.

After Greene returned to the United States, he met with Reisini at the Minneapolis-St. Paul International Airport. Reisini gave Greene a cashier's check made out to "Chabad-Lubavitch of Rochester, Minnesota" in the amount of \$45,000. Greene was then arrested and charged in a four-count indictment alleging three felonies and one misdemeanor.

Greene pleaded guilty to mail fraud, in violation of 18 U.S.C. § 1341 and to smuggling U.S. currency into a federal prison, in violation of 18 U.S.C. § 1791(a)(1), (b)(4), and (d)(1)(E). Greene signed a plea agreement, agreeing to plead guilty to one felony count and one misdemeanor count. In the plea agreement, the parties specified the amount of loss for guidelines purposes at \$5,500 and without any enhancement under U.S.S.G. § 3B1.3 for abuse of position of trust or use of special skill. The plea agreement stated that the position of the parties as to the applicable guidelines did not bind the court and that Greene could not withdraw his plea if the court rejected the recommendations of the parties regarding the sentencing factors.

The presentence report, however, found that the amount of loss was at least \$50,000 and recommended that Greene's offense level be increased two points for the facts "suggesting" an abuse of a position of trust and use of a special skill. On April 27, 1994, Greene moved for an evidentiary hearing on the presentence report, objecting to the determination that the amount of loss equaled \$50,000 and to the recommendation for a two point enhancement for abuse of trust or use of a special skill.

The district court, however, did not hold an evidentiary hearing, and stated that an evidentiary hearing is only necessary or appropriate where there is a dispute over the facts. The district court concluded that, in this case, there was no dispute over the facts themselves, but a dispute over the application of the facts to the law. Therefore, the district court deemed an evidentiary hearing unnecessary. At sentencing, the district court, adopting the conclusions of the presentence report, determined the amount of fraud at \$50,000 and increased Greene's offense level by two points for abuse of a position of trust and use of a special skill.

The district court determined that the factual

record reflected that Greene demanded \$50,000 to obtain a get and the presentence report asserts that a get actually costs between \$200 and \$500 to obtain. The court, therefore, concluded that Greene intended to inflict a loss of approximately \$50,000. (Sentencing Tr. at 5-7). Although mentioned at oral argument but not raised as an issue on appeal, counsel representing Greene on appeal, but not representing him at the guilty plea or sentencing hearing, questioned whether a high fee for a divorce which was later obtained can amount to fraud.

Greene urged that the amount of loss should be reduced by the expense he incurred by traveling to Israel to obtain the get. The district court noted that the trip coincided with his sister's wedding, but even if the court accepted Greene's premise, the guideline calculation would remain the same. (Sentencing Tr. at 6-7). In addition, the district court concluded that a two level enhancement was appropriate because Greene had abused a position of trust as a contract employee of the Bureau of Prisons and because his special skills as a rabbi made it *386 significantly easier for him to commit the crime. (Sentencing Tr. at 7-9).

As already stated, the district court sentenced Greene to five months of imprisonment, five months of home detention and two years of supervised release under the split-sentence provision of U.S.S.G. § 5C1.1(d)(2). If Greene's objections were sustained, however, his appropriate sentence would fall within a sentencing range of zero to six months. Greene then filed a request for release pending appeal. We granted his request for release and expedited his appeal.

II. DISCUSSION

[1] The parties agree that the district court denied Greene an evidentiary hearing. This appeal thus focuses on whether Greene made a sufficient objection to facts related in the presentence report which would trigger an obligation to hold an evidentiary hearing.

In *United States v. Hammer*, 3 F.3d 266, 272 (8th Cir.1993), cert. denied, --- U.S. ---, 114 S.Ct. 1121, 127 L.Ed.2d 430 (1994), we held that unless a defendant has admitted the facts alleged in a presentence report, the presentence report is not evidence and not a legally sufficient bases for

making findings on contested issues of fact. The Hammer court also determined that:

[i]f a defendant objects to factual allegations in a presentence report, the Court must either state that the challenged facts will not be taken into account at sentencing, or it must make a finding on the disputed issue. See Fed.R.Crim.P. 32(c)(3)(D). If the latter course is chosen, the government must introduce evidence sufficient to convince the Court by a preponderance of the evidence that the fact in question exists.

Id. at 272-73 (quoting *United States v. Streeter*, 907 F.2d 781, 791-92 (8th Cir.1990)).

We first address whether Greene properly set forth his objections to the factual findings of the presentence report, requiring the court to hold an evidentiary hearing under Hammer. Greene made a timely written objection to the factual accuracy of the presentence report under the procedure established in the United States District Court for the District of Minnesota Local Rule 83.10(f). Nevertheless, at the sentencing hearing, the district court explicitly rejected Greene's request for an evidentiary hearing to determine the amount of loss attributable to Greene's conduct and to determine whether Greene abused his position of trust.

The Government argues that Greene did not preserve his objections because he failed to explicitly object at the sentencing hearing to the factual findings of the district court and of the presentence investigation. In addition, the Government claims that by stipulating to the written plea agreement, Greene admitted to facts tantamount to a \$50,000 loss and to abuse of trust and use of a special skill. We disagree.

Here, the district court erred by assuming that no dispute over the facts existed, but only a dispute over the application of the law to the facts. In addition to filing written objections, Greene's counsel specifically requested an evidentiary hearing on the presentence report. This placed in dispute the facts and inferences to be drawn from the facts.

[2][3] In this case, the record reflects that Greene objected to the presentence report in a timely fashion and requested an evidentiary hearing. The government bears the burden of proof on the disputed issues because they relate factors which would enhance the sentence. As Hammer instructs,

once a defendant objects to the presentence report, the court must either make a finding as to whether the disputed fact exists or state that it will not take the disputed fact into account. *Id.* at 273. If the sentencing court chooses to make a finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report. *Id.* Hammer emphasizes that the court, not the probation officer, must, upon an appropriate record, be the fact-finder where a dispute exists.

On this record before us on appeal, the district court did not follow the legal requirements set forth in Hammer. Although the district court addressed Greene's objections at the sentencing hearing, the court did not hold an evidentiary hearing at all. Instead, the district court accepted the factual narrative *387 plus ultimate facts and conclusions arrived at by the probation officer in the presentence report, that Greene intended to inflict a loss of \$50,000 and abused his position of trust or used a special skill.

Accordingly, we reverse David Isser Greene's sentence and remand for an evidentiary hearing by the district judge to find the amount of loss Greene intended to inflict and to determine whether Greene abused his position of trust or used a special skill pursuant to U.S.S.G. § 3B1.3.

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UNITED STATES, Petitioner,
v.
Milton Dean BATCHELDER.

No. 78-776.

Argued April 18, 1979.
Decided June 4, 1979.

Defendant's conviction of violating a provision of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 prohibiting previously convicted felons from receiving a firearm that has traveled in interstate commerce was affirmed by the United States Court of Appeals for the Seventh Circuit, 581 F.2d 626, but the Court ordered the defendant's sentence reduced from five to a maximum of two years. Certiorari was granted. The Supreme Court, Mr. Justice Marshall, held that: (1) the defendant was properly sentenced to five years under Title IV, even though his conduct also violated a similar provision of Title VII of the Omnibus Act, which provided for a maximum two-year sentence, and (2) as so construed, the statutory provisions at issue were not void for vagueness, did not violate equal protection or due process on the theory that they allowed the prosecutor unfettered discretion in selecting which of two penalties to apply, nor did they impermissibly delegate to the executive branch the Legislature's responsibility to fix criminal penalties.

Reversed.

[1] CONSTITUTIONAL LAW ⇨ 62(5.1)

92k62(5.1)

Formerly 92k62(5)

Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h),

924(a); 18 U.S.C.A. App. § 1202(a).

[1] CONSTITUTIONAL LAW ⇨ 250.3(1)

92k250.3(1)

Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h), 924(a); 18 U.S.C.A. App. § 1202(a).

[1] CONSTITUTIONAL LAW ⇨ 270(1)

92k270(1)

Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h), 924(a); 18 U.S.C.A. App. § 1202(a).

[1] WEAPONS ⇨ 3

406k3

Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two

penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h), 924(a); 18 U.S.C.A. App. § 1202(a).

[1] WEAPONS ⇔ 17(8)
406k17(8)

Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h), 924(a); 18 U.S.C.A. App. § 1202(a).

[2] CRIMINAL LAW ⇔ 29(3)
110k29(3)

Formerly 110k29

When act violates more than one criminal statute, government may prosecute under either so long as it does not discriminate against any class of defendants.

[3] DISTRICT AND PROSECUTING ATTORNEYS ⇔ 8
131k8

Whether to prosecute and what charge to file or bring before grand jury are decisions that generally rest in prosecutor's discretion.

[4] CRIMINAL LAW ⇔ 1206.3(4)
110k1206.3(4)
Formerly 110k1208(2)

Just as defendant has no constitutional right to elect which of two applicable federal statutes shall be basis of his indictment and prosecution, neither is he entitled to choose penalty scheme under which he will be sentenced. U.S.C.A.Const. art. 2, §§ 2, 3; 28 U.S.C.A. §§ 515, 516.

****2198 Syllabus [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter

of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*114 Respondent was found guilty of violating 18 U.S.C. § 922(h), which is part of Title IV of the Omnibus Crime Control and Safe **2199 Streets Act of 1968 (Act). That provision prohibits previously convicted felons from receiving a firearm that has traveled in interstate commerce. The District Court sentenced respondent under 18 U.S.C. § 924(a) to five years' imprisonment, the maximum term authorized for violation of § 922(h). The Court of Appeals affirmed the conviction but remanded for resentencing. Noting that the substantive elements of § 922(h) and 18 U.S.C.App. § 1202(a), which is contained in Title VII of the Act, are identical as applied to a convicted felon who unlawfully receives a firearm, the court interpreted the Act to allow no more than the 2-year maximum sentence provided by § 1202(a).

Held: A defendant convicted of violating § 922(h) is properly sentenced under § 924(a) even though his conduct also violates § 1202(a). Pp. 2201-2205.

(a) Nothing in the language, structure, or legislative history of the Act suggests that because of the overlap between §§ 922(h) and 1202(a), a defendant convicted under § 922(h) may be imprisoned for no more than the maximum term specified in § 1202(a). Rather, each substantive statute, in conjunction with its own sentencing provision operates independently of the other. Pp. 2201-2202.

(b) The Court of Appeals erroneously relied on three principles of statutory interpretation in construing § 1202(a) to override the penalties authorized by § 924(a). The doctrine that ambiguities in criminal statutes must be resolved in favor of lenity is not applicable here since there is no ambiguity to resolve. Nor can § 1202(a) be interpreted as implicitly repealing § 924(a) whenever a defendant's conduct might violate both sections. Legislative intent to repeal must be manifest in the "positive repugnancy between the provisions." *United States v. Borden Co.*, 308 U.S. 188, 199, 60 S.Ct. 182, 188, 84 L.Ed. 181. In this case, the penalty provisions are fully capable of coexisting because they apply to convictions

under different statutes. Finally, the maxim that statutes should be construed to avoid constitutional questions offers no assistance here, since this principle applies only when an alternative interpretation is fairly possible from the language of the statute. There is simply no basis in *115 the Act for reading the term "five" in § 924(a) to mean "two." Pp. 2202-2203.

(c) The statutory provisions at issue are not void for vagueness because they unambiguously specify the activity proscribed and the penalties available upon conviction. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent that would a single statute authorizing alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied. Pp. 2203-2204.

(d) Nor are the statutes unconstitutional under the equal protection component or Due Process Clause of the Fifth Amendment on the theory that they allow the prosecutor unfettered discretion in selecting which of two penalties to apply. A prosecutor's discretion to choose between §§ 922(h) and 1202(a) is not "unfettered"; selectivity in the enforcement of criminal laws is subject to constitutional constraints. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion. Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced. Pp. 2204-2205.

(e) The statutes are not unconstitutional as impermissibly delegating to the Executive Branch the Legislature's responsibility **2200 to fix criminal penalties. Having clearly informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each statute, Congress has fulfilled its duty. P. 2205.

581 F.2d 626, reversed.

Andrew J. Levander, Washington, D.C., for petitioner, pro hac vice.

Charles A. Bellows, Chicago, Ill., for respondent.

Mr. Justice MARSHALL delivered the opinion of the Court.

At issue in this case are two overlapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Act). [FN1] *116 sBoth prohibit convicted felons from receiving firearms, but each authorizes different maximum penalties. We must determine whether a defendant convicted of the offense carrying the greater penalty may be sentenced only under the more lenient provision when his conduct violates both statutes.

FN1. 82 Stat. 197.

I

Respondent, a previously convicted felon, was found guilty of receiving a firearm that had traveled in interstate commerce, in violation of 18 U.S.C. § 922(h). [FN2] The District Court sentenced him under 18 U.S.C. § 924(a) to five years' imprisonment, the maximum term authorized for violation of § 922(h). [FN3]

FN2. In pertinent part, 18 U.S.C. § 922(h) provides: "It shall be unlawful for any person--"(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; "(2) who is a fugitive from justice; "(3) who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug . . . or narcotic drug . . . ; or "(4) who has been adjudicated as a mental defective or who has been committed to any mental institution; "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

FN3. Title 18 U.S.C. § 924(a) provides in relevant part: "Whoever violates any provision of this chapter . . . shall be fined not more than \$5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

The Court of Appeals affirmed the conviction but, by a divided vote, remanded for resentencing. 581 F.2d 626 (CA7 1978). The majority recognized that

respondent had been indicted and convicted under § 922(h) and that § 924(a) permits five years' imprisonment for such violations. 581 F.2d, at 629. However, noting that the substantive elements *117 of § 922(h) and 18 U.S.C.App. § 1202(a) are identical as applied to a convicted felon who unlawfully receives a firearm, the court interpreted the Omnibus Act to allow no more than the 2-year maximum sentence provided by § 1202(a). 581 F.2d, at 629. [FN4] In so holding, the Court of Appeals relied on three principles of statutory construction. Because, in its view, the "arguably contradict [ory]" penalty provisions for similar conduct and the "inconclusive" legislative history raised doubt whether Congress had intended the two penalty provisions to coexist, the court first applied the doctrine that ambiguities in criminal legislation are to be resolved in favor of the defendant. *Id.* at 630. **2201 Second, the court determined that since § 1202(a) was "Congress' last word on the issue of penalty," it may have implicitly repealed the punishment provisions of § 924(a). 581 F.2d, at 630. Acknowledging that the "first two principles cannot be applied to these facts without some difficulty," the majority also invoked the maxim that a court should, if possible, interpret a statute to avoid constitutional questions. *Id.*, at 630-631. Here, the court reasoned, the "prosecutor's power to select one of two statutes that are identical except for their penalty provisions" implicated "important constitutional protections." *Id.*, at 631.

FN4. Section 1202(a) states: "Any person who--"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or "(2) has been discharged from the Armed Forces under dishonorable conditions, or "(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or "(4) having been a citizen of the United States has renounced his citizenship, or "(5) being an alien is illegally or unlawfully in the United States, "and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both." 18 U.S.C.App. § 1202(a).

*118 The dissent found no basis in the Omnibus Act or its legislative history for engrafting the penalty provisions of § 1202(a) onto §§ 922(h) and

924(a). 581 F.2d, at 638-639. Relying on "the long line of cases . . . which hold that where an act may violate more than one criminal statute, the government may elect to prosecute under either, even if [the] defendant risks the harsher penalty, so long as the prosecutor does not discriminate against any class of defendants," the dissent further concluded that the statutory scheme was constitutional. *Id.*, at 637.

We granted certiorari, 439 U.S. 1066, 99 S.Ct. 830, 59 L.Ed.2d 30 (1979), and now reverse the judgment vacating respondent's 5-year prison sentence.

II

[1] This Court has previously noted the partial redundancy of §§ 922(h) and 1202(a), both as to the conduct they proscribe and the individuals they reach. See *United States v. Bass*, 404 U.S. 336, 341-343, and n.9, 92 S.Ct. 515, 519-20, 30 L.Ed.2d 488 (1971). However, we find nothing in the language, structure, or legislative history of the Omnibus Act to suggest that because of this overlap, a defendant convicted under § 922(h) may be imprisoned for no more than the maximum term specified in § 1202(a). As we read the Act, each substantive statute, in conjunction with its own sentencing provision, operates independently of the other.

Section 922(h), contained in Title IV of the Omnibus Act, prohibits four categories of individuals from receiving "any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." See n.2, *supra*. Persons who violate Title IV are subject to the penalties provided by § 924(a), which authorizes a maximum fine of \$5,000 and imprisonment for up to five years. See n.3, *supra*. Section 1202(a), located in Title VII of the Omnibus Act, forbids five categories of individuals from "receiv[ing], possess [ing], or transport[ing] in commerce or affecting commerce . . . any firearm." This same section authorizes a maximum fine of *119 \$10,000 and imprisonment for not more than two years. See n.4, *supra*.

While §§ 922 and 1202(a) both prohibit convicted felons such as petitioner from receiving firearms [FN5] each Title unambiguously specifies the

penalties available to enforce its substantive proscriptions. Section 924(a) applies without exception to "[w]hoever violates **2202 any provision" of Title IV, and § 922(h) is patently such a provision. See 18 U.S.C., ch. 44; 82 Stat. 226, 234; S.Rep. No. 1097, 90th Cong., 2d Sess., 20-25, 117 (1968); U.S.Code Cong. & Admin.News 1968, p. 2112. Similarly, because Title VII's substantive prohibitions and penalties are both enumerated in § 1202, its penalty scheme encompasses only criminal prosecutions brought under that provision. On their face, these statutes thus establish that § 924(a) alone delimits the appropriate punishment for violations of § 922(h).

FN5. Even in the case of convicted felons, however, the two statutes are not coextensive. For example, Title VII defines a felony as "any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less." 18 U.S.C.App. § 1202(c)(2). Under Title IV, "a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(h)(1), excludes "(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . . , or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20). In addition, the Commerce Clause elements of §§ 922(h) and 1202(a) may vary slightly. See *Barrett v. United States*, 423 U.S. 212, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976); *Scarborough v. United States*, 431 U.S. 563, 571-572, 97 S.Ct. 1963, 1968, 52 L.Ed.2d 582 (1977).

That Congress intended to enact two independent gun control statutes, each fully enforceable on its own terms, is confirmed by the legislative history of the Omnibus Act. Section 922(h) derived from § 2(f) of the Federal Firearms Act of *120 1938, 52 Stat. 1251, and § 5 of that Act, 52 Stat. 1252, authorized the same maximum prison term as § 924(a). Title IV of the Omnibus Act merely recodified with some modification this "carefully constructed package of gun control legislation,"

which had been in existence for many years. *Scarborough v. United States*, 431 U.S. 563, 570, 97 S.Ct. 1963, 1967, 52 L.Ed.2d 582 (1977); see *United States v. Bass*, supra, 404 U.S., at 343 n.10, 92 S.Ct., at 520; 15 U.S.C. §§ 902, 905 (1964 ed.).

By contrast, Title VII was a "last-minute" floor amendment, "hastily passed, with little discussion, no hearings, and no report." *United States v. Bass*, supra, at 344, and n.11, 92 S.Ct., at 520; see *Scarborough v. United States*, supra, 431 U.S., at 569-570, and n.9, 97 S.Ct., at 1967. And the meager legislative debates involving that amendment demonstrate no intention to alter the terms of Title IV. Immediately before the Senate passed Title VII, Senator Dodd inquired whether it would substitute for Title IV. 114 Cong.Rec. 14774 (1968). Senator Long, the sponsor of the amendment, replied that § 1202 would "take nothing from" but merely "add to" Title IV. 114 Cong.Rec. 14774 (1968). Similarly, although Title VII received only passing mention in House discussions of the bill, Representative Machen made clear that the amendment would "complement . . . the gun-control legislation contained in title IV." *Id.*, at 16286. Had these legislators intended to pre-empt Title IV in cases of overlap, they presumably would not have indicated that the purpose of Title VII was to complement Title IV. See *Scarborough v. United States*, supra, at 573, 97 S.Ct., at 1968. [FN6] *121 These discussions, together with the language and structure of the Omnibus Act, evince Congress' clear understanding that the two Titles would be applied independently. [FN7]

FN6. Four months after enacting the Omnibus Act, the same Congress amended and re-enacted Titles IV and VII as part of the Gun Control Act of 1968. 82 Stat. 1213. This latter Act also treats the provisions of Titles IV and VII as independent and self-contained. Title I of the Gun Control Act amended Title IV, compare 82 Stat. 225 with 82 Stat. 1214, and Title III of the Gun Control Act amended Title VII. Compare 82 Stat. 236 with 82 Stat. 1236. The accompanying legislative Reports nowhere indicate that the sentencing scheme of § 1202(a) was to govern convictions under § 922. See H.R.Conf.Rep. No. 1956, 90th Cong., 2d Sess., 31, 34 (1968); S.Rep. No. 1501, 90th Cong., 2d Sess., 21, 37 (1968); U.S.Code Cong. & Admin.News 1968, p. 4410.

FN7. The anomalies created by the Court of Appeals' decision further suggest that Congress must have intended only the penalties specified in § 924(a) to apply to violations of § 922(h). For example, a person who received a firearm while under indictment for murder would be subject to five years' imprisonment, since only § 922(h) includes those under indictment for a felony. 18 U.S.C. § 922(h)(1). If he received the firearm after his conviction, however, the term of imprisonment could not exceed two years. Similarly, because § 922(h) alone proscribes receipt of ammunition, a felon who obtained a single bullet could receive a 5-year sentence, while receipt of a firearm would be punishable by no more than two years' imprisonment under § 1202(a). In addition, the Court of Appeals' analysis leaves uncertain the result that would obtain if a sentencing judge wished to impose a maximum prison sentence and a maximum fine for conduct violative of both Titles. The doctrine of lenity would suggest that the \$5,000 maximum of § 924(a) and the 2-year maximum of § 1202(a) would apply. However, if the doctrine of implied repeal controls, arguably the \$10,000 fine authorized by § 1202(a) could be imposed for a violation of § 922(h). See *infra*, at 2203.

****2203** In construing § 1202(a) to override the penalties authorized by § 924(a), the Court of Appeals relied, we believe erroneously, on three principles of statutory interpretation. First, the court invoked the well-established doctrine that ambiguities in criminal statutes must be resolved in favor of lenity. E. g., *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971); *United States v. Bass*, 404 U.S., at 347, 92 S.Ct., at 522; *United States v. Culbert*, 435 U.S. 371, 379, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978); *United States v. Naftalin*, 441 U.S. 768, 778-779, 99 S.Ct. 2077, 2084, 60 L.Ed.2d 624 (1979); *Dunn v. United States*, 442 U.S., at 112-113, 99 S.Ct., at 2197. Although this principle of construction applies to sentencing as well as substantive provisions, see *Simpson v. United States*, 435 U.S. 6, 14-15, 98 S.Ct. 909, 913-914, 55 L.Ed.2d 70 (1978), in the instant case there is no ambiguity to resolve. Respondent unquestionably violated § 922(h), and § 924(a) unquestionably permits five years' imprisonment for such a violation. That § 1202(a) provides different penalties for essentially the same conduct is no justification for taking liberties with unequivocal

statutory *122 language. See *Barrett v. United States*, 423 U.S. 212, 217, 96 S.Ct. 498, 501, 46 L.Ed.2d 450 (1976). By its express terms, § 1202(a) limits its penalty scheme exclusively to convictions obtained under that provision. Where as here, "Congress has conveyed its purpose clearly, . . . we decline to manufacture ambiguity where none exists." *United States v. Culbert*, *supra*, 435 U.S., at 379, 98 S.Ct., at 1117.

Nor can § 1202(a) be interpreted as implicitly repealing § 924(a) whenever a defendant's conduct might violate both Titles. For it is "not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976). Rather, the legislative intent to repeal must be manifest in the " 'positive repugnancy between the provisions.' " *United States v. Borden Co.*, 308 U.S. 188, 199, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). In this case, however, the penalty provisions are fully capable of coexisting because they apply to convictions under different statutes.

Finally, the maxim that statutes should be construed to avoid constitutional questions offers no assistance here. This " 'cardinal principle' of statutory construction . . . is appropriate only when [an alternative interpretation] is 'fairly possible' " from the language of the statute. *Swain v. Pressley*, 430 U.S. 372, 378 n.11, 97 S.Ct. 1224, 1228, 51 L.Ed.2d 411 (1977); see *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); *United States v. Sullivan*, 332 U.S. 689, 693, 68 S.Ct. 331, 334, 92 L.Ed. 297 (1948); *Shapiro v. United States*, 335 U.S. 1, 31, 68 S.Ct. 1375, 1391, 92 L.Ed. 1787 (1948). We simply are unable to discern any basis in the Omnibus Act for reading the term "five" in § 924(a) to mean "two."

III

In resolving the statutory question, the majority below expressed "serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct." 581 F.2d, at 633-634 (footnote omitted). Specifically, the court suggested that the statutes might (1) be void for vagueness, (2) implicate "due process and equal protection interest[s]" in avoiding excessive

prosecutorial discretion and in *123 obtaining equal justice," and (3) constitute an impermissible delegation of congressional authority. *Id.*, at 631-633. We find no constitutional infirmities.

A

It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." **2204 *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). See *Connally v. General Construction Co.*, 269 U.S. 385, 391-393, 46 S.Ct. 126, 127-128, 70 L.Ed. 322 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *Dunn v. United States*, 442 U.S., at 112-113, 99 S.Ct., at 2197. So too, vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. See *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *United States v. Brown*, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); cf. *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

The provisions in issue here, however, unambiguously specify the activity proscribed and the penalties available upon conviction. See *supra*, at 2201-2202. That this particular conduct may violate both Titles does not detract from the notice afforded by each. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.

B

[2][3] This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute *124 under either so long as it does not discriminate against any class of

defendants. See *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46, 73 S.Ct. 77, 79, 97 L.Ed. 61 (1952); *Rosenberg v. United States*, 346 U.S. 273, 294, 73 S.Ct. 1152, 1163, 97 L.Ed. 1607 (1953) (Clark, J., concurring, joined by five Members of the Court); *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962); *SEC v. National Securities, Inc.*, 393 U.S. 453, 468, 89 S.Ct. 564, 572, 21 L.Ed.2d 668 (1969); *United States v. Naftalin*, 441 U.S., at 778, 99 S.Ct., at 2084. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion. See *Confiscation Cases*, 7 Wall. 454, 19 L.Ed. 196 (1869); *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974); *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978).

The Court of Appeals acknowledged this "settled rule" allowing prosecutorial choice. 581 F.2d, at 632. Nevertheless, relying on the dissenting opinion in *Berra v. United States*, 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013 (1956), [FN8] the court distinguished overlapping statutes with identical standards of proof from provisions that vary in some particular. 581 F.2d, at 632-633. In the court's view, when two statutes prohibit "exactly the same conduct," the prosecutor's "selection of which of two penalties to apply" would be "unfettered." *Id.*, at 633, and n.11. Because such prosecutorial discretion could produce "unequal justice," the court expressed doubt that this form of legislative redundancy was constitutional. *Id.*, at 631. We find this analysis factually and legally unsound.

FN8. *Berra* involved two tax evasion statutes, which the Court interpreted as proscribing identical conduct. The defendant, who was charged and convicted under the felony provision, argued that the jury should have been instructed on the misdemeanor offense as well. The Court rejected this contention and refused to consider whether the defendant's sentence was invalid because in excess of the maximum authorized by the misdemeanor statute. The dissent urged that permitting the prosecutor to control whether a particular act would be punished as a misdemeanor or a felony raised "serious constitutional questions." 351 U.S., at 139-140, 76 S.Ct., at 691.

[4] Contrary to the Court of Appeals' assertions,

a prosecutor's discretion to choose between §§ 922(h) and 1202(a) is not *125 "unfettered." Selectivity in the enforcement of criminal laws is, of course, subject **2205 to constitutional constraints. [FN9] And a decision to proceed under § 922(h) does not empower the Government to predetermine ultimate criminal sanctions. Rather, it merely enables the sentencing judge to impose a longer prison sentence than § 1202(a) would permit and precludes him from imposing the greater fine authorized by § 1202(a). More importantly, there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. Cf. *Rosenberg v. United States*, supra, 346 U.S., at 294, 73 S.Ct., at 1163 (Clark, J., concurring); *Oyler v. Boles*, supra, 368 U.S., at 456, 82 S.Ct., at 505. Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced. See U.S.Const., Art. II, §§ 2, 3; 28 U.S.C. §§ 515, 516; *United States v. Nixon*, supra, 418 U.S., at 694, 94 S.Ct., at 3100.

FN9. The Equal Protection Clause prohibits selective enforcement "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962). Respondent does not allege that his prosecution was motivated by improper considerations.

C

Approaching the problem of prosecutorial discretion from a slightly different perspective, the Court of Appeals postulated that the statutes might impermissibly delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties. *126 See *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812); *United States v. Grimaud*, 220

U.S. 506, 516-517, 519, 31 S.Ct. 480, 482-483, 484, 55 L.Ed. 563 (1911); *United States v. Evans*, 333 U.S., at 486, 68 S.Ct., at 636. We do not agree. The provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws. Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty. See *United States v. Evans*, supra, at 486, 492, 495, 68 S.Ct., at 636, 639, 640.

Accordingly, the judgment of the Court of Appeals is

Reversed.

END OF DOCUMENT

UNITED STATES of America, Appellee,
v.
WALLACH, et al., Defendants,
**Rusty Kent London, Eugene Robert Wallach, a/
k/a "E. Robert (Bob) Wallach," and
Wayne Franklyn Chinn, Defendants-Appellants.**

**Nos. 181-183, Dockets 89-1544, 89-1563 and 89-
1575.**

United States Court of Appeals,
Second Circuit.

Argued Oct. 23, 1990.

Decided May 31, 1991.
As Amended Aug. 13, 1991.

Defendants were convicted in the United States District Court for the Southern District of New York, Richard Owen, J., of racketeering, mail fraud, interstate transportation of stolen property, and conspiracy to violate the federal conflict of interest law and they appealed. The Court of Appeals, Meskill, Circuit Judge, held that: (1) fact that all officers and directors of corporation agreed to payments to defendants did not preclude finding of fraud; (2) even if defendants were entitled to payment from the corporation for purposes other than the stated purposes of the payments, they could be found to have defrauded the corporation; but (3) perjury of government witness required reversal of all convictions.

Reversed and remanded.

Altimari, Circuit Judge, filed a concurring opinion.

[1] CRIMINAL LAW ⇨ 919(1)
110k919(1)

Whether introduction of perjured testimony requires new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury; where prosecution knew or should have known of the perjury, conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury; if it is established that the Government knowingly permitted the introduction of false testimony,

reversal is virtually automatic; where Government was unaware of witness' perjury, new trial is warranted only if the testimony was material and the court is left with a firm belief that, but for perjured testimony, the defendant would most likely not have been convicted.

[1] CRIMINAL LAW ⇨ 940
110k940

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[1] CRIMINAL LAW ⇨ 945(1)
110k945(1)

Whether introduction of perjured testimony requires new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury; where prosecution knew or should have known of the perjury, conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury; if it is established that the Government knowingly permitted the introduction of false testimony, reversal is virtually automatic; where Government was unaware of witness' perjury, new trial is warranted only if the testimony was material and the court is left with a firm belief that, but for perjured testimony, the defendant would most likely not have been convicted.

[2] CRIMINAL LAW ⇨ 706(2)
110k706(2)

Government should have been aware of witness' perjury concerning his gambling activities, so that use of the testimony required reversal where the

Government questioned the witness extensively when presented with evidence of his gambling activities but, rather than proceeding with great caution when he was cross-examined about those activities, set out on redirect examination to rehabilitate him.

[2] CRIMINAL LAW ⇔ 1171.8(1)

110k1171.8(1)

Government should have been aware of witness' perjury concerning his gambling activities, so that use of the testimony required reversal where the Government questioned the witness extensively when presented with evidence of his gambling activities but, rather than proceeding with great caution when he was cross-examined about those activities, set out on redirect examination to rehabilitate him.

[3] CRIMINAL LAW ⇔ 1169.1(2.1)

110k1169.1(2.1)

Formerly 110k1169.1(2)

Even if Government did not know that witness was perjuring himself when he denied gambling activity after date on which he allegedly reformed himself, that perjured testimony required reversal; witness was one of two significant witnesses against the defendant; the other witness had admitted perjuring himself in other proceedings, and witness who perjured himself at defendants' trial had been involved in the acts with which the defendants were charged but was represented as having reformed himself and having ceased gambling.

[4] UNITED STATES ⇔ 40

393k40

Order of the independent counsel court giving independent counsel jurisdiction to investigate whether any provision of federal law was violated by Attorney General's relationship or dealings with certain persons did not give the independent counsel jurisdiction over violations of federal law by those other persons which was unrelated to the acts of the Attorney General.

[5] INDICTMENT AND INFORMATION ⇔ 10.1(1)

210k10.1(1)

Prosecutors were not biased against defendants because of prosecutors' relationship with the Attorney General so as to preclude them from being disinterested prosecutors and to render the

indictment invalid.

[6] POSTAL SERVICE ⇔ 35(2)

306k35(2)

Essential elements of a mail fraud violation are a scheme to defraud, money or property, and the use of the mails to further the scheme. 18 U.S.C.A. § 1341.

[7] POSTAL SERVICE ⇔ 35(5)

306k35(5)

To establish existence of scheme to defraud, Government must present proof that defendant possessed a fraudulent intent. 18 U.S.C.A. § 1341.

[8] POSTAL SERVICE ⇔ 35(9)

306k35(9)

Although money or property must be the object of mail fraud scheme, Government is not required to show that the intended victim was actually defrauded and need only show that defendants contemplated some actual harm or injury. 18 U.S.C.A. § 1341.

[9] POSTAL SERVICE ⇔ 35(9)

306k35(9)

Fact that defendants did perform some services for corporation, but not those for which payment was purportedly made to them, did not defeat charge of mail fraud as the corporation and the shareholders did not receive the services that they believed were being provided.

[10] CORPORATIONS ⇔ 180

101k180

Role of shareholders in governing conduct of corporation is minimal and limited to fundamental decisions, such as the election of directors or the approval of extraordinary matters and amendments of the articles of incorporation and bylaws; shareholders have no legal right to control day-to-day affairs of a corporation.

[11] CORPORATIONS ⇔ 182.1(1)

101k182.1(1)

Shareholders do not hold legal title to any of the corporation's assets; corporation, the entity itself, is vested with title.

[12] POSTAL SERVICE ⇔ 35(9)

306k35(9)

Shareholders ownership of stock in corporation was a property interest giving rise to a right to

information necessary to monitor and police the behavior of the corporation, so that fraud which deprived them of that comprised them of a property interest and could be the subject of a mail fraud prosecution. 18 U.S.C.A. § 1341.

[13] POSTAL SERVICE ⇔ 48(4.2)

306k48(4.2)

Formerly 306k48(4.8)

Allegation that defendants, in concert with insiders of corporation, set up a scheme to conceal the true nature of their dealings and the ultimate recipients of payments from the corporation adequately alleged deprivation of property belonging to the shareholders, and thus could support mail fraud conviction; misrepresentations permitted officers to pay out large sums from the corporation to undisclosed individuals for allegedly improper purposes, while maintaining the facade that the payments were in furtherance of legitimate corporation goals, and thus deprived the shareholders and the corporation of the opportunity to make informed decisions. 18 U.S.C.A. § 1341.

[14] FRAUD ⇔ 68

184k68

Fact that directors and officers of corporation have authority to act on behalf of corporation and shareholders does not preclude a criminal fraud from being perpetrated against the corporation when all officers are participants in the scheme. 18 U.S.C.A. § 1341.

[15] POSTAL SERVICE ⇔ 35(10)

306k35(10)

Credit card billings were central to scheme whereby corporate officer was allowed to use corporate credit cards for his own benefit, with the corporation paying the bills, and thus could support prosecution for mail fraud. 18 U.S.C.A. § 1841.

[16] POSTAL SERVICE ⇔ 35(10)

306k35(10)

Property was taken through a scheme whereby director of corporation was permitted to use corporation credit cards for his own personal benefit, and concealment of the payments to the director from the corporation by masking them as business expenses perpetrated a fraud on the corporation and its shareholders which could be prosecuted under the mail fraud statute. 18 U.S.C.A. § 1341.

[17] RECEIVING STOLEN GOODS ⇔ 1

324k1

To obtain a conviction under the National Stolen Property Act, Government must prove beyond a reasonable doubt that defendant transported property, as defined by the statute, in interstate commerce, that the property was worth than \$5,000, and that the defendant knew that the property was stolen, converted or taken by fraud. 18 U.S.C.A. § 2314.

[18] RECEIVING STOLEN GOODS ⇔ 2

324k2

To establish violation of the National Stolen Property Act, Government must prove that the defendant was actually successful in defrauding his intended victim of property in excess of \$5,000 and actual pecuniary harm must be shown; in contrast, Government need only prove an intent to defraud in order to obtain a mail fraud conviction and actual success of the scheme is not essential. 18 U.S.C.A. §§ 1341, 2314.

[19] RECEIVING STOLEN GOODS ⇔ 2

324k2

To obtain a conviction for transportation of stolen property, Government need not prove that defendant actually participated in scheme to defraud someone of property; proof that the defendant knew that the property had been stolen or procured by fraud is sufficient. 18 U.S.C.A. § 2314.

[19] RECEIVING STOLEN GOODS ⇔ 3

324k3

To obtain a conviction for transportation of stolen property, Government need not prove that defendant actually participated in scheme to defraud someone of property; proof that the defendant knew that the property had been stolen or procured by fraud is sufficient. 18 U.S.C.A. § 2314.

[20] RECEIVING STOLEN GOODS ⇔ 5

324k5

Fact that officers and directors of corporation were aware of everything that had transpired with respect to payments made by corporation and had willingly disbursed relevant funds did not preclude finding that those who received the funds were guilty of transporting stolen property. 18 U.S.C.A. § 2314.

[21] STATUTES ⇔ 241(1)

361k241(1)

Application of the rule of lenity is warranted only where the statute's language or intended purpose is unclear.

[22] CONSPIRACY ⇌ 24(1)

91k24(1)

To establish existence of conspiracy, Government need only establish existence of agreement and an overt act in furtherance of the agreement. 18 U.S.C.A. § 371.

[22] CONSPIRACY ⇌ 27

91k27

To establish existence of conspiracy, Government need only establish existence of agreement and an overt act in furtherance of the agreement. 18 U.S.C.A. § 371.

[23] CONSPIRACY ⇌ 28(2)

91k28(2)

Conspiracy is a crime separate and apart from the substantive offense that is the object of the conspiracy. 18 U.S.C.A. § 371.

[24] CONSPIRACY ⇌ 24.10

91k24.10

Because it is the conspiratorial plan itself that is the focus of a charge of conspiracy, illegality of the agreement is not dependent upon the actual achievement of the goal.

[25] CONSPIRACY ⇌ 38

91k38

Impossibility is not a defense to a conspiracy charge. 18 U.S.C.A. § 371.

[26] CONSPIRACY ⇌ 24.10

91k24.10

Defendants could be charged with conspiracy to violate the conflict of interest of statute by making advance payment to a person whom they expected to be appointed to federal office and to continue to lobby for defendant's corporation, even though the person was never appointed. 18 U.S.C.A. §§ 203, 371.

[26] CONSPIRACY ⇌ 28(3)

91k28(3)

Defendants could be charged with conspiracy to violate the conflict of interest of statute by making advance payment to a person whom they expected to be appointed to federal office and to continue to

lobby for defendant's corporation, even though the person was never appointed. 18 U.S.C.A. §§ 203, 371.

[27] CONSPIRACY ⇌ 24.10

91k24.10

Where conspiracy involves conduct intended to take place at a future time, relevant question is whether the alleged conspirators subjectively believed that the conditions necessary for attaining objective were likely to be fulfilled. 18 U.S.C.A. § 371.

[28] CRIMINAL LAW ⇌ 369.2(1)

110k369.2(1)

Even under the inclusionary approach to the introduction of similar act evidence, district court must be careful to consider the cumulative impact of the evidence on the jury and to avoid the potential prejudice that might flow from its admission. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[29] CRIMINAL LAW ⇌ 371(1)

110k371(1)

Evidence that defendant had accepted money to lobby the Attorney General to obtain support of the Government for a pipeline and did not disclose it on income tax returns was admissible to show his intent in dealing with the Government on behalf of another corporation from which he allegedly received payments in an illegal manner. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[30] WITNESSES ⇌ 274(2)

410k274(2)

Government is permitted to ask questions of character witnesses concerning their knowledge of specific acts of defendant's conduct, but the extent to which such collateral character evidence is admissible is limited to insure that the jury does not convict defendant for conduct with which he has not been charged. Fed.Rules Evid.Rule 405, 28 U.S.C.A.

[31] CRIMINAL LAW ⇌ 706(5)

110k706(5)

Although evidence that defendant, who was charged with deliberately receiving payments from corporation for lobbying efforts, had, while serving as attorney for two young children who were badly burned, settled the case for \$1.7 million, retaining \$1 million as his fee, and had obtained the approval of settlement over objections of the children's

parents from a state court judge whom the attorney was recommending for appointment to the federal bench may have been technically admissible, to impeach character witness, the inquiry was expanded beyond the bounds of propriety and relevance when prosecutor characterized the defendant's behavior in the other case as an outrage and appealed for vengeance by inviting the jurors to stand in the shoes of the parents of the children.

[31] CRIMINAL LAW ⇔ 723(1)
110k723(1)

Although evidence that defendant, who was charged with deliberately receiving payments from corporation for lobbying efforts, had, while serving as attorney for two young children who were badly burned, settled the case for \$1.7 million, retaining \$1 million as his fee, and had obtained the approval of settlement over objections of the children's parents from a state court judge whom the attorney was recommending for appointment to the federal bench may have been technically admissible, to impeach character witness, the inquiry was expanded beyond the bounds of propriety and relevance when prosecutor characterized the defendant's behavior in the other case as an outrage and appealed for vengeance by inviting the jurors to stand in the shoes of the parents of the children.

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*449 Robert H. Bork, Washington, D.C. (Robert J. Giuffra, Jr., New York City, Gregory E. Maggs, Washington, D.C., Ellen Yaroshefsky, New York City, Dennis P. Riordan, Riordan & Rosenthal, San

Francisco, Cal., Gary P. Naftalis, David S. Frankel, Robert A. Culp, Kramer, Levin, Nessen, Kamin & Frankel, New York City, of counsel), for defendant-appellant Eugene Robert Wallach.

Michael E. Tigar, Austin, Tex., for defendant-appellant Rusty Kent London.

Ted W. Cassman, Emeryville, Cal. (Penelope M. Cooper, Cristina C. Arguedas, Cooper, Arguedas & Cassman, Emeryville, Cal., of counsel), for defendant-appellant Wayne Franklyn Chinn.

Baruch Weiss, Elliott B. Jacobson, Asst. U.S. Attys., S.D.N.Y., New York City (Otto G. Obermaier, U.S. Atty., Steven A. Standiford, Debra Ann Livingston, Helen Gredd, Asst. U.S. Attys., S.D.N.Y., New York City, of counsel), for appellee U.S.

Before MESKILL and ALTIMARI, Circuit Judges, and KEENAN, [FN*] District Judge.

FN* Honorable John F. Keenan, United States District Judge for the Southern District of New York, sitting by designation.

MESKILL, Circuit Judge:

This appeal presents several questions, the dispositive one being whether the perjured testimony of a key government witness requires a reversal of the convictions. The appellants seek to overturn judgments of conviction entered in the United States District Court for the Southern District of New York, following a sixteen week jury trial, Owen, J., presiding. The jury returned verdicts against co-defendants Eugene Robert Wallach (Wallach), Rusty Kent London (London) and Wayne Franklyn Chinn (Chinn). Wallach was convicted of engaging in a pattern of racketeering activity, in violation of 18 U.S.C. § 1961 et seq., two counts of interstate transportation of stolen property, in violation of 18 U.S.C. §§ 2314 and 2, and one count of conspiracy to violate the federal conflict of interest law and to defraud the United States, in violation of 18 U.S.C. § 371. London was convicted of one count of engaging in a pattern of racketeering activity, in violation of 18 U.S.C. § 1961 et seq., one count of conspiracy to engage in a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d), three counts of interstate transportation of stolen property,

in violation of 18 U.S.C. §§ 2314 and 2, four counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff, 18 U.S.C. § 2, and 17 C.F.R. § 240.10b-5, and one count of aiding and abetting false statements, in violation of 18 U.S.C. §§ 1001 and 2. Chinn was convicted of one count of engaging in a pattern of racketeering activity, in violation of 18 U.S.C. § 1961 et seq., one count of conspiracy to engage in a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d), two counts of interstate transportation of stolen property, in violation of 18 U.S.C. §§ 2314 and 2, five counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff, 18 U.S.C. § 2, and 17 C.F.R. § 240.10b-5, and two counts of making false statements, in violation of 18 U.S.C. § 1001.

Wallach was sentenced to a total of six years imprisonment, fined \$250,000, and ordered to forfeit \$425,000. London was sentenced to a total of five years imprisonment, fined \$250,000, and ordered to forfeit approximately \$1.24 million. Chinn was sentenced to a total of three years imprisonment, *450 fined \$100,000, and ordered to forfeit approximately \$1.16 million. Regarding these forfeiture amounts, the district court adjudged London and Chinn jointly and severally liable for \$1.14 million of the total amount that each man was individually assessed.

Defendants attack their convictions on several grounds. We reverse all the convictions and remand for a new trial.

BACKGROUND

The convictions subject to challenge stem from the defendants' dealings with the now defunct entity known as Wedtech Corporation (Wedtech). Over a period of years, each of the defendants engaged in a series of transactions with Wedtech. At trial, the government contended and the jury found in a number of instances that the conduct of each defendant constituted a criminal offense. Defendants concede that they engaged in transactions with Wedtech, but they submit that as a matter of law their convictions cannot be sustained. Defendants advance several theories to support their position. Due to the complexity of this case and to

ease understanding of the issues presented, we assume the accuracy of the government's facts as they relate to the charges in the indictment. We, therefore, begin our discussion by outlining the government's version of the facts. The facts are developed further in connection with our discussion of the defendants' legal arguments.

A. Facts

Wedtech began as a small metal parts manufacturer in the South Bronx, New York. During its infancy, Wedtech was known as the Welbilt Tool & Die Company (Welbilt). Welbilt was a privately held entity founded by John Mariotta, an individual of Puerto Rican descent. In 1975, Welbilt was accepted into the Small Business Administration's (SBA) "Section 8(a)" program, under which businesses owned by economically and socially disadvantaged minorities are eligible for government contracts without competitive bidding. In August 1983, Welbilt made a public offering of its stock and changed its name to Wedtech. (All subsequent references will be to Wedtech.)

Government contracts--primarily defense department contracts--were the lifeblood of Wedtech's economic survival. Most of these contracts were obtained under Wedtech's Section 8(a) status. In 1980, Wedtech sought to be awarded a Department of the Army contract for the production of small engines, but the Army and Wedtech could not agree to the financial terms of the contract. Wedtech officers concluded that the exercise of political influence might assist the corporation in obtaining the contract. To that end, Wedtech embarked on a lobbying effort.

In 1981, Wedtech officials were introduced to defendant Wallach, a lawyer and a close personal friend of Edwin Meese, III (Meese), then Counselor to President Ronald Reagan. After meeting the Wedtech officials, Wallach visited the company's facilities and agreed to assist the company in obtaining the sought-after defense contracts by contacting his friend Meese. From May 1981 until the end of 1984, Wallach sent several memoranda to Meese or his subordinates regarding the award of the small engine contract and other Wedtech matters. Ultimately, in September 1982, the Army awarded the small engine contract to Wedtech at a contract price of approximately \$27 million.

(Cite as: 935 F.2d 445, *450)

Wallach reported to the Wedtech officers that his efforts were primarily responsible for the contract award. During this lobbying effort, Wallach received no compensation from Wedtech, although he was reimbursed for his expenses.

Throughout his relationship with Wedtech, Wallach often dealt with Mario Moreno (Moreno) and Anthony Guariglia (Guariglia). Moreno, who originally joined Wedtech in 1978 as a consultant, became an officer in 1981 and eventually rose to become vice-chairman of Wedtech's board of directors. Guariglia, a certified public accountant, joined Wedtech in May 1983 as vice-president and controller. Guariglia went on to become Wedtech's president and a member of its board of directors.

*451 Given his apparently successful lobbying effort on the small engine contract, Wallach, in late 1982, approached Wedtech officials and requested \$200,000 as payment for his continued services during the last few months of 1982 and for services he would render in 1983. In December 1982, Wallach sent a proposed consulting agreement to Wedtech. Wedtech officers advised Wallach that the company was experiencing financial problems and that the agreement would not be executed until the company's financial situation improved. As an alternative, in March 1983, Wedtech officers promised to give Wallach one percent of the corporation's stock; Wedtech planned to make an initial public offering (IPO) of its stock later that year. Wallach continued his relationship with Wedtech and assisted the company with its plans to go public. Wedtech, in need of working capital in the months preceding the IPO, sought and obtained a \$3 million bridge loan from Bank Leumi Trust Company (Bank Leumi). As a condition of this loan, Bank Leumi insisted that Wedtech's other creditors agree to subordinate their rights to ensure that Bank Leumi would be protected in the event of Wedtech's default.

One of the creditors, the Economic Development Agency (EDA), an agency within the Department of Commerce, refused to subordinate its priority position. In response, Wallach initiated a new lobbying effort directed at securing EDA's agreement. Wallach enlisted the assistance of Meese and members of his staff in an effort to obtain EDA's cooperation. In July 1983, EDA agreed to the subordination. Wedtech obtained the necessary

bridge loan from Bank Leumi and its IPO took place in August 1983.

1. Wedtech's \$125,000 Payment and Wallach's Letter

After completion of the public offering, Wallach approached Wedtech officers and renewed his request for \$200,000. Wallach, at Wedtech's request, agreed to accept \$125,000 for his lobbying efforts. Wedtech officials then asked Wallach to submit a letter which would explain that the payment was for services rendered in connection with the public offering. On September 7, 1983, Wallach sent such a letter to Guariglia. That letter read as follows:

Dear Tony:

Congratulations to all upon the success of the public offering. It is well deserved.

As we discussed, my fee for consultation relative to the registration and public offering is \$125,000.

It is a great privilege to work closely with you and your very estimable colleagues at Wedtech.

Wedtech rendered full payment on the same date. Attributing the payment to services provided in connection with the public offering enabled Wedtech to utilize a more favorable accounting treatment. Specifically, had the true purpose of the payment been accurately reported, Wedtech would have been required to report the full amount as an expense and to deduct it from the corporation's earnings for the year in which the payment was made. Attributing the payment to the public offering permitted Wedtech to capitalize the amount of the payment--thereby avoiding the need to deduct the entire amount as an expense in one tax year. Such treatment had the effect of inflating Wedtech's profits per share and resulted in the inclusion of false information in Wedtech's SEC filings.

2. \$300,000 Prepayment for 1985-86 and the UPSCO Letter

In January 1984, Wedtech entered into a written agreement with Wallach for his consulting services. Wallach was to receive \$150,000 per year to be paid quarterly. However, at Wallach's request the full sum was paid in February of 1984. In September 1984, Wallach and Wedtech officers entered into a verbal agreement whereby Wallach would receive \$300,000 as a prepayment for services he was to

render in the years 1985 and 1986. After discussions between the parties, it was agreed that Wallach would submit a letter attributing this payment to services performed in connection with Wedtech's acquisition of *452 a shipyard, the Upper Peninsula Shipbuilding Company (UPSCO), located in Michigan. UPSCO had been acquired by Wedtech during the summer months of 1984. On October 26, 1984, Wedtech issued to Wallach a check in the amount of \$300,000. In a letter dated November 6, 1984, Wallach attributed the payment to services he performed in connection with the UPSCO acquisition. This letter read, in pertinent part, as follows:

Re: Upper Peninsula Shipbuilding Company
Dear Tony:

I am acknowledging receipt of the check which I have received from the Company. I am, of course, delighted to have played a role in assisting the Company's acquisition of this very desirable new venture. We all share substantial optimism about the increased potential which the remarkable facilities provide to Wedtech.

This letter, like the earlier "public offering letter," misrepresented the true basis for the payment and resulted in Wedtech's earnings being artificially inflated and in the filing of false reports with the SEC. Furthermore, the payment was structured in this manner after Wallach informed Guariglia and Moreno that he anticipated receiving an appointment to a position in the United States Department of Justice under his friend, then-Attorney General Meese. Wallach had advised Guariglia and Moreno that he wished to continue to lobby for Wedtech's interests while a full-time government officer.

Wallach never obtained a federal position. During 1984 and 1985, however, he continued his lobbying efforts for the benefit of Wedtech. Indeed, he played a role in assisting the company to obtain renewals of a Navy contract for the manufacture of pontoons--temporary piers for the loading and unloading of ships. The total value of these renewals was approximately \$108 million.

3. Wallach Introduces London and Chinn

In April 1985, Wallach introduced defendants London and Chinn to the officers of Wedtech. London, a specialist in real estate and financial management, and Chinn, a financial analyst

specializing in stocks, first met in 1978 and worked on a number of transactions together. London owned and did business through two corporate entities known as International Financial Consulting and Investments, Inc. (IFCI) and National Consulting and Management, Inc. (NCMI). Similarly, Chinn owned and acted through a corporation known as Financial Management International, Inc. (FMI). [FN1] Wallach believed that London and Chinn could assist Wedtech. A business relationship soon developed between Wedtech and these financial analysts. On June 10, 1985, Wedtech entered into a written retention agreement (Retention Agreement) with London and Chinn. In August of 1985, Chinn was made a director of Wedtech.

FN1. The indictment refers to Chinn's corporation as Financial Management International, Inc. (FMI). The government in its brief makes reference to a Chinn corporation named Financial Management and Consulting, Inc., yet utilizes the abbreviation FMI. Because we believe this second reference to be nothing more than a typographical error and in light of the language of the indictment, any reference in this opinion to FMI refers to Financial Management International, Inc.

According to the terms of the Retention Agreement, London and Chinn were to provide financial advice and improve Wedtech's image in the investment community. In return, London and Chinn were each to receive 50,000 shares of Wedtech common stock and reimbursement for expenses. On June 19, 1985, London and Chinn entered into a second agreement with Wedtech's five main officers--John Mariotta, Fred Neuberger, Lawrence Shorten, Mario Moreno and Anthony Guariglia. Under this agreement, London and Chinn were to take steps to increase the value of Wedtech's stock. Ultimately, they were to sell the restricted stock that was held by the five officers. As compensation, the officers agreed to pay London and Chinn ten percent (10%) of any increase in the value *453 of the stock above the then-market price of \$13 per share. This second agreement became known as the "Ten Percent Agreement." Chinn later assigned his interest under this agreement to IFCI, London's corporation.

a. Six Checks Totaling \$99,999.98

(Cite as: 935 F.2d 445, *453)

Wallach, during the summer of 1985, had requested additional compensation for his lobbying services. Wedtech agreed to pay Wallach an additional \$150,000, but due to a cash deficiency sought to structure the payment over time. To avoid making any payments to Wallach during a period when it was anticipated that he would be holding a federal government position, Wallach, London, Chinn, Guariglia and Moreno agreed to conceal the payments by having Wedtech pay the funds to IFCI.

In July of 1985, and continuing through January 1986, Wedtech made a series of payments to London's corporation, IFCI. Specifically, Wedtech issued one check in the amount of \$58,333.33 and five others, each in the amount of \$8,333.33--totaling \$99,999.98. These payments were made in response to an invoice submitted by London which sought \$150,000 for consulting services related to Wedtech's attempt to sell a tug barge system. The payments were made to IFCI to facilitate the funneling of Wedtech monies to Wallach. London would pay the taxes and then forward the balance in cash to Wallach. Because the invoice that London submitted characterized the \$150,000 as relating to the sale of the tug barge--a capital asset--Wedtech accountants were able to capitalize, as opposed to expense, the costs, thereby artificially inflating Wedtech's income per share.

b. December 1985 Agreement: Secondary Public Offering

In December 1985, Wedtech officers agreed to enter into an agreement with London to assist the corporation with its second public offering, scheduled for January 1986. The agreement called for London to receive \$1 million as compensation for his services. Chinn was a silent party to this agreement. The purpose of the agreement was to get London and Chinn to create a demand for the newly issued stock by "parking" it. Additionally, London and Chinn were to pay \$100,000 as a kickback to Guariglia to ensure their receipt of the \$1 million. Wedtech officers also paid to London and Chinn \$114,000 in related expenses. Thus, the total sum involved was \$1.14 million. Finally, London, Chinn and Guariglia agreed that the \$1 million would be paid to London's corporation, IFCI, and that, in turn, Chinn's share would be channelled to him via his corporation, FMI, and that Wallach was to receive a twenty percent share of the \$1 million

payment. This mode of disbursing the funds was adopted in order to avoid the SEC mandated disclosure of the payment to Chinn, a Wedtech director. The registration statement that was filed in connection with the public offering made no mention of this \$1.14 million payment. Similarly, the final prospectus that was mailed to shareholders omitted any reference to the payment. In the spring of 1986, Wedtech's outside counsel discovered that a payment had been made. Accordingly, a committee was organized to investigate the fee. In response to committee inquiries, London denied that he had shared the fee, and he attributed the payment to marketing services he allegedly had rendered and would continue to render in connection with a metallic coating process that Wedtech had developed. The committee eventually decided to characterize the fee to comport with this new explanation.

4. Wedtech's Final Days

In the summer of 1986, Wedtech's operations became the subject of numerous federal investigations. On December 26, 1986, Wedtech, finding itself unable to meet its financial obligations, filed for bankruptcy. On January 26, 1987, Moreno and Guariglia entered into cooperation agreements with the government, and on January 30, 1987, each man pleaded guilty to certain criminal charges. Moreno and Guariglia were the government's primary witnesses against the defendants, Wallach, London and Chinn.

*454 C. The Indictment

On October 17, 1988, Wallach, London and Chinn were charged in a twenty-one count Superseding Indictment: Count One charged all three defendants with engaging in a pattern of racketeering activity, in violation of 18 U.S.C. § 1961 et seq. Count Two charged all three defendants with a conspiracy to engage in the pattern of racketeering activity charged in Count One, in violation of 18 U.S.C. § 1962(d). These two RICO counts detailed six acts of racketeering. Racketeering Acts One and Two charged Wallach with fraudulently obtaining from Wedtech checks in the amount of \$125,000 and \$300,000, respectively, and transporting those checks in interstate commerce. Racketeering Act Three charged all three defendants with fraudulently obtaining from

Wedtech six checks totaling \$99,999.98 and transporting those checks in interstate commerce. Racketeering Act Four charged London and Chinn with defrauding Wedtech of \$240,000 through an illegal kickback scheme that constituted mail fraud, commercial bribery and securities fraud. Racketeering Act Five charged London and Chinn with fraudulently obtaining from Wedtech two checks totaling \$1.14 million in a scheme that involved interstate transportation of the property taken by fraud, mail fraud, commercial bribery and securities fraud. Racketeering Act Six charged Chinn with committing mail fraud by fraudulently obtaining more than \$20,000 in fictitious business expense payments from Wedtech.

Counts Three, Four, and Six through Eighteen charged one or more of the defendants with substantive offenses that mirrored the six racketeering acts charged in Count One. Count Five charged all three defendants with conspiring to defraud the United States of Wallach's honest and faithful services and to violate 18 U.S.C. § 203, the federal conflict of interest statute, by agreeing to prepay Wallach for services he was to render on behalf of Wedtech while a full-time government employee, all in violation of 18 U.S.C. § 371. Count Nineteen charged Chinn with making false statements on a Form S-1 (Registration Statement) filed with the SEC, in violation of 18 U.S.C. § 1001. Count Twenty charged London with aiding and abetting Chinn's filing of the Form S-1 false statements, in violation of 18 U.S.C. §§ 1001 and 2. Count Twenty-one charged Chinn with making false statements on a "personal financial statement" filed by Wedtech with the Small Business Administration, in violation of 18 U.S.C. § 1001.

D. The Verdict

After a sixteen week trial, the jury began its deliberations on August 2, 1989. On Saturday, August 5, 1989, the fourth day of deliberations, juror number nine called in sick. Judge Owen, after speaking with the sick juror, directed that the remaining eleven jurors continue their deliberations pursuant to Fed.R.Crim.P. 23(b). On August 8, 1989, the eleven member jury returned its verdicts.

1. Eugene Robert Wallach

Wallach was convicted on Count One (substantive

RICO), on Counts Three and Four (interstate transportation of two fraudulently obtained checks), and on Count Five (conspiracy to violate the conflict of interest law and to defraud the United States). He was acquitted on Count Two (RICO conspiracy) and Count Six (interstate transportation of checks totaling \$99,999.98). In connection with his conviction on Count One (substantive RICO), the jury found Racketeering Acts One and Two (interstate transportation of two checks) to have been proven, but not Act Three (interstate transportation of checks totaling \$99,999.98).

Wallach was sentenced to concurrent terms of six years imprisonment on each of Counts One and Four, five years imprisonment on Count Five, and one year imprisonment on Count Three. The sentences imposed on Counts Three and Five were to run consecutively and to be served concurrently with the sentence imposed on Counts One and Four. Thus, the total term of imprisonment was six years. Wallach was also fined \$250,000 on Count One and ordered to forfeit \$425,000.

*455 2. Rusty Kent London

London was convicted on Counts One (substantive RICO), Two (RICO conspiracy), Six (interstate transportation of checks totaling \$99,999.98), Ten through Fifteen (interstate transportation of checks totaling \$1.14 million and mail fraud), Seventeen (securities fraud), and Twenty (aiding and abetting false statements). He was acquitted on Counts Five (conspiracy to defraud the United States and to violate the conflict of interest law), Seven through Nine, and Sixteen. Regarding the RICO convictions, the jury found Racketeering Act Three and portions of Racketeering Act Five to have been proven but not Racketeering Act Four and portions of Act Five.

London was sentenced to concurrent terms of five years imprisonment on each of Counts One, Two, Six, Ten through Fifteen, Seventeen, and Twenty. A fine of \$250,000 was imposed on Count One and London was ordered to forfeit \$1,239,999.98. Judge Owen ordered that London and Chinn were jointly and severally liable for \$1.14 million of the total amounts that each man had been ordered to forfeit.

3. Wayne Franklyn Chinn

Chinn was convicted on Counts One (substantive RICO), Two (RICO conspiracy), Ten through Fifteen (interstate transportation of checks totaling \$1.14 million and mail fraud), Seventeen through Nineteen, and Twenty-one (false statements). He was acquitted on Counts Five through Nine and on Count Sixteen. The jury found Racketeering Act Six and parts of Act Five to have been proven but not Racketeering Acts Three, Four and portions of Act Five.

Chinn was sentenced to concurrent terms of three years imprisonment on each of Counts One, Two, Ten through Fifteen, Seventeen through Nineteen, and Twenty-one. He was fined \$100,000 and ordered to forfeit \$1,160,133.39. The forfeiture order was subject to the same conditions as London's forfeiture order.

DISCUSSION

The defendants collectively and individually advance numerous arguments attacking their convictions. To simplify the analysis, our discussion relates to all of the defendants unless otherwise noted.

A. The Perjury Issue

The government's primary witnesses against the defendants were Moreno and Guariglia. Both men testified pursuant to cooperation agreements with the government. Because Moreno had perjured himself in a prior proceeding, the jury was instructed to evaluate his testimony carefully. No such instruction was given relative to Guariglia's testimony. These two witnesses provided the foundation upon which the prosecution built its entire case. They offered the only testimony that directly linked the defendants with the admittedly illegal conduct of Wedtech. Indeed, their testimony was, to say the least, critical to the government.

The defendants argue that their convictions must be reversed because Guariglia perjured himself during the course of his testimony at trial. The government concedes that Guariglia committed perjury. Indeed, on June 26, 1990, Guariglia was indicted and charged with committing perjury during the course of the trial of the instant case. [FN2] Guariglia's perjury related to his testimony on direct examination that he had stopped his

compulsive gambling in the summer of 1988. Specifically, Guariglia testified that he had not gambled from the summer of 1988 to the time of the trial in June 1989. He further testified that he stopped gambling at the direction of prosecutors in the Southern District of New York and because he recognized that he was "hooked" on gambling.

FN2. At the time of oral argument the charges against Guariglia had not been resolved. We have since been notified that Guariglia was convicted on February 27, 1991, after a jury trial, of two counts of perjury committed during the course of the trial below.

On cross-examination, Guariglia admitted that he had signed gambling markers totaling \$65,000 at the Tropicana, an Atlantic City casino, in September and October of 1988. Guariglia, however, continued to *456 maintain that he had not gambled on those occasions. On redirect, Guariglia offered an explanation for his drawing of the markers. Regarding the \$15,000 in markers drawn on September 18, 1988, Guariglia testified that he drew the markers and cashed in the chips to pay off some previous markers which he believed he owed. He further stated that when he attempted to render payment he learned that no markers were outstanding and accordingly put the \$15,000 in cash in his pocket. As to his conduct on October 26, 1988, Guariglia testified that he had signed markers and obtained chips in the amount of \$50,000. He asserted, however, that he did not gamble. Instead, he stated that he gave the chips to a personal friend named Marshall Koplitz.

In response to Guariglia's testimony on redirect, the defendants proffered the testimony of John Copriviza, the assistant cage manager at the Tropicana Casino in Atlantic City. Defense counsel also disclosed to the government certain Tropicana records known as "player rating slips" which identified Guariglia as having placed bets on October 26, 1988. The government objected to the testimony of Copriviza and the introduction of the records under Fed.R.Evid. 608(b), arguing that the records and testimony were extrinsic evidence offered to impeach Guariglia's credibility and therefore subject to exclusion. The district court sustained the government's objection.

The question of Guariglia's perjury was again

presented to the district court in the context of defendants' motion for a new trial. At that time the government conceded that Guariglia had committed perjury during the trial, but maintained that it learned of the perjury in December 1989, well after the completion of the trial. During the hearing of March 23, 1989, the government acknowledged that information establishing that Guariglia had gambled in Puerto Rico in November 1988 and that he had operated a stationery supply business illegally was obtained from an individual named Ira Cohen. Once the government corroborated this information, Guariglia was arrested for violating the terms of his bail, and defense counsel were notified of the perjury. [FN3]

FN3. Assistant United States Attorney Baruch Weiss filed an "Affirmation" in response to the defendants' new trial motion which outlined the information that was learned from Mr. Cohen and the steps that the government took in response thereto.

[1] Whether the introduction of perjured testimony requires a new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury. With respect to this latter inquiry, there are two discrete standards of review that are utilized. Where the prosecution knew or should have known of the perjury, the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Perkins v. LeFevre*, 691 F.2d 616, 619 (2d Cir.1982) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)); see also *Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir.1988) (question is whether the jury's verdict "might" be altered); *Annunziato v. Manson*, 566 F.2d 410, 414 (2d Cir.1977). Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is "virtually automatic." *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir.1975) (citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)), cert. denied, 429 U.S. 819, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976). Where the government was unaware of a witness' perjury, however, a new trial is warranted only if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have

been convicted." *Sanders*, 863 F.2d at 226; see also *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir.1975) (The test "is whether there was a significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction.") (citations omitted).

Here, in an opinion and order dated April 11, 1990, the district court concluded that it *457 was unnecessary to hold an evidentiary hearing to determine whether when Guariglia testified the government knew that he was lying. The district court found that there was "neither allegation nor evidence that the prosecution had any knowledge" of Guariglia's perjury. Accordingly, the district court applied the more demanding standard adopted in *Sanders* and concluded that the perjurious testimony was immaterial to the guilt or innocence of the defendants and that the jury's decision would not have been different. The district judge stated:

The testimony was not material: Guariglia's gambling and skimming did not bear on the defendants' guilt or innocence only on Guariglia's credibility. And here, these instances of falsehood would have been merely minor, cumulative additions to the massive mound of discredit heaped upon Guariglia over several days of both direct and cross-examination.

[2] Defendants submit that the government was aware of the perjury and that the district court ignored the facts on this issue. According to defendants, the prosecution should have been aware of the perjury once Guariglia was cross-examined and admitted having purchased gambling chips at an Atlantic City casino on two occasions in the fall of 1988. Instead, the prosecution sought to rehabilitate the witness on redirect, permitting Guariglia to testify that he had bought the chips but that he had not gambled, even after defense counsel disclosed to the government written records from the Tropicana Casino reflecting that Guariglia had gambled. We agree with the defendants that the government should have been aware of Guariglia's perjury.

Although the record demonstrates that the prosecution did not "sit on its hands" after becoming aware that Guariglia may have perjured himself, we are not satisfied that the government properly utilized the available information. Confronted with Guariglia's admission that he had been to the

Tropicana on two occasions during the fall of 1988, the government asserts, and we do not doubt, that it questioned Guariglia extensively regarding these trips to Atlantic City. The government also contacted the individuals who purportedly were with Guariglia on those occasions and was advised that Guariglia had not gambled. Finally, the record indicates that the government made some effort to contact individuals at the Tropicana. The extent and nature of the last inquiry is unclear and the failure of the district court to conduct any inquiry on this point provides us with little assistance.

In light of Guariglia's acknowledged history of compulsive gambling, we believe that given the inconsistencies in his statements the government should have been on notice that Guariglia was perjuring himself. Yet, instead of proceeding with great caution, the government set out on its redirect examination to rehabilitate Guariglia and elicited his rather dubious explanation of what had happened. Defendants placed before the government and the court powerful evidence that Guariglia was lying. Although this information was not formally admitted into evidence, it nonetheless cast a dark shadow on the veracity of Guariglia's statements. We fear that given the importance of Guariglia's testimony to the case, the prosecutors may have consciously avoided recognizing the obvious--that is, that Guariglia was not telling the truth.

Guariglia was the centerpiece of the government's case. Had it been brought to the attention of the jury that Guariglia was lying after he had purportedly undergone a moral transformation and decided to change his ways, his entire testimony may have been rejected by the jury. It was one thing for the jury to learn that Guariglia had a history of improprieties; it would have been an entirely different matter for them to learn that after having taken an oath to speak the truth he made a conscious decision to lie. While the jury was instructed that Moreno was an acknowledged perjurer whose testimony should be weighed carefully, no such instruction was given relative to Guariglia's testimony. Accordingly, because we are convinced that the government should have known that Guariglia was committing perjury, all the convictions must be reversed.

[3] *458 Even assuming that the government had no knowledge of the perjury at the time of trial, we

believe that reversal would still be warranted. The government acknowledges that it received additional information concerning the falsity of Guariglia's testimony in December 1989, months after the trial's conclusion. Specifically, the government learned that Guariglia had gambled in Puerto Rico in November 1988 and that he had been involved in another illegal scheme during the period of his cooperation with the government. This additional information in itself provides a sufficient basis for granting the defendants a new trial. We reach this conclusion cognizant that a motion for a new trial on the basis of newly discovered evidence " '[is] granted only with great caution ... in the most extraordinary circumstances.' " Sanders, 863 F.2d at 225 (quoting *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir.1987)); see *Stofsky*, 527 F.2d at 243.

Where newly discovered evidence demonstrates that a principal government witness committed perjury, we must determine "whether the jury probably would have altered its verdict had it known of the witness' false testimony." *Stofsky*, 527 F.2d at 246. In *Seijo*, 514 F.2d at 1357, a case involving newly discovered evidence of perjured testimony, we reversed a conviction on facts strikingly similar to those now before us. While *Seijo* involved prosecutorial neglect, its reasoning and analysis is nonetheless helpful to our resolution of the instant case. See *Seijo*, 514 F.2d at 1364.

In *Seijo*, a cooperating witness, when asked on cross-examination whether he had ever been convicted of a drug offense, answered untruthfully that he had never been convicted of such an offense. Although the prosecution had no reason to know that the response was untruthful at the time it was given, we, nevertheless, reversed the defendant's conviction.⁴ In so doing, we emphasized that despite the presence of other impeaching material during the trial the disclosure of the witness' false statement would have had a tremendous impact on the jury's credibility assessment of the witness. *Id.*

FN4. The prosecutor is *Seijo* had no actual knowledge of the perjury. An FBI sheet noting the prior conviction had been sent to the prosecutor's office, but was misfiled; the prosecutor never saw it. *Seijo*, 514 F.2d at 1363. This mistake, while innocent, contributed to the trial error.

In the instant case, the district court found the evidence of Guariglia's perjury inconsequential because it was merely cumulative, providing one more basis for challenging Guariglia's credibility. In *Seijo*, we rejected this same reasoning. We noted that the witness had been subjected to direct and cross-examination and that he had admitted cooperating with the government, using opium, and being addicted to and selling heroin. Despite these admissions, we concluded that his denial of a prior marijuana conviction had 'a different and more serious bearing. In this aspect, it cannot be said to constitute merely cumulative impeaching material.' *Id.* at 1363 (emphasis added). As we emphasized: 'The taint of [the] false testimony is not erased because his untruthfulness affects only his credibility as a witness. 'The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence.' ' *Id.* at 1364 (quoting *Napue*, 360 U.S. at 269, 79 S.Ct. at 1177).

Subsequent to our decision in *Seijo*, we recognize that these same concerns merit careful attention even in situations where the government has not contributed to the error—either through neglect or intentional misconduct—in permitting a witness' perjury. *Stofsky*, 527 F.2d at 246. '[A] witness's credibility could very well [be] a factor of central importance to the jury, indeed every bit as important as the factual elements of the crime itself.' *Id.* (citing *Seijo*, 514 F.2d at 1363-64) (other citations omitted.) Therefore, we concluded: 'Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's case but also upon the credibility of the government's witness.' *Id.*

Applying that analysis here, we conclude as a matter of law that had the jury been aware of Guariglia's perjury it probably would have acquitted the defendants. Guariglia's false testimony regarding his gambling directly calls into question the veracity of the rest of his statements. Guariglia's testimony was essential to the government's case; indeed, he tied all the pieces together. And, as we have emphasized, he was the only witness who the jury was led to believe had

undergone a radical moral transformation. Moreover, the *459 government through its redirect and in its closing argument made much of Guariglia's motive for telling the truth. One of the prosecutors stated in closing:

The government submits to you that Mr. Moreno and Mr. Guariglia are credible witnesses and you should credit their testimony for a number of reasons. First of all, they have confessed to their crimes, they have admitted their crimes, and they have pleaded guilty to serious felony counts. They entered into cooperation agreements with the government and those agreements are in evidence....

You heard the terms of those agreements when they testified. If they perjured themselves, if they give false testimony in this trial, then the deal is off. They can be prosecuted for every crime they committed and everything they have said in interviews with the U.S. Attorney's office and every trial they have testified in their testimony can be used against them. That I submit gives them a powerful motive to tell the truth when they testified at this trial.

(emphasis added). While vouching for a witness' credibility alone is not ordinarily a basis for reversal, these comments provide one more reason to set aside the jury's verdict. In sum, we reverse the convictions because after reviewing the record we are left "with a firm belief that but for the perjured testimony, the defendant[s] would most likely not have been convicted." *Sanders*, 863 F.2d at 226 (applying the *Stofsky* probability standard).

Defendants advance numerous other challenges to their convictions. Although our decision on the perjury issue is itself a sufficient basis for disposing of these appeals, the likelihood of a new trial suggests that we should also address some of the other arguments urged by the defendants. We limit our analysis to those issues that directly challenge the validity of the indictment or the legal viability of the government's theory underlying any of the charges.

B. The Indictments and the U.S. Attorney's Bias

The defendants challenge the authority and motives of the U.S. Attorney's Office for the Southern District of New York. Specifically, they offer two reasons in support of their contention that the indictment in this case was improperly obtained.

First, they assert that the Independent Counsel (IC) appointed to investigate former Attorney General Edwin Meese had exclusive prosecutorial jurisdiction over the conduct that is charged in the underlying indictment. Second, defendants contend that the prosecutors were inherently biased because they wanted either to protect or to attack Meese. We find these claims to lack merit.

1. The Independent Counsel

[4] Defendants argue that once the IC was appointed to investigate the conduct of then-Attorney General Meese, the U.S. Attorney's Office for the Southern District of New York was divested of jurisdiction over any matter that related to Meese without first obtaining written authorization from the IC pursuant to 28 U.S.C. § 597(a). Section 597(a) gives the IC exclusive prosecutorial jurisdiction over matters referred to him unless he otherwise agrees in writing.

On February 2, 1987, Independent Counsel James McKay was appointed pursuant to 28 U.S.C. § 593(b) to conduct an investigation of Franklyn Nofzinger and his relationship with Wedtech. On May 11, 1987, Deputy Attorney General Burns sent a letter to McKay requesting that he accept the referral of an investigation of Attorney General Meese. McKay accepted the referral and both the Department of Justice and McKay petitioned the Independent Counsel Court (ICC) for an order further defining McKay's responsibilities. On August 18, 1987, the ICC issued its order. It provided:

Independent Counsel James C. McKay shall have jurisdiction to investigate ... whether ... any ... provision of the federal criminal law, was violated by Mr. Meese's relationship or dealings at any time from 1981 to the present with any of the following: Welbilt Electronics Die Corporation/Wedtech Corporation ...; Franklin C. Nofzinger; E. Robert Wallach; W. Franklyn Chinn; and/or Financial Management International, Inc. (emphasis added). Defendants read this order and the Burns referral letter as having vested the IC with exclusive jurisdiction over their relationships with Wedtech. Thus, they argue when prosecutors from the Southern District of New York appeared before the Grand Jury on May 28 and 29, 1987, they did so without jurisdiction. Defendants stress that it was not until December 21, 1987, that the IC formally

referred, pursuant to 28 U.S.C. § 597(a), the authority to indict to the Southern District.

*460 Defendants' interpretation of the ICC's order directing the investigation of Meese fails to appreciate the order's plain language. It was only Meese's conduct that Independent Counsel McKay was charged with responsibility to investigate. By its terms, the order did not preclude other investigations of Wedtech, Wallach or Chinn. The government did not need the IC's authorization to seek an indictment in the Southern District of New York. The decision to approach the IC only indicates that the prosecutors did not want to disrupt or to infringe on any aspect of the IC's ongoing investigation of Meese. The Southern District prosecutors' prudence is not a basis for concluding that they lacked the requisite authority to act.

2. Prosecutorial Bias and Conflict of Interest

[5] Defendants further argue that every Department of Justice (DOJ) prosecutor was inherently biased in some way due to the alleged involvement of the DOJ's top official, then-Attorney General Meese. Thus, the defendants submit, the U.S. Attorneys in the Southern District of New York were not "disinterested prosecutors" as required by the Due Process Clause. These sweeping arguments are completely lacking in merit. The only case law that defendants rely on to support their position involves individual prosecutors who were discovered to have had an actual interest in the outcome of a case. Additionally, the argument that every DOJ employee was somehow tainted because of the alleged involvement of Meese is incredible and simply the product of speculation. Defendants point to nothing that demonstrates the existence of any bias or prejudice. Finally, even assuming the existence of some bias, defendants have in no way established that they were prejudiced by any conflict of interest. See *Wright v. United States*, 732 F.2d 1048, 1056 n. 8 (2d Cir.1984) (extent of prejudice that must be shown depends on what stage proceedings have reached), cert. denied, 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985).

C. The Mail Fraud Charges

1. Counts Twelve Through Fifteen

Counts Twelve through Fifteen charged London

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and Chinn with mail fraud in violation of 18 U.S.C. § 1341. Each of these counts also included a charge of aiding and abetting in violation of 18 U.S.C. § 2. The charges in Counts Twelve through Fifteen related to certain mailings made by London in furtherance of his purported scheme with Chinn to obtain \$1.14 million from Wedtech. London and Chinn submit that these charges are legally insufficient because the government only alleges a fraudulent taking of intangible rights--interests that do not rise to the level of "property" within the meaning of the mail fraud statute.

The government's theory was that London and Chinn used the mails to further a scheme designed to funnel Wedtech funds to Chinn through his entity FMI, to pay a \$100,000 kickback to Guariglia, and to pass a twenty percent share of the \$1 million to Wallach. The alleged scheme began when Moreno and Guariglia agreed to pay London and Chinn \$1 million for their services in connection with Wedtech's secondary public offering. Guariglia, in a side deal, was to receive a \$100,000 kickback. The \$1 million was to be paid from Wedtech to London's corporation, IFCI. London would then make a payment to Chinn's entity, FMI. The payment was structured in this fashion because Chinn was a director of Wedtech at the time; if he had received the payment directly, it would have to have been reported on SEC disclosures. After the offering was completed, Guariglia authorized an additional disbursement to London of \$140,000 for expenses. Thus, the total sum involved was \$1.14 million.

London sent an invoice to Wedtech attributing the \$1.14 million fee to services rendered in connection with Wedtech's secondary public offering. The prospectus for the secondary public offering was mailed to Wedtech shareholders and failed to disclose that Chinn, a Wedtech director, was receiving part of the \$1.14 million payment. Later, when the payments were discovered, London sent letters to Wedtech's outside *461 counsel which mischaracterized the purpose of the payments and the true recipients.

[6][7][8] The federal mail fraud statute prohibits an individual from "devis [ing] or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

18 U.S.C. § 1341. The essential elements of a mail fraud violation are (1) a scheme to defraud, (2) money or property, and (3) use of the mails to further the scheme. See *McNally v. United States*, 483 U.S. 350, 356, 107 S.Ct. 2875, 2879, 97 L.Ed.2d 292 (1987); *United States v. Pisani*, 773 F.2d 397, 409 (2d Cir.1985). To establish the existence of a scheme to defraud, the government must present proof that the defendants possessed a fraudulent intent. *United States v. Schwartz*, 924 F.2d 410, 420 (2d Cir.1991); *United States v. Starr*, 816 F.2d 94, 98 (2d Cir.1987). And although money or property must be the object of the scheme, *McNally*, 483 U.S. at 358-59, 107 S.Ct. at 2880-81, the government is not required to show that the intended victim was actually defrauded. The government need only show that the defendants contemplated some actual harm or injury. *Starr*, 816 F.2d at 98; *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 (2d Cir.1970).

[9] London and Chinn submit that Wedtech received services in return for the payments and that, therefore, the shareholders were not defrauded of any property. As we explain below in connection with our discussion of the charges under the National Stolen Property Act, 18 U.S.C. § 2314, providing alternative services does not defeat a fraud charge because the fact remains that the corporation and its shareholders did not receive the services that they believed were being provided. In addition, the defendants contend that the only property alleged to have been taken was the shareholders' intangible "right to control" how Wedtech's money was spent. They argue that the Supreme Court's holding in *McNally*, 483 U.S. 350, 107 S.Ct. 2875, precludes a mail fraud charge based on the alleged taking of such intangible property rights. We disagree.

In *McNally*, the Supreme Court reversed a mail fraud conviction that was predicated on the charge that the defendant had defrauded the citizens of a state of their intangible right to "honest and impartial government." *Id.* at 355, 107 S.Ct. at 2879, but see 18 U.S.C.A. § 1346 (legislatively overruling *McNally*). London and Chinn maintain that Wedtech and its shareholders, like the citizens in *McNally*, were not deprived of any tangible property rights and, therefore, prosecution under the mail fraud statute is impermissible. Defendants misread the Supreme Court's opinion in *McNally*.

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Furthermore, defendants' definition of "property" is too narrowly drawn.

In *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), the Supreme Court clarified its decision in *McNally*. The Court declared: "McNally did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.* 484 U.S. at 25, 108 S.Ct. at 320. Indeed, the Court recognized that its holding was quite specific: "We held in *McNally* that the mail fraud statute does not reach 'schemes to defraud citizens of their intangible rights to honest and impartial government,' and that the statute 'is limited in scope to the protection of property rights.'" *Id.* (citations omitted). In upholding a mail fraud conviction, the *Carpenter* Court recognized that the Wall Street Journal's confidential business information--an intangible interest--constituted property within the statute's purview. *Id.* Thus, the central focus of our inquiry is whether under the government's theory any property right was taken or placed at risk of loss as a result of the defendants' alleged scheme; if no property right was involved, the mail fraud charges cannot survive.

The indictment charged that the victims of the alleged "scheme and artifice" were Wedtech and its shareholders who were defrauded of the \$1.14 million in payments as well as the "right to control" how the money was spent. In addition, those who *462 purchased Wedtech stock as part of the secondary offering were alleged to be victims. London and Chinn maintain that these alleged victims were not deprived of any property right. The corporation and shareholders, according to London and Chinn, were in fact benefitted as a result of their efforts to enhance the value of the corporation's stock. Moreover, they claim that it is only the directors and officers of a corporation who are charged with the responsibility for managing the entity and that, therefore, the shareholders could not have been deprived of any property interest because they possess no "right to control" how corporate funds are spent.

[10][11] At the outset, we recognize that a corporation can only act through its agents--officers and directors. It is the directors who are charged with the responsibility for managing the affairs of a corporation. *Diamond v. Oreamuno*, 29 A.D.2d

285, 287, 287 N.Y.S.2d 300, 302 (1st Dep't 1968), *aff'd*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969). Generally, the role of shareholders in governing the conduct of the corporation is minimal and limited to fundamental decisions such as the election of directors or the approval of extraordinary matters like mergers, a sale of substantially all corporate assets, dissolutions and amendments of the articles of incorporation or the corporate bylaws. See R. Clark, *Corporate Law* § 3.1.1, at 94 (1986); see also N.Y. Bus. Corp. L. §§ 703, 903, 909 (McKinney 1991); 1 *Fletcher Cyclopaedia of the Law of Private Corporations* § 30, at 553 (Perm. ed. 1990) (hereinafter "*Fletcher*"). Thus, the shareholders have no legal right to control the day-to-day affairs of a corporation. Moreover, shareholders do not hold legal title to any of the corporation's assets. Instead, the corporation--the entity itself--is vested with the title. 5A *Fletcher* § 2213, at 323. "[T]he corporation in respect of corporate property and rights is entirely distinct from the stockholders who are the ultimate or equitable owners of its assets." 5303 *Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 323, 486 N.Y.S.2d 877, 884, 476 N.E.2d 276, 283 (1984) (quoting *Brock v. Poor*, 216 N.Y. 387, 401, 111 N.E. 229, 234 (1915)).

[12] While shareholders have neither a right to manage the corporation nor a right to hold title to corporate property, their ownership of stock in the corporation is nonetheless a property interest. Although the stock certificates may be the only physical (tangible) manifestation of this property, the ownership interest that the certificates represent plainly is "property." "[S]hares of stock are property, but they are intangible and incorporeal property existing only in abstract legal contemplation." 11 *Fletcher* § 5097, at 92. There are, however, other incidents accompanying the property interest that a stockholder owns.

The government asserts that the actions taken by the defendants denied the shareholders the "right to control" how corporate assets were spent--an intangible property interest. The "right to control" has been recognized as a property interest that is protected by the mail fraud statute. See, e.g., *United States v. Biaggi*, 909 F.2d 662, 687 (2d Cir.1990) (Defense Department's right to control contract awards protected by mail fraud statute), *cert. denied*, --- U.S. ---, 111 S.Ct. 1102, 113

L.Ed.2d 213 (1991); *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir.) (corporation deprived of right to control spending when officers awarded contracts to outside contractor and received a kickback), cert. denied, --- U.S. ---, 111 S.Ct. 69, 112 L.Ed.2d 43 (1990); *United States v. Kerkman*, 866 F.2d 877, 880 (6th Cir.) (same), cert. denied, -- U.S. ---, 110 S.Ct. 95, 107 L.Ed.2d 59 (1989); see also *McNally*, 483 U.S. at 360, 107 S.Ct. at 2881 (suggesting that conviction may have been affirmed if jury had been "charged that to convict it must find that the Commonwealth [of Kentucky] was deprived of control over how its money was spent"). Despite the recurrent references to a "right to control," we think that use of that terminology can be somewhat misleading and confusing. Examination of the case law exploring the "right to control" reveals that application of the theory is predicated on a showing that some *463 person or entity has been deprived of potentially valuable economic information. See *United States v. Little*, 889 F.2d 1367, 1368 (5th Cir.1989) (concealment of economically material information can constitute mail fraud), cert. denied, --- U.S. ---, 110 S.Ct. 2176, 109 L.Ed.2d 505 (1990). Thus, the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution.

A stockholder's right to monitor and to police the behavior of the corporation and its officers is a property interest. This incident of stock ownership represents one way that a shareholder can protect the value of his or her investment. The maintenance of accurate books and records is of central importance to the preservation of this property interest. "The stockholders' right of inspection of the corporation's books and records rests upon the underlying ownership by them of the corporation's assets and property" and is an incident of "ownership of the corporate property." 5A *Fletcher* § 2213, at 323. Indeed, given the important role that information plays in the valuation of a corporation, the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest.

The importance of this right to information is recognized by the statutes and rules that govern the operation of a publicly held corporation. Indeed, the officers of a publicly held corporation are legally obligated to keep and to maintain books and records

which "accurately and fairly reflect the transactions and dispositions of the assets" of the corporation. 15 U.S.C. § 78m(b)(2)(A); 17 C.F.R. § 240.1362-1; cf. *United States v. Siegel*, 717 F.2d 9, 14 (2d Cir.1983) (mail fraud violation when "a fiduciary fails to disclose material information 'which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other' ") (citations omitted). The provision of complete information protects a shareholder's investment--a clear property interest. In the event that a stockholder disagrees with a corporation's actions, steps can be taken to prevent such further activity or the shares can be sold. When intentionally deprived of accurate information regarding how corporate assets are being spent, a shareholder's investment is placed at great risk. If corporate officers and directors, and those acting in concert with them, were free to conceal the true nature of corporate transactions, it is conceivable that the assets of the corporation could be so dissipated as to render a shareholder's investment valueless.

London and Chinn also submit that Wedtech and its shareholders received valuable services in return for the payments that were made, and therefore, the shareholders were not defrauded. The provision of alternative services does not defeat a mail fraud prosecution. As Judge Learned Hand eloquently explained many years ago in response to a similar argument:

Civily of course the action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the [mail fraud] statute is directed.

United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), cert. denied, 286 U.S. 554, 52 S.Ct. 579, 76 L.Ed. 1289 (1932).

[13] Where, as here, it is alleged that London and Chinn, in concert with Wedtech insiders, set up a scheme to conceal the true nature of their dealings and the ultimate recipients of the payments, we conclude that a mail fraud charge can be sustained. By using the mails to submit false invoices and other

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inaccurate information, these defendants intentionally sought to misrepresent the nature of the transactions in which they were involved. These misrepresentations permitted the officers to pay out large sums from the corporation to undisclosed individuals for what were purportedly improper purposes, while maintaining *464 the facade that these payments were in furtherance of legitimate corporate goals. By concealing this information, the value of Wedtech stock was obscured and the shareholders and the corporation were deprived of the opportunity to make informed decisions.

[14] Finally, we cannot accept defendants' argument that the directors and officers of the corporation have the authority to act on behalf of the shareholders and the corporation and that therefore a criminal fraud cannot be perpetrated when all the officers are participants in the scheme. Defendants would have us endorse a theory of criminal law that would effectively grant corporate officials and third-parties working in concert with them a license to loot the corporate treasury as long as they were all in on the scheme. We decline to do so. Such a theory completely fails to recognize and to protect the property interests of the shareholders and the corporation. As we have stated on a prior occasion, once a property right is found to exist, section 1341's language " 'any scheme or artifice to defraud' " is to be interpreted broadly. United States v. Evans, 844 F.2d 36, 40 (2d Cir.1988) (quoting McNally, 483 U.S. at 356, 107 S.Ct. at 2879); see also Durland v. United States, 161 U.S. 306, 313-14, 16 S.Ct. 508, 40 L.Ed. 709 (1896). As one member of our Court has noted in a different context, "[t]he issuance of checks falsely prepared to reflect the performance of non-existent services is a fraud on someone, ultimately the shareholders, who are deprived of an opportunity to know how corporate funds are being spent." United States v. Weiss, 752 F.2d 777, 794 (2d Cir.) (Newman, J., dissenting), cert. denied, 474 U.S. 944, 106 S.Ct. 308, 88 L.Ed.2d 285 (1985). We accordingly conclude that the government advanced a viable theory of fraud under the mail fraud statute.

2. Count Eighteen

Count Eighteen charged Chinn individually with committing mail fraud in connection with his submission of credit card receipts for reimbursement. According to the government,

Chinn had a side deal, which was approved by Guariglia and one other Wedtech official, whereby Chinn was permitted to spend up to \$100,000 annually for personal expenses on his Wedtech corporate credit cards. During the thirteen month period from September 1985 through November 1986, Chinn utilized his Wedtech credit cards for his personal benefit by purchasing approximately \$23,000 in goods and services. The indictment charged that the mail fraud occurred when Diners Club and American Express mailed monthly account statements to Wedtech for payment. Chinn attacks these charges on two grounds: (1) the mailings were made by the credit card companies not by Chinn, and (2) he reiterates the argument that no "property" protected by the mail fraud statute was taken. We do not find either argument to be persuasive.

In support of his first argument, Chinn argues that the Supreme Court's holdings in *Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), and *United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), demonstrate that such allegations cannot support a mail fraud charge. In *Parr*, the Court held that two employees who used their school district credit cards to obtain gasoline and other services for their personal use could not be prosecuted for mail fraud simply because the oil companies involved ultimately submitted the bills to the school district for payment. The Court reasoned that the mailings were not in furtherance of the scheme because the perpetrators had already gotten what they wanted. 363 U.S. at 392-93, 80 S.Ct. at 1184. Similarly, in *Maze*, the individual charged had stolen his roommate's credit card and proceeded to embark on a traveling spree. The *Maze* Court concluded that the subsequent mailing of the credit card billings could not provide a basis for conviction under the mail fraud statute because the success of the defendant's scheme in no way depended on the mailings. Indeed, as the Court noted, the mailings actually increased the probability that the defendant would be detected. 414 U.S. at 402-03, 94 S.Ct. at 649-50.

*465 Despite the superficial similarity among the cases, we find the instant case distinguishable from *Parr* and *Maze*. Here, the government's theory was that Chinn had entered into an agreement with Guariglia and other Wedtech insiders, wherein Chinn's compensation would be increased by as

much as \$100,000 per year. The fundamental question is whether the mailings were "incident to an essential part of the scheme." Parr, 363 U.S. at 390, 80 S.Ct. at 1183 (quoting *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954)). Discussing the proper focus of such mail fraud challenges, the Supreme Court recently declared:

We also reject [the] contention that mailings that someday may contribute to the uncovering of a fraudulent scheme cannot supply the mailing element of the mail fraud offense. The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud.... Those who use the mails to defraud proceed at their peril.

Schmuck v. United States, 489 U.S. 705, 715, 109 S.Ct. 1443, 1449-50, 103 L.Ed.2d 734 (1989) (emphasis added).

[15] We conclude that under the government's theory the credit card billings were central to the scheme and essential to its continued success. This was not to be a "one shot" proposition. See *id.* at 711, 109 S.Ct. at 1448. Rather, the intention of the scheme was to enhance Chinn's compensation by paying him periodically for personal expenses that he incurred. Such payments were to be made under the guise of reimbursements for business related expenses. Therefore, unlike the situations in Parr and Maze, the credit card billings not only were anticipated by Chinn, but also were essential to the success of the scheme. In Parr and Maze, the alleged perpetrators had no intention of continuing to communicate with the victims of their fraud. Here, however, the government's theory is that Chinn had expressly agreed with Guariglia that an additional \$100,000 in compensation would be forthcoming through payments that would be disguised as reimbursements for business related expenses. Absent the regular credit card company mailings, Wedtech could not have treated these payments as reimbursements for business expenses and Chinn's ability to continue to receive the payments would have come to an end. It thus cannot be said that "[t]he scheme ... had reached [its] fruition" once Chinn received the goods and services which he charged on the Wedtech accounts. Parr, 363 U.S. at 393, 80 S.Ct. at 1184 (quoting

Kann v. United States, 323 U.S. 88, 94, 65 S.Ct. 148, 150, 89 L.Ed. 88 (1944)). The government's theory underlying Count Eighteen is legally sufficient.

[16] Likewise, Chinn's second argument that no "property" was taken lacks merit. As we previously explained, the intentional submission of inaccurate or incomplete billing invoices can provide the basis for a mail fraud prosecution. That reasoning is equally applicable here. Moreover, Chinn was a director of Wedtech at the time of these alleged improper payments. As such he owed a fiduciary duty to the corporation and its shareholders to disclose fully the true purpose of the payments he received. See Siegel, 717 F.2d at 14 (fiduciary's failure to disclose material information can provide basis for mail fraud violation). Instead, Chinn, with Guariglia's cooperation, concealed the payments by masking them as business expenses, thereby perpetrating a fraud on Wedtech and its shareholders.

D. The National Stolen Property Act Charges

London, Wallach and Chinn were each charged with violating the National Stolen Property Act, 18 U.S.C. § 2314 (the Act) and with aiding and abetting violations of the Act, 18 U.S.C. § 2. Section 2314 prohibits the interstate transportation of "any goods, wares, merchandise, securities or money" valued at \$5,000 or more by individuals who knew the property to have been "stolen, converted, or taken by fraud." 18 U.S.C. § 2314. Counts Three *466 and Four charged Wallach with violating the Act by transporting across state lines two checks in the amounts of \$125,000 and \$300,000, respectively. Count Six charged all three defendants with violating the Act by transporting a series of checks totaling \$99,999.98 across state lines. Both Wallach and Chinn were acquitted of the charges in Count Six. Counts Ten and Eleven charged London and Chinn with violating the Act by transporting two checks totaling \$1.14 million across state lines.

In relation to all these charges, the government's theory was that through misrepresentation and deception London, Wallach and Chinn defrauded Wedtech and its shareholders. The product of this fraud was the receipt of Wedtech property, namely, the face value of the checks. Specifically, the

government alleged that the false invoice and the false letter submitted by Wallach, in connection with his receipt of the checks for \$125,000 and \$300,000, amounted to a "fraud" on Wedtech and its shareholders. Similarly, it was alleged that London and Chinn fraudulently obtained corporate funds by providing false and misleading information. These activities, the government charged, coupled with subsequent interstate transportation of the relevant checks, resulted in violations of the Act.

Defendants challenge the viability of these charges. Their arguments parallel, in large part, those advanced in connection with the mail fraud charges. We conclude, as we did with respect to the mail fraud charges, that the National Stolen Property Act charges are legally sufficient.

[17][18][19] To obtain a conviction under the National Stolen Property Act, the government must prove beyond a reasonable doubt the following elements: (1) the defendant transported property, as defined by the statute, in interstate commerce, (2) the property was worth \$5,000 or more, and (3) the defendant knew the property was "stolen, converted or taken by fraud." *Dowling v. United States*, 473 U.S. 207, 214, 105 S.Ct. 3127, 3131, 87 L.Ed.2d 152 (1985); see *United States v. Vontsteen*, 872 F.2d 626, 630 (5th Cir.1989); *United States v. Stack*, 853 F.2d 436, 438-39 (6th Cir.1988). The government charged that the defendants transported the Wedtech checks in interstate commerce knowing them to have been procured by fraud. While the definition of fraud is generally the same under the mail fraud statute, 18 U.S.C. § 1341, and under the Act, 18 U.S.C. § 2314, see, e.g., *United States v. Kibby*, 848 F.2d 920, 922-23 (8th Cir.1988), there are two significant differences between the offenses. First, to establish a violation of section 2314 the government must prove that the defendant was actually successful in defrauding his intended victim of property in excess of \$5,000—actual pecuniary harm must be shown. *United States v. Lennon*, 751 F.2d 737, 744 (5th Cir.), cert. denied, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985). In contrast, to obtain a conviction under section 1341, the government need only prove an intent to defraud; actual success of the scheme to defraud is not an essential element of the crime. See *United States v. Gelb*, 881 F.2d 1155, 1162-63 (2d Cir.), cert. denied, --- U.S. ---, 110 S.Ct. 544, 107

L.Ed.2d 541 (1989). Second, to obtain a conviction under section 2314 the government need not prove that the defendant actually participated in the scheme to defraud someone of property; proof that the defendant knew the property to have been stolen or procured by fraud is sufficient. *Stack*, 853 F.2d at 439.

Defendants maintain, as they did with respect to the mail fraud charges, that no fraud was committed because each of them provided valuable services to Wedtech even if these services were not accurately disclosed at the time payment was sought. We find little merit in this argument. The mere fact that the defendants may have performed some other services than those specified in their invoices and letters is irrelevant to the issue whether a fraud was perpetrated; the corporation and its shareholders did not receive the services stipulated in the documentation provided by the defendants. By providing misleading information, the defendants concealed essential facts from the corporation and its shareholders, facts which if disclosed might *467 have led to the relevant payments being recouped and any similar future payments being halted. See *Starr*, 816 F.2d at 98; *Regent Office Supply*, 421 F.2d at 1182.

Relying on *Dowling*, 473 U.S. 207, 105 S.Ct. 3127, the defendants also argue that the charges for violating section 2314 are legally insufficient because no physical property crossed state lines. In *Dowling*, the Supreme Court reviewed a section 2314 conviction which was based on the interstate transportation of bootleg phonograph records which had been manufactured and distributed without the consent of those who owned the copyrights to the musical compositions performed on the records. The Court reasoned that the phonograph records themselves had not been stolen or procured by fraud, only the songs performed on the records were being improperly used. In reversing the convictions, the Court held that the statute does not apply to wholly intangible property interests such as those possessed by a copyright holder. *Id.* at 216-17, 105 S.Ct. at 3133 ("[T]he provision seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported."). The Court concluded that a copyright, like other forms of intellectual property, lacks the physical characteristic that the statute contemplates. *Id.* at 217-18, 105 S.Ct. at 3133.

In reaching this conclusion, the Court placed emphasis on the special nature of federal copyright law. *Id.* at 217, 105 S.Ct. at 3133. Specifically, a copyright holder does not enjoy complete and inviolable control over the use of his or her work. *Id.* The Copyright Act contemplates, in limited circumstances, that others can make use of copyrighted information without obtaining the holder's permission. *Id.* Because federal law permits such intrusions, the Court reasoned: "[T]he property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple 'goods, wares, [or] merchandise,' for the copyright holder's dominion is subjected to precisely defined limits." *Id.* Given the distinct nature of copyrights, the Court noted that interference with a copyright "does not easily equate with theft, conversion, or fraud." *Id.*

The Dowling Court found additional support for its decision when it examined the history of the Act. The Court determined that section 2314 originally was adopted to criminalize conduct which absent its interstate characteristic would ordinarily have been left to the states to regulate. Because Congress had exclusive power over the area of copyrights, whether or not interstate commerce was involved, the Court stated that it would be "implausible to suppose that Congress intended to combat the problem of copyright infringement" when it passed section 2314. *Id.* at 220-21, 105 S.Ct. at 3135. The Court, therefore, held that section 2314 could not provide the basis for a prosecution stemming from the interstate transportation of copyrighted material.

The defendants argue that the reasoning of Dowling is directly applicable because the only property alleged to have been transported with knowledge that it was procured by fraud was the shareholders' "right to control" and their related interest in not having the earnings of the company artificially inflated. The defendants contend that these property interests, like the copyrights in Dowling, are entirely incorporeal and cannot provide the basis for a section 2314 conviction. We, however, do not find Dowling to be controlling.

In contrast to the situation in Dowling, the defendants herein were charged simply with transporting checks across state lines knowing them

to have been procured through fraud. Each check at issue had a value that exceeded \$5,000. The checks, unlike the copyrights in Dowling, without a doubt constitute physical property within the meaning of the statute. Moreover, the defendants' acquisition and transportation of that property wholly deprived Wedtech of the use and benefit of those funds; such a complete deprivation does not occur in the context of a copyright infringement. Finally, neither state nor federal law permits the assets of a corporation to be dissipated by corporate officials and those acting in concert with them for undisclosed *468 purposes. As we made clear in our discussion of the mail fraud charges, the intentional provision of false and inaccurate financial information can constitute a fraud. A direct product of this fraud, under the government's theory, was the checks that were issued in payment for the services noted in the various invoices and letters submitted by the defendants. We are convinced that such allegations state a viable charge under the National Stolen Property Act.

[20] Furthermore, we reiterate that the participation of Wedtech officers in this alleged scheme does not rule out the existence of fraud. Defendants contend that because the officers and directors of Wedtech were aware of everything that had transpired and willingly disbursed the relevant funds there can be no violation of the statute. In short, they assert that one cannot acquire by fraud what one has been voluntarily given. As this Circuit has recognized: "Because the concept of 'stolen' property requires an interference with the property rights of its owner, property that has been transported, ... or otherwise disposed of, with the consent of the owner cannot be considered 'stolen' within the meaning of §§ 2312-2315." *United States v. Bennett*, 665 F.2d 16, 22 (2d Cir.1981).

The linchpin of the defendants' argument is that shareholders possess no right to control the day-to-day operations of a corporation and no possessory interest in corporate property. Notwithstanding the truth of these premises, shareholders do have a right to receive accurate and complete information and they are the beneficial owners of corporate assets. As we discussed in connection with the mail fraud charges, when false information is intentionally provided to the corporation, a fraud on the corporation and its shareholders is committed. Any monies dispersed to satisfy these false invoices, in

our opinion, also have been procured by fraud.

In this regard, we find the Sixth Circuit's reasoning in *United States v. Gullett*, 713 F.2d 1203 (6th Cir.1983), cert. denied, 464 U.S. 1069, 104 S.Ct. 973, 79 L.Ed.2d 211 (1984), to be persuasive. In *Gullett*, two partners in an accounting firm engaged in a scheme in which clients of the firm wrote checks to the firm for services that were never performed. In turn, the clients took a tax deduction and ultimately shared in the proceeds of the checks. The defendants, the accounting firm partners, attacked their section 2314 convictions asserting that the officers of the allegedly defrauded corporations had used their "agency powers to write checks for the purpose of generating cash to benefit the corporations." *Id.* at 1210. The Sixth Circuit rejected this argument stating: "This explanation ... ignores the parade of phony invoices and fictitious payees which were created in order to deceive uninvolved corporate officers and shareholders." *Id.* The *Gullett* Court further explained:

Although corporate officers with broad agency powers authorized and participated in the scheme, the officers necessarily made false entries on the books of their corporations in order to secure the corporate payments. These false entries deliberately misrepresented the nature of the transactions to the corporation as an entity and hence to its owners, the shareholders, and its directors. In reliance on these false statements, the corporation made the payments. The defendants knew the invoices and documents were false and that the corporations would rely on them to make payments. Thus the basic elements of fraud--misrepresentation and detrimental reliance--are present.

Id. at 1211.

The defendants contend that *Gullett* is inapposite and should not be relied on because there not all the officers of the corporations involved were a party to the scheme. Here, they argue that the government does not contend that any Wedtech officers or directors were not aware of what was happening. We think that this argument completely misses the mark. Officers and directors owe a duty to the corporation and its shareholders. If all the officers and directors become a party to a scheme to use corporate assets improperly, the resulting injury to the entity and its owners--the *469 shareholders--is no less than when only some of the officers are

involved. Officers and directors do not have a license to plunder corporate treasuries acting individually or collectively. The defendants, according to the government, were completely aware that Wedtech's officers were requesting false invoices so as to mislead the corporation and its shareholders regarding the true purposes for the payments. In this respect, the defendants were knowing parties to this concealment, and their submission of the requested documentation made the scheme possible. As we once stated in a mail fraud prosecution, "regardless of the fact that higher officials directed the wrongful acts, the harm was no less injurious to the corporation." *Weiss*, 752 F.2d at 785.

The defendants advance one other argument to attack the validity of the section 2314 charges. They maintain that the Act does not unambiguously apply to the specific conduct charged in the indictment and therefore these charges should not be permitted to stand. They urge application of the "rule of lenity," which requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). The rule recognizes that legislatures and not the courts should define criminal liability. *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Id.* We conclude that application of the rule of lenity is unwarranted in this case.

[21] Application of the rule of lenity is warranted only where the statute's language or intended purpose is unclear. Quite recently the Supreme Court, in rejecting a similar challenge to another aspect of section 2314 stated: "This Court has never required that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, --- U.S. ---, ---, 111 S.Ct. 461, 467, 112 L.Ed.2d 449 (1990). The Court further noted that in adopting section 2314 "Congress' general purpose [was] to combat interstate fraud," and emphasized that the statute should be broadly construed. *Id.* 111 S.Ct. at 468. In view of the government's theory with respect to

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the section 2314 charges, we fail to see the merit in defendants' argument. Defendants are alleged to have knowingly participated in a scheme which resulted in monies being disbursed from Wedtech ostensibly for services that, in fact, had not been performed or for the benefit of individuals whose identity was concealed. Any property derived from such conduct and then transported across state lines plainly falls within the purview of section 2314. Accordingly, we conclude that the theory advanced by the government is sufficient to support the section 2314 charges and that the rule of lenity does not apply.

E. Count Five: The Conspiracy Charge

Count Five of the indictment charged Wallach with conspiracy, in violation of 18 U.S.C. § 371. The government charged that the conspiracy had two objects: (1) to defraud the citizens of the United States of their right to Wallach's honest and faithful services, and (2) to violate 18 U.S.C. § 203, which prohibits the receipt of or the agreement to receive any compensation for services to be rendered at a time when the intended recipient is an officer of the United States. Wallach attacks the legal sufficiency of these charges. Because of our decision to reverse all the convictions, we do not address Wallach's evidentiary challenges. We limit our discussion to Wallach's legal argument that only those individuals who actually become federal officials can be charged with conspiring to violate Section 203.

Section 203(a)(2) is aimed at preventing the corruption of public officials. During the relevant time period, the statute provided in pertinent part:

(a) Whoever, otherwise than as provided by law for the proper discharge of *470 official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another--

....

(2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States ...

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest,

before any department, agency ... or any civil, military, or naval commission.
18 U.S.C. § 203(a) (1982).

Wallach never became a federal official or employee. Wallach, therefore, argues that mere anticipation of obtaining a position in the federal government provides a legally insufficient basis to maintain a prosecution under section 203. Essentially, Wallach argues that a person cannot conspire to violate a substantive statute when the substantive statute does not reach that person. Even assuming the correctness of Wallach's initial premise, we find his arguments to be unpersuasive as they relate to a conspiracy charge.

[22][23][24][25] "It is well settled that the law of conspiracy serves ends different from, and complementary to, those served by criminal prohibitions of the substantive offense." *United States v. Feola*, 420 U.S. 671, 693, 95 S.Ct. 1255, 1268, 43 L.Ed.2d 541 (1975). The law of conspiracy serves two independent values: (1) it protects society from the dangers of concerted criminal activity, and (2) it serves a preventive function by stopping criminal conduct in its early stages of growth before it has a full opportunity to bloom... *Id.* at 693-94, 95 S.Ct. at 1268. As the applicable law has been summarized:

The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed. Criminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventive action.

Id. at 694, 95 S.Ct. at 1268 (citations omitted). Thus, to establish the existence of a conspiracy the government need only establish the existence of an agreement and an overt act in furtherance of the agreement. *United States v. Giordano*, 693 F.2d 245, 249 (2d Cir.1982). "Whether the substantive crime itself is, or is likely to be, committed is irrelevant." *United States v. Rose*, 590 F.2d 232, 235 (7th Cir.1978), cert. denied, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979). Conspiracy is a crime separate and apart from the substantive offense that is the object of the conspiracy. Because it is the conspiratorial plan itself that is the focus of the charge, the illegality of the agreement is not

dependent on the actual achievement of its goal. *Giordano*, 693 F.2d at 249. Indeed, "it does not matter that the ends of the conspiracy were from the beginning unattainable." *Id.*; see also *United States v. Petit*, 841 F.2d 1546, 1550-51 (11th Cir.) (conviction for conspiring to receive stolen goods which had been transported by an interstate carrier affirmed even though goods themselves had not been stolen), cert. denied sub nom. *Fernandez v. United States*, 487 U.S. 1237, 108 S.Ct. 2906, 101 L.Ed.2d 938 (1988); *United States v. LaBudda*, 882 F.2d 244 (7th Cir.1989) (conviction for conspiring to sell stolen U.S. Savings Bonds proper even though government had not proven that bonds were in fact stolen). Impossibility, therefore, is not a defense to a conspiracy charge. See *W. LaFave & A. Scott, Criminal Law* 545-46 (2d ed. 1986). "[I]t is the intent of the defendants to violate the law which matters, not whether their conduct would actually violate the underlying substantive statute." *LaBudda*, 882 F.2d at 248 (citing cases). The central question becomes whether the government's proof could establish *471 that the accused planned to commit a substantive offense which, if attainable, would have violated a federal statute, and that at least one overt step was taken to advance the conspiracy's purpose. *Giordano*, 693 F.2d at 249.

[26] Under the government's theory, Wallach agreed with Guariglia and other Wedtech officers to continue to lobby on behalf of Wedtech once he obtained a position within the federal government. In addition, the government contends that in contemplation of Wallach becoming a federal official a \$300,000 advance payment was made to avoid any appearance of impropriety and to conceal Wallach's agreement to continue to lobby on behalf of Wedtech while holding a federal office. The parties to the agreement believed that Wallach would soon be a federal official and they structured their dealings accordingly. Thus, the government's theory encompasses the two essential elements of a viable conspiracy charge--agreement and overt act. At a retrial, a jury will have the ultimate responsibility for determining whether the government's evidence actually proves beyond a reasonable doubt the existence of these two elements. Under Wallach's approach, however, a charge of conspiring to violate section 203 could only be maintained if one of the parties involved actually was a federal official at the time of the agreement. We reject this interpretation.

Section 203 is aimed at limiting corruption within the federal government by safeguarding the integrity of the public administration. As the Supreme Court has explained:

Conflict of interest legislation is "directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

Crandon v. United States, 494 U.S. 152, --- n. 20, 110 S.Ct. 997, 1005 n. 20, 108 L.Ed.2d 132 (1990) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562, 81 S.Ct. 294, 315, 5 L.Ed.2d 268 (1961)). To achieve its purpose, the statute precludes federal employees from receiving any compensation from private parties for providing services in connection with any matter in which the United States has an interest. See *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.), cert. denied sub nom. *Tate v. United States*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). A conspiracy to engage in conduct violative of the substantive statute is equally threatening to the integrity of the governmental apparatus that section 203 seeks to protect. Thus, recognizing the legitimacy of a conspiracy charge even when none of the alleged parties to the agreement is as yet a federal official is entirely consistent with section 203's purpose and intent.

[27] By its very nature, conspiracy law often is aimed at reaching behavior that is intended to take place at a future time and in many instances attainment of the conspiracy's object turns on certain conditions being met or satisfied. See Note, *Conditional Objectives of Conspiracies*, 94 *Yale L.J.* 895, 899 (1985). In our view, where such a situation is involved, the relevant question is whether the alleged conspirators subjectively believed that the conditions necessary for attaining the objective were likely to be fulfilled. See generally *id.* at 905-06. This approach appropriately focuses on the actual intent of the alleged parties to the conspiracy. The mere happenstance that Wallach's purported goal of obtaining such employment was not realized should not in our view insulate him from such a charge. Accordingly, we see no bar to the charge of conspiracy to violate section 203.

Wallach was also charged with conspiring to defraud the citizens of the United States of his honest and loyal services. We see no need to discuss in detail Wallach's arguments relating to this aspect of Count Five. However, in the event of a retrial, the district court should clarify the instructions relating to this particular charge by making it absolutely clear that the "honest and loyal" services at issue are those of *472 Wallach himself and not those of Meese. By making this minor adjustment in the language of the instructions, any ambiguity should be removed and the potential for misinterpretation by the jury significantly lessened.

F. The District Court's Evidentiary Rulings

[28] Wallach asserts that the district court improperly permitted the government to introduce evidence regarding prior incidents of conduct. He submits that under Fed.R.Evid. 404(b) and under Rule 403 this evidence should have been excluded. Although we have adopted an "inclusionary approach" to the introduction of similar act evidence as long as the evidence is not being introduced to show propensity, *United States v. Brennan*, 798 F.2d 581, 589 (2d Cir.1986), a district court must be careful to consider the cumulative impact of such evidence on the jury and to avoid the potential prejudice that might flow from its admission. See *United States v. Peterson*, 808 F.2d 969, 974 (2d Cir.1987) (probative value must exceed potential for prejudice); 2 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 404[08] (1990).

[29] The evidence at issue involved a showing that Wallach accepted \$150,000 to lobby Meese to obtain the support of the United States for a Mid-East pipeline. The evidence proffered and ultimately introduced showed that Wallach, through a series of transactions, one of which involved Chinn, received the \$150,000 and did not disclose it on his income tax returns. The government argued that this evidence of "other crimes, wrongs, or acts" was probative of Wallach's intent in his dealings with Wedtech. The district court found this evidence relevant to show that Wallach's concealment of the Wedtech payments was not innocent. We see no error in the introduction of this evidence. The district court, however, also permitted the prosecution to delve into other instances of Wallach's conduct.

During the cross-examination of Wallach's character witnesses, the government was permitted to introduce evidence concerning Wallach's performance as a personal injury attorney in the California case of *Bert v. Wenzel*. Specifically, the government questioned the witnesses' knowledge about Wallach's handling of this personal injury case in which two young children were severely burned. The government's evidence focused on Wallach's agreement to settle the case for \$1.7 million and to retain \$1 million as his fee. The settlement was approved over the objections of the children's parents by then-California State Judge, Eugene Lynch. At the time of the approval, Wallach had been encouraging Meese to recommend Lynch for an appointment to the federal bench. The district court concluded the government had shown a "good faith basis" for inquiry into the matter.

[30] Under Fed.R.Evid. 405, the government is permitted to ask questions of character witnesses concerning their knowledge of specific instances of the defendant's conduct. 22 C. Wright & K. Graham, *Federal Practice & Procedure*, § 5268, at 609-11 (1978). This is because the defense essentially has placed character in issue. However, the reason the rules of evidence limit the extent to which such collateral character evidence is admissible is to ensure that the jury does not convict the defendant for conduct with which he has not been charged. 22 *Federal Practice & Procedure*, § 5239, at 437-38.

[31] Although the *Bert v. Wenzel* evidence may have been technically admissible, we believe that a district court must proceed with caution and carefully evaluate the cumulative effect of such evidence on a jury. The district court always has the authority and discretion to exclude such evidence under the balancing test mandated by Fed.R.Evid. 403. Here, with particular reference to the *Bert v. Wenzel* evidence, our concern has been elevated by the manner in which the prosecution argued this evidence to the jury. The prosecutor made a blatant effort to prejudice the jury in his appeal for vengeance by inviting the jurors to stand in the shoes of the parents of the children involved in the case. He also characterized Wallach's behavior *473 as an "outrage." This was overzealous advocacy. These comments were unnecessary and in our view quite prejudicial. Wallach was not on trial for his conduct concerning the personal injury case.

While some limited inquiry into this matter may have been probative of the scope of knowledge on which Wallach's character witnesses were operating, we believe that inquiry into the entire matter was expanded well beyond the bounds of propriety and relevance. Thus, in the event of a retrial, steps should be taken to confine the use of such evidence to its intended purpose--challenging the basis for the character witnesses' opinions.

G. The Remaining Issues

We have considered the other arguments advanced by the defendants but choose to address at this time only those that are likely to recur at a retrial.

CONCLUSION

Because we believe that the perjury of one of the government's key witnesses infected the trial proceedings and interfered with the jury's ability to weigh his testimony, we reverse all the convictions. Additionally, our review of defendants' other arguments leads us to conclude that the charges advanced in the indictment are legally sufficient. Accordingly, we reverse all the judgments of conviction and remand for a new trial.

ALTIMARI, Circuit Judge, concurring:

I cannot subscribe to the notion that the Assistant United States Attorneys ("AUSAs") who represented the government in this case should have known that Anthony Guariglia was committing perjury at the time of trial. I do agree, however, that reversal is warranted despite the fact that the government had no knowledge of Guariglia's perjury. Accordingly, I write separately to express my views on these issues.

The idea that the government would knowingly rely on false testimony in obtaining a conviction is repugnant to the very concept of ordered liberty and is perhaps the most grievous accusation that can be levelled against a prosecutor. See *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); see also *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). A review of the entire record including the post-argument submissions [FN1] leaves me with the firm conviction that the AUSAs properly discharged the obligations of their office.

Therefore, in contrast to the majority, I do not believe that "a virtual automatic reversal" of the defendants' convictions is mandated. *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir.1975), cert. denied, 429 U.S. 819, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976).

FN1. I note with displeasure that much of the information regarding Guariglia's perjury and the government's response to that perjury was presented in a series of post-argument letters to the Court. As this Court has previously stressed, such submissions are looked upon with extreme disfavor. See *United States v. Bortnovsky*, 820 F.2d 572, 575 (2d Cir.1987) (per curiam). However, it was the defendants who initiated the submissions, to which the government merely responded.

To appreciate fully what the prosecutors knew about the admission of Anthony Guariglia's perjurious testimony, it is important to understand when and how this matter initially arose. During vigorous cross-examination, defense counsel confronted Guariglia with documents, obtained from the Tropicana Casino in Atlantic City, indicating that Guariglia had signed three markers totalling \$15,000 in September 1988 and one \$50,000 marker in October 1988. These markers provided strong circumstantial evidence that, despite his testimony to the contrary and despite the requirements of his cooperation agreement, Guariglia had gambled after the summer of 1988. On re-direct examination, Guariglia reiterated that he had not gambled. Instead, he claimed that he had exchanged the markers totalling \$15,000 for cash and had used the \$50,000 marker to obtain chips for Marshal Koplitz, a friend and business associate.

Certainly, if the government had simply accepted at face value Guariglia's somewhat *474 dubious explanation, a legitimate question might be raised about the prosecutors' conduct. However, this is not what occurred. Rather, in the midst of trial, the AUSAs extensively questioned Guariglia about the events in Atlantic City and the truthfulness of his testimony. Moreover, in an attempt to ascertain the truth or falsity of Guariglia's story, the AUSAs located and interviewed Koplitz and another individual who was with Guariglia in Atlantic City. Both verified Guariglia's version of events. Additionally, the prosecutors--albeit with limited success--attempted to contact and interview

Tropicana Casino officials. Thus, it seems to me that the AUSAs did all that was reasonable to assure that they were neither relying on false testimony nor permitting false testimony to go uncorrected. Cf. Stofsky, 527 F.2d at 244 ("We do not employ the omniscience of a Monday morning quarterback as the standard for determining what investigation should have been made by the government.").

It should also be realized that when the government did obtain meaningful evidence that Guariglia had perjured himself at trial, the AUSAs did not hesitate in undertaking an investigation and prosecution that ultimately resulted in Guariglia's perjury conviction. To my mind, this is a further illustration that throughout the proceedings the AUSAs sought to learn--not avoid or ignore--the truth.

Thus, I believe that the critical issue on this appeal is whether Guariglia's perjury is so material that "the jury probably would have altered its verdict if it had had the opportunity to appraise the impact [of the perjury] not only upon the factual elements of the government's case but also upon the credibility of the government's witness." Stofsky, 527 F.2d at 246. In considering this issue, the district court concluded that "this additional brace of wrongdoings, if known to the jury, would not in any way have had the slightest effect upon its verdict." *United States v. Wallach*, 733 F.Supp. 769, 771 (S.D.N.Y.1990). This conclusion was based on Judge Owen's consideration of a broad array of factors:

The testimony was not material: Guariglia's gambling and skimming did not bear on the defendants' guilt or innocence, only on Guariglia's credibility. And here, these instances of falsehood would have been merely minor, cumulative additions to the massive mound of discredit heaped upon Guariglia over several days of both direct and cross-examination. The jury heard that Guariglia's past included: bribery of numerous government officials, including Congressmen Biaggi and Garcia, Richard D. Ramirez of the Navy, Gordon Osgood of the Army, Jerrydoe Smith of the Postal Service, Peter Neglia of the Small Business Administration and Vito Castellano of the National Guard; commercial bribes to bank officials and a Con Edison employee; countless false filings with the Securities and Exchange Commission, the Small

Business Administration and the Internal Revenue Service; the use of kickbacks, frauds and the use of the 'FHJ slush fund' to steal \$1,624,702 from Wedtech; the payment of over \$500,000 in illegal payoffs to union officials for labor peace; the fabrication of a Navy telex to inflate Wedtech's apparent profit; concealing ill-gotten gains in nine foreign bank accounts; false statements to District Attorney Morgenthau and his staff when the investigation began, and, during the course of the investigation, obtaining a false Swedish passport. The defendants also brought out post-cooperation wrongdoing in connection with tax irregularities, arguable continued gambling in Atlantic City, and continued failure to make restitution to the Wedtech shareholders....
Id. at 771-72.

While the foregoing recitation is undeniably powerful, it is also somewhat misleading, because it fails to take proper account of the unique and oftentimes devastating impact of a witness perjuring himself in front of a jury. While disclosure of such perjury might not transform the jury's image of the witness from paragon to knave, see *United States v. Gilbert*, 668 F.2d 94, 96 (2d Cir.1981), cert. denied, 456 U.S. 946, *475 102 S.Ct. 2014, 72 L.Ed.2d 469 (1982), it may provide the proverbial straw that broke the camel's back. See, e.g., *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir.1975). Indeed, as the majority cogently explains, Guariglia was an essential witness at trial and, while there may have been heated argument over his credibility and misdeeds, his ongoing perjury had not been revealed to the jury.

In sum, I agree with the majority's conclusion that reversal of the convictions is warranted. But I do so solely on the ground that "the jury probably would have altered its verdict" had it been aware of Guariglia's on-going perjury. Stofsky, 527 F.2d at 246. In all other respects, I concur in the majority's well-reasoned opinion.

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