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THE JUSTICE DEPARTMENT'S IMPLEMENTATION OF THE INDEPENDENT COUNSEL ACT

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

JUNE 6, 2000

Serial No. 106–231

Printed for the use of the Committee on Government Reform



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THE JUSTICE DEPARTMENT'S IMPLEMENTATION OF THE INDEPENDENT COUNSEL ACT

TUESDAY, JUNE 6, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room 2154, Rayburn House Office Building, Hon. Dan Burton (chairman of the committee) presiding.

Present: Representatives Burton, Gilman, Morella, Shays, Horn, Mica, Barr, Hutchinson, Lantos, Cummings, and Kucinich.

Staff present: Kevin Binger, staff director; James C. Wilson, chief counsel; David A. Kass, deputy counsel and parliamentarian; Mark Corallo, director of communications; M. Scott Billingsley, counsel; Kimberly A. Reed, investigative counsel; Kristi Remington, senior counsel; Robert Briggs, deputy chief clerk; Robin Butler, office manager; Michael Canty, legislative aide; Scott Fagan and John Sare, staff assistants; Leneal Scott, computer systems manager; Lisa Smith Arafune, chief clerk; Maria Tamburri, assistant to chief counsel; Corinne Zaccagnini, systems administrator; Phil Schiliro, minority staff director; Phil Barnett, minority chief counsel; Kenneth Ballen, minority chief investigative counsel; Kristin Amerling, minority deputy chief counsel; Paul Weinberger and Michael Yang, minority counsel; Ellen Rayner, minority chief clerk; Earley Green, minority assistant clerk; Andrew Su, minority research assistant; and Chris Traci, minority staff assistant.

Mr. BURTON. A quorum being present, I ask unanimous consent that all members' and witnesses' written opening statements be included in the record. Without objection, so ordered.

I ask unanimous consent that all articles, exhibits and extraneous or tabular material referred to be included in the record and, without objection, so ordered.

I ask unanimous consent that two binders of exhibits which have been shared with the minority before the hearing be included in the record and without objection, so ordered.

I ask unanimous consent that questioning in this matter proceed under clause 2(j)(2) of House Rule 11 and committee rule 14 in which the chairman and ranking minority member allocate time to members of the committee as they deem appropriate for extended questioning not to exceed 60 minutes equally divided between the majority and the minority. Without objection, so ordered.

I also ask unanimous consent that questioning in the matter under consideration proceed under clause 2(j)(2) of House Rule 11 and committee rule 14 in which the chairman and ranking minor-

ity member allocate time to committee counsel as they deem appropriate for extending questioning not to exceed 60 minutes divided equally between the majority and minority; and, without objection, so ordered.

Mr. Lantos.

Mr. LANTOS. You are going so fast, Mr. Chairman, some of us need time to catch up.

Mr. BURTON. OK.

Mr. LANTOS. I want to raise a question with respect to the release of documents. As you know, the Department of Justice in writing has expressed objections to the release of documents, and I will introduce a letter in the record indicating their reasons for objections.

[The information referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

June 2, 2000

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter dated May 31, 2000, in which you indicate your Committee's consideration of disseminating the La Bella and Freeh memoranda, as well as other, unspecified documents provided to the Committee in connection with your oversight review of the Attorney General's decisions related to campaign financing matters, at a June 6, 2000 hearing of the Committee.

These documents were provided under an agreement into which the Committee entered with this Department in order to satisfy the legitimate need of Congress for oversight information while protecting important institutional and law enforcement interests of this Department, including the separation of law enforcement decisions from political considerations, and the confidentiality of open and frank internal deliberations. We appreciate your adherence to the agreement by providing notice to us prior to release of any document or portion thereof.

We object to the Committee's proposed public release of these sensitive law enforcement documents at the June 6 hearing. The Department has always sought to ensure that all law enforcement decisions are products of open, frank and independent assessments of the pertinent law and facts – uninhibited by political and other improper outside influences. If each attorney's advice and recommendations can be publicly dissected by Congress or the media, then the free and candid flow of ideas would certainly be jeopardized. In particular, we are concerned that attorneys handling the most politically sensitive matters involving high-level government officials may, in the future, refrain from providing their honest views on investigative strategy and the merits or demerits of the case if they know that their confidential views will be debated and second-guessed in public.

Public release of these documents also would infringe privacy interests. Many of the documents necessarily contain extensive discussion of unproved allegations against many entirely innocent persons peripheral to the investigations. Indeed, there is such information in the La Bella and Freeh memoranda. There is no reason to drag these allegations and individuals into the spotlight, and such material should be redacted prior to any release. We appreciate the

strict confidentiality with which you and your staff have treated these documents to date. We strongly urge you to continue to respect the privacy rights of these persons.

Finally, we request that you and the Ranking Member use your considerable leadership to request that Members provide notice to you and, through you to us, of those specific documents which may be released at the June 6, 2000 hearing. We believe that identification of the specific documents to be considered for release is a necessary part of part of the "reasonable notice" to which we agreed. Such identification will allow us to identify and share with you any specific concerns we have with the portions of those documents which are considered for discussion or release. Following our meeting with you and the Ranking Member, or with the Committee, contemplated in the agreement, the Committee thus will be in a position to make a reasoned, fully informed decision as to whether particular information should be made public.

Again, thank you for informing us of this matter. We look forward to identification of the documents your Committee will consider for release, and to working closely with you and your staff to resolve these issues promptly.

Sincerely

Robert Raben by JT

Robert Raben

cc: The Honorable Henry Waxman
Ranking Minority Member

Mr. LANTOS. In essence, the Department believes that disclosing internal deliberations to the public will have a chilling effect on future deliberations within the Department.

Second, the Department believes that releasing the documents will infringe the privacy interests of innocent individuals who have been involved in the investigation.

Is it my understanding that you intend to ignore the objections of the Department of Justice?

Mr. BURTON. Mr. Lantos, we don't intend to ignore the requests of the Department of Justice. We worked out an agreement with them prior to getting those documents which took us about 2½ years to get, and we said that before we would release any documents we would inform them of our intent. We would also have a committee vote on it, and they would be completely reviewed by our staffs. We have reviewed them very thoroughly. We will go into some of those today. We won't be releasing them without the consent of the committee. So we were complying with every bit of the agreement that we made with the Justice Department.

Mr. LANTOS. Do I understand that your position is that the Department of Justice has no objections to the release of documents?

Mr. BURTON. No, I am sure that they object because there are some very embarrassing things in there that I don't think that they want in the public domain.

Mr. LANTOS. Under the circumstances, I would like to amend your request, and I suggest we release all relevant documents, not just selected documents; and I have a definition what I mean by all documents.

Mr. BURTON. Would you state your definition?

Mr. LANTOS. The documents I propose be released are all memoranda, supporting documents and other materials produced to the committee by the Department of Justice in response to the committee's subpoena of May 3, 2000, relating to independent counsel deliberations. This includes any independent counsel deliberations relating to the investigations of the President, the Vice President, Harold Ickes, Alexis Herman, Bruce Babbitt, Louis Freeh and others.

Mr. BURTON. I have talked to our counsel about this prior to the meeting, and I don't think we have any objection to that, Mr. Lantos.

Mr. LANTOS. Thank you.

Mr. BURTON. So, without objection, that will be so ordered; and those documents will be released along with the documents that we have in question.

For 2½ years, we have been conducting oversight over the Justice Department. We've watched them conduct their campaign fundraising investigation. We've watched how they have implemented the Independent Counsel Act. What we've learned has been frustrating and disillusioning.

For a long time, it looked like the problems started late in 1997. FBI Director Louis Freeh tried to get Attorney General Reno to appoint an independent counsel. He wrote her a 27-page memo. She refused.

Then in July 1998, the chief prosecutor on the task force, Chuck La Bella, tried to do the same thing. He wrote Ms. Reno a 94-page

memo. He was joined by the top FBI agent on the task force, Mr. James DeSarno. Again, she refused.

But now we have learned that the problems did not start in the fall of 1997. It appears that they started a year earlier, in 1996, right at the outset of the investigation. The documents we have appear to show that the early problems revolved around one of our witnesses today, Mr. Lee Radek. Mr. Radek is the head of the Justice Department's Public Integrity Section. They prosecute public officials. They implement the Independent Counsel Act.

In December 1996, Mr. Radek had a meeting with two FBI officials—Bill Esposito and Neil Gallagher. We just received a copy of a memo from Director Freeh. According to this memo, Mr. Radek stated that he was under a lot of pressure in this fundraising investigation because the Attorney General's job might hang in the balance.

That's a pretty serious statement. Mr. Freeh took it seriously enough when he heard about it. He met with the Attorney General. He told her what Mr. Radek said. He asked her to recuse herself and he asked her to recuse Mr. Radek.

Neither thing happened. Ms. Reno didn't even look into the allegations. In fact, I understand that Ms. Reno doesn't even remember her meeting with Mr. Freeh. That is not unusual because we have had an epidemic of memory loss of people from the White House and the Justice Department for a long time. I understand that Mr. Radek doesn't even remember his meeting with Mr. Esposito. I can't understand somebody not remembering a meeting like that; but, once again, the epidemic continues.

What happened after that bad start is predictable. One of the fiercest critics of the Independent Counsel Act, Lee Radek, was put in charge of implementing the act that he was opposing. Listen to what he had to say in the New York Times in July 1997, when a lot of these decisions were being made: "Institutionally, the independent counsel statute is an insult. It is a clear enunciation by the legislative branch that we cannot be trusted on certain species of cases."

Well, what happened? Mr. Radek spent 3 years fighting tooth and nail to make sure that an independent counsel was never appointed, and it never happened. What a surprise. The Justice Department's investigation was beset by constant infighting and finger pointing. They were tied up in knots.

After 2½ years of fighting, we have finally received the Freeh and La Bella memos. They are pretty damning. The La Bella memos speaks volumes about what was happening at Public Integrity. Instead of talking about it myself, I'm going to let Mr. La Bella do the talking. Here's what his memo says about his struggles with the Public Integrity Section and Mr. Radek over investigating the White House and appointing an independent counsel: "You cannot investigate in order to determine if there is information concerning a 'covered person,' or one who falls within the discretionary provision, sufficient to constitute grounds to investigate. Rather, it seems that this information must just appear."

Must just appear. That was on page 8 of his memo.

Mr. La Bella argued that there was a double standard that benefited White House personnel. He said,

Whenever the Independent Counsel Act was arguably implicated, the Public Integrity Section was called in to consider if a preliminary investigation should be commenced.

A peculiar investigative phenomenon resulted. The Department would not investigate covered White House personnel nor open a preliminary inquiry unless there was a critical mass of specific and credible evidence of a Federal violation.

And yet the task force has commenced criminal investigations of noncovered persons based on a wisp of information.

I think that is really important. They would not investigate covered White House personnel nor open a preliminary inquiry unless there was critical mass of specific and credible evidence of a Federal violation, and yet the task force commenced criminal investigations of noncovered persons based upon a wisp of information. This is the man that they put in charge of the task force.

What Mr. La Bella has to say about the noninvestigation of using soft money for issue ads is unbelievable. He says,

If these allegations involved anyone other than the President, Vice President, senior White House or DNC and Clinton/Gore 1996 officials, an appropriate investigation would have commenced months ago without hesitation. However, simply because the subjects of the investigation are covered persons, a heated debate has raged within the Department as to whether to investigate at all. The allegations remain unaddressed.

That is on page 14.

He goes on,

The debates appear to have been result- oriented from the outset. In each case the desired result was to keep the matter out of the reach of the Independent Counsel Act. In Common Cause, this was accomplished by never reaching the issue. The contortions that the Department has gone through to avoid investigating these allegations are apparent.

That is on page 14.

I'll read one last quote on this subject because, it's so important.

One could argue that the Department's treatment of the Common Cause allegations has been marked by gamesmanship rather than an evenhanded analysis of the issues. That is to say, since a decision to investigate would inevitably lead to a triggering of the Independent Counsel Act, those who are hostile to the triggering of the Act had to find a theory upon which we could avoid conducting an investigation.

That is on page 38.

Finally, regarding the Loral investigation, Mr. La Bella says this:

In Loral, avoidance of an Independent Counsel Act was accomplished by constructing an investigation which ignored the President of the United States—the only real target of these allegations. It is time to approach these issues head on, rather than beginning with a desired result and reasoning backward.

That is on page 14.

Gamesmanship? Contortions? Beginning with a desired result and reasoning backward?

That is unbelievable. Was there ever a better case for an independent counsel? Can you blame the American people or many in Congress for being cynical?

Bear in mind that Mr. La Bella isn't saying that he had the evidence to convict these people. He is saying that he was being held back from investigating them in the first place.

So first you have the White House and the DNC closing their eyes to the crimes being committed all around them. Then you have Janet Reno's Justice Department going through contortions to avoid investigating them. That is why we have kept after this investigation as long as we have.

Now, the Justice Department doesn't want us to release these memos. They have withheld them from Congress for over 2 years. The Attorney General was held in contempt of Congress by this committee rather than turn them over. Their argument is that these documents would provide defendants with a road map to the investigation. Well, if this is a road map, it is a road map of a car going around in circles.

They also argue that giving up these memos would chill the advice people give the Attorney General. Nothing could be further from the truth. But they are embarrassing. Very embarrassing. And I think that's the real reason that they don't want them in the public domain.

What these documents really do is expose the bankruptcy of this investigation. The damage has been done at this point. More than 3 years have gone by. Witnesses have fled the country. The fact is that 122 people have either fled the country or taken the fifth amendment. The only thing we can do now is to try to make sure that it never happens again.

The question isn't, how could we make these documents public? The question is, how could we not?

There are just a couple of more issues I would like to address.

First, there is a whole series of memos in which Mr. Radek argues against appointing an independent counsel. However, when you read the people's responses to whom he wrote, his reasoning, you see that Mr. Radek was either shading the truth or getting the facts wrong.

Let me give you just one example. In August 1998, Mr. Radek wrote a long memo stating that there should be no independent counsel to investigate whether the Vice President made false statements about his fundraising calls. He was immediately taken to task by a line attorney and FBI agents working on the case for many blatant inaccuracies. One quote from the line attorney's memo sums it up. "The agents disagree vehemently with the characterization of the Panetta interviews. Specifically, they assert that he did not change his statement, although the Radek memo says he did so three times."

We'll be questioning Mr. Radek about all of these memos.

Another important area is the Department's terrible record in this investigation: The President wasn't questioned about any of the important foreign money players. The Vice President wasn't questioned about the Hsi Lai Temple. A search warrant for Charlie Trie's home was withdrawn at the last minute, even though the FBI wanted to go ahead and get documents. It wasn't served for 3 months, despite indications from the FBI that documents were being destroyed. James Riady was never indicted, despite ample evidence.

I can't tell you how many times this committee's investigators interviewed someone and found out that the Justice Department hadn't talked to them or subpoenaed documents and found out that the Justice Department didn't have them. And I've met some of the prosecutors and agents who have worked on this case. They are talented people. I have nothing but high regard for Mr. La Bella and Mr. DeSarno and Mr. Freeh and for the prosecutors and agents

who served under them. I think they had roadblocks put in their way from the very beginning.

Let me read just one passage from a memo drafted by a senior lawyer, Mr. Steve Clark, who quit the investigation out of frustration. Mr. Clark said, "Never did I dream that the task force's efforts to air this issue would be met with so much behind-the-scenes maneuvering, personal animosity, distortions of fact and contortions of law." This is one of the guys investigating this.

I don't know what else you can expect when one of the leaders of the investigation says at the outset that he is under a lot of pressure and the Attorney General's job hangs in the balance.

Finally, if anyone still has any doubts about how political Janet Reno's Justice Department has become, what happened yesterday afternoon should erase them. My staff got a call from the Justice Department at the end of the day. Justice is not happy that we are going to release these documents. They told my staff that they had found one last document they wanted to turn over to us, and this one was about me.

My staff asked them when they found this document. They wouldn't say.

My staff asked if the investigation of me was closed. They didn't know.

My staff asked who ordered this document to be turned over. They wouldn't answer.

Well, this is about the most transparent attempt to intimidate a Member of Congress that I have ever seen, and it ain't gonna fly.

I want answers to all these questions, and I am going to make sure that I get them from the Justice Department.

They tried to intimidate me in 1997. They started a criminal investigation of me based on some trumped-up charges raised by a former executive director of the Democratic National Committee. That didn't work.

They tried to intimidate me again when I sent a document subpoena to the Attorney General for information on Ron Brown. A couple days later, an FBI agent walked into my campaign headquarters with a subpoena from the Justice Department for 5 years of my campaign records. That didn't work.

They leaked a list of ongoing cases to Capitol Hill. It listed my case as still open but likely to be closed shortly. Apparently, they thought that I would be intimidated if they kept my case open. No such luck.

This isn't going to scare me or this committee off. I will not be deterred. I want everybody here from the Justice Department, everybody, to understand something. If you think that I'm going to be intimidated, you'd better think again. I think it is a real shame that the Justice Department has sunk to this level.

What we have here in the documents tells one side of the story. They tell it pretty convincingly. Today we will hear the other side, from Mr. Radek.

Mr. Esposito, Mr. Gallagher, we appreciate you being here. We will look forward to hearing from all of you.

I now recognize Mr. Lantos for his opening statement.

Mr. LANTOS. Thank you very much, Mr. Chairman.

Today, this committee is holding a hearing which the majority has titled, The Justice Department's Implementation of the Independent Counsel Act. A more appropriate title for this hearing would be, Beating a Dead Horse, the Government Reform Committee Once Again Reviews the Independent Counsel Decision.

For the record, this committee's repetitive, monotonous and unfruitful investigation has already cost the American taxpayer over $8 million. Today, the committee is examining whether the Attorney General, Janet Reno, appropriately decided against appointing an independent counsel to investigate campaign finance allegations. According to the chairman, the Attorney General has been blocking for the President by deciding not to appoint an independent counsel.

Our committee already has explored and re-explored and re-explored again this issue. In fact, the committee held hearings on this topic in December 1997, at which both the Attorney General and the FBI Director, Louis Freeh, testified. The committee then brought Director Freeh back to discuss the issue in August 1998. These dates are significant because the chairman emphasizes a memo written in 1996. The FBI director testified in December 1997 and in August 1998 on the same subject, and we shall hear from him in a moment.

Director Freeh repeatedly said that he believed that the Attorney General's decision was motivated by nothing but the law and the facts. I wish to repeat that. The FBI Director repeatedly testified before this committee under oath that he believed that the Attorney General's decision was motivated by nothing but the law and the facts.

Now, however, Chairman Burton believes he has a smoking gun on this matter. He claims that a December 1996, memo by Director Freeh recently described in the media requires revisiting the independent counsel decision. On May 18, press accounts reported that in this memo Director Freeh commented on remarks by Mr. Lee Radek, Chief of the Public Integrity Section of the Department of Justice, who purportedly made to FBI Deputy Director Mr. Esposito that there was a lot of pressure on him regarding the campaign finance investigation because the Attorney General's job might hang in the balance.

On May 19, Chairman Burton issued a press release on this 1996 memo. The press release states in part, "This committee has been investigating the campaign fundraising scandal for 3 years. In that time we have uncovered significant evidence that led us to conclude that Attorney General Reno has been blocking for the President and this administration. Now we have a piece of evidence from the Director of the FBI"—now meaning a memo dated 1996—"that makes it abundantly clear that we have been right all along. Janet Reno and Lee Radek have been blatantly protecting the President, the Vice President and their party from the outset on this scandal."

Director Freeh's own statements before this committee, however, directly contradict Mr. Burton's theory. Director Freeh, who disagreed with the Attorney General's decision regarding the appointment of an independent counsel for campaign finance matters, testified before our committee in December 1997, and August 1998, a year and—almost a year and three-quarters after this memo, at

great length. At these hearings he made numerous statements under oath regarding the Attorney General's decision and her integrity. I suggest that we take a look at what he said.

[Videotape played.]

Mr. LANTOS. We have additional footage.

[Videotape played.]

Mr. LANTOS. As this videotape makes crystal clear, the Director of the FBI, Mr. Freeh, discussed the Attorney General's decision extensively and under oath with this committee long after he wrote the December 1996, memo, which, of course, contains nothing on the basis of his own knowledge. That memo contains second- and third-hand information. FBI Director Freeh stated under oath that he does not believe the Attorney General was covering up for the White House or for Democrats.

So today we have two choices. We either believe the Director of the FBI that he was telling the truth in his testimony under oath before this committee on two separate occasions, or we believe Mr. Burton's theory that the Attorney General was blocking for the President. The committee today is not only repeating its own investigation on the independent counsel decision, it is duplicating recent Senate hearings on this same matter. As a matter of fact, we had to postpone the commencement of this hearing because Senator Specter was conducting parallel hearings on the other side and they ran overtime.

The Senate Judiciary Committee held a hearing 2 weeks ago and one this morning on the same topic with virtually the same witnesses.

It is also worth noting that today's hearing concerns the implementation of a statute that no longer exists. As a matter of fact, I was amused to note in Chairman Burton's opening remarks that he quotes Mr. Radek in 1997 being critical of the independent counsel statute.

Well, apparently the Republican-controlled House and Senate agreed with Mr. Radek, because last year they chose not to renew in any form the independent counsel statute. The independent counsel statute was abandoned by the Congress because, on balance, it was deemed by the majority to be counterproductive.

So, as of today, we are discussing the implementation of a statute, and there are very few statutes that Congress abandons. This happens to be one of them. Without any sunshine provision, we just decided we better not renew it. So Mr. Radek's judgment on this issue certainly was seconded by the majority of both Houses of Congress.

The Independent Counsel Act, which was enacted in 1978, put limits on the Attorney General's discretion regarding investigating allegations of criminal wrongdoing by the President and other high-level administration officials. Congress allowed the law to expire on June 30, 1999. So we are going to spend some more time today going around and around about whether the Attorney General appropriately used her discretion under the independent counsel statute when Congress has already provided the Attorney General with substantially more discretion concerning Federal law enforcement or executive branch officials by allowing the independent counsel law to expire.

From time to time I was amused in all of these hearings to have reference by the other side to a built-in conflict of interest between an Attorney General and the President or Vice President because, clearly, the Attorney General serves under the President. Well, when the independent counsel statute was approved by the Congress of the United States, this was a well-known fact. As a matter of fact, were the independent counsel statute still in effect, next year an Attorney General will be appointed who will be appointed either by Mr. Gore or by Mr. Bush, and clearly the same argument could be raised as was raised all the time.

Congress knew what it was doing. Congress knew that a President appoints an Attorney General and the Attorney General decides whether an independent counsel is required to investigate alleged wrongdoing by high-ranking officials of the executive branch.

As we review and consider the documents that the Department of Justice recently provided our committee, the key issue is whether the allegations of campaign fundraising abuses have been thoroughly investigated. The major documents we have received were written between 1996 and mid-1998. We know that since then the Department of Justice has examined a wide range of campaign fundraising allegations. Since then, our committee has also examined numerous campaign finance allegations. In total, the chairman has unilaterally issued 915 subpoenas on campaign-finance-related matters.

We also know that since then the Department of Justice has brought a number of campaign finance prosecutions. Individuals central to the campaign finance allegations pleaded guilty to wrongdoing, including Johnny Chung, Charlie Trie, John Huang, have also come before the committee for detailed questioning.

These sessions did not produce evidence of major allegations that the Department of Defense has ignored. In fact, none of these witnesses implicated any senior White House or Democrat party officials in wrongdoing. This committee should keep these facts in mind as we proceed today. The chairman believes that there is a massive coverup going on. Our job is to assess whether he has any evidence at all to back up his allegations.

Thank you, Mr. Chairman.

Mr. BURTON. Thank you, Mr. Lantos.

I will now welcome our first panel to the witness table: Mr. Lee Radek, William Esposito and Neil Gallagher.

[Witnesses sworn.]

Mr. BURTON. Mr. Radek, you are recognized for an opening statement.

STATEMENTS OF LEE RADEK, PUBLIC INTEGRITY SECTION CHIEF, DEPARTMENT OF JUSTICE; WILLIAM ESPOSITO, FORMER DEPUTY DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; AND NEIL GALLAGHER, ASSISTANT DIRECTOR FOR TERRORISM, FEDERAL BUREAU OF INVESTIGATION

Mr. RADEK. Good morning, Mr. Chairman and members of the committee. I am here today in response to your request that I testify about matters relating to the Independent Counsel Act and its application to campaign financing matters.

I serve within the Department of Justice as Chief of the Public Integrity Section, a position that is and has always been a career position. Indeed, no one within the section is a political appointee or has ever held a political appointment. The work of the Section is nonpartisan in fact as well as perception. As for me, I am, and always have been, a nonpolitical career prosecutor. Including my military service, I have more than 30 years of service with the Federal Government; and my career with the Department of Justice spans 6 administrations and 10 Attorneys General.

I joined the Justice Department in 1971 through the Attorney General's Honors program. For 5 years, I served as a trial attorney in the Criminal Division, dealing with labor racketeering and legislative matters. In 1976, I was selected to assist in the formation of the Public Integrity Section, where I served as a line prosecutor for 2 years. In 1978, I was selected to become Deputy Chief of the Public Integrity Section, a position I held for 14 years.

In 1989, I was detailed to be part of the prosecution team that handled the Illwind investigation into defense procurement fraud and corruption. As part of that assignment, I became a Special Assistant U.S. Attorney in the Eastern District of Virginia. In 1992, I was selected to be the Director of the Asset Forfeiture Office. In 1994, I returned to the Public Integrity Section as Chief, where I have now served for 6 years.

As Chief of the Public Integrity Section, I have supervised the investigation and prosecution of corrupt public officials from the executive, legislative and judicial branches at every level of government, local, State and Federal. Over the years that I have had the privilege to work with the fine prosecutors that make up the Section, the Section has conducted successful prosecutions and convictions of Federal judges, Members of Congress, Federal prosecutors, a wide variety of State officials and numerous officials within the Federal executive branch.

Of course, responsibility for prosecutions of the highest-level executive branch officials was removed from the Department by the Congress when it passed the Independent Counsel Act in 1978. However, from the time that the Independent Counsel Act was first enacted until its demise in June 1999, the Public Integrity Section was charged with the front-line responsibility for the administration of the act's requirements. Our principal task was conducting initial inquiries and preliminary investigations pursuant to the act, gathering the necessary facts to enable Attorneys General to reach the decisions charged to them by the act.

In a letter the chairman sent to me last week, he indicated that the primary areas of interest of the committee to be explored in this hearing were my role with respect to the Campaign Finance Task Force and my role with respect to the Independent Counsel Act matters relating to campaign financing. I will briefly outline the facts with regard to these areas of interest and then will answer any questions you might have concerning them.

During the summer of 1996, allegations that both political parties may have violated campaign financing law in connection with the upcoming national elections began to circulate. In the fall, several Members of Congress wrote to the Attorney General, request-

ing that she seek appointment of an independent counsel to investigate these allegations.

In November 1996, a response was sent to these Members, informing them that while there were no grounds to seek appointment of an independent counsel at that time, the Department took these allegations seriously and intended to actively pursue them. It was announced that it had been decided to establish a task force within the Department, a team of investigators and experienced prosecutors, which would assume responsibility for the handling of all campaign financing matters arising out of the 1996 election cycle. This would ensure that possible connections among the various matters were not missed and that any emerging independent counsel issues arising out of these investigations would be promptly identified and handled pursuant to the requirements of the act.

Both campaign financing prosecutions and administration of the Independent Counsel Act have been part of the historical responsibility of the Public Integrity Section. As a result, the task force, while a separate entity from the Public Integrity Section, with its own work space and personnel, was initially under my direct supervision. However, in the fall of 1997, the Attorney General named Charles La Bella to be its head. At first, I continued to have a substantial advisory role with respect to the work of the task force, but over time, as the work progressed and with the demise of the Independent Counsel Act, my role diminished. I have played no role in task force decisions since last year.

Your letter, Mr. Chairman, also expressed an interest in my responsibilities with respect to the independent counsel decisions involving campaign finance. As I mentioned earlier, the Public Integrity Section has been responsible for the administration of the act throughout its history, handling each independent counsel matter since it was first passed in 1978. With respect to the independent counsel matters connected to the work of the task force, the Section and the task force worked together on each matter, developing the necessary facts to permit the Attorney General to make a determination as to whether to seek appointment of an independent counsel. On each matter, both I and the head of the task force—along with many others involved in the process—made our recommendations to the Attorney General, sometimes jointly and sometimes separately, based on our honest assessments of the facts and the applicable law.

I was one of many people who gave the Attorney General recommendations. Her style has been to seek out the views of a variety of advisors, listen carefully to each of us, consider our arguments, ask her own questions, and then reach her own decisions. Sometimes she followed my advice; sometimes she did not. At the end of the day, it was the Attorney General who made the decisions, as was required under that statute; and the reasons for her decisions on specific preliminary investigations are set forth in the detailed formal filings made with the court.

It has been widely known there were internal disagreements among various officials on a number of independent counsel issues, particularly with respect to issues raised in the so-called "La Bella" memo. This, of course, is neither new nor should it be unexpected. Any group of lawyers grappling with complex legal and factual

issues are bound to have disagreements, and the issues we faced were both complex and difficult.

As you are aware, I disagreed with some of Mr. La Bella recommendations. But I also agreed with Mr. La Bella on many occasions during the time that we worked together. We were both nonpolitical career prosecutors. We had different interpretations of some acts of the Independent Counsel Act, but I certainly agree with his recent statement that the internal debate within the Department was never about politics and that nobody at the Department was politically protecting anybody.

Now, if you have any, I am prepared to answer questions, Mr. Chairman.

Mr. BURTON. Thank you, Mr. Radek.

[The prepared statement of Mr. Radek follows:]

STATEMENT OF LEE J. RADEK
CHIEF, PUBLIC INTEGRITY SECTION,
CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Good morning, Mr. Chairman and members of the Subcommittee. I'm here today in response to your request that I testify about matters relating to the Independent Counsel Act and its application to campaign financing matters.

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assignment, I became a Special Assistant United States Attorney in the Eastern District of Virginia. In 1992, I was selected to be the Director of the Asset Forfeiture Office. In 1994, I returned to Public Integrity as Chief, where I have now served for six years.

As Chief of the Public Integrity Section, I have supervised the investigation and prosecution of corrupt public officials from the executive, legislative and judicial branches at every level of government, local, state and federal. Over the years that I have had the privilege to work with the fine prosecutors that make up the Section, the Section conducted successful prosecutions and convictions of federal judges, Members of Congress, federal prosecutors, a wide variety of state officials, and numerous officials within the federal Executive Branch.

Of course, responsibility for prosecutions of the highest level Executive Branch officials was removed from the Department by the Congress when it passed the Independent Counsel Act in 1978. However, from the time that the Independent Counsel Act was first enacted until its demise in June 1999, the Public Integrity Section was charged with the front-line responsibility for the administration of the Act's requirements. Our principle task was conducting initial inquiries and preliminary investigations pursuant to the Act, gathering the necessary facts to enable Attorneys General to reach the decisions charged to them by the Act .

In a letter the Chairman sent to me last week, he indicated that the primary areas of interest of the Committee to be explored in this hearing were my role with respect to the

Campaign Financing Task Force and my role with respect to the Independent Counsel Act matters relating to campaign financing. I will briefly outline the facts with regard to these areas of interest, and then will answer any questions you might have concerning them.

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initially under my direct supervision. However, in the fall of 1997, the Attorney General named Charles LaBella to be its head. At first, I continued to have a substantial advisory role with respect to the work of the Task Force, but over time, as the work progressed, and with the demise of the Independent Counsel Act, my role diminished; indeed, I have played no role in Task Force decisions since last year.

Your letter, Mr. Chairman, also expressed an interest in my responsibilities with respect to the independent counsel decisions involving campaign finance. As I mentioned earlier, the Public Integrity Section has been responsible for the administration of the Act throughout its history, handling each independent counsel matter since it was first passed in 1978. With respect to Independent Counsel matters connected to the work of the Task Force, the Section and the Task Force worked together on each matter, developing the necessary facts to permit the Attorney General to make a determination as to whether to seek appointment of an independent counsel. On each matter, both I and the head of the Task Force – along with many others involved in the process – made our recommendations to the Attorney General, sometimes jointly and sometimes separately, based on our honest assessments of the facts and applicable law.

I was one of many people who gave the Attorney General recommendations. Her style has been to seek out the views of a variety of advisors, listen carefully to each of us, consider our arguments, ask her own questions, and then reach her own decisions. Sometimes she followed my advice; sometimes she did not. At the end of the day, it was the Attorney General who

made the decisions – as was required under the statute – and the reasons for her decisions on specific preliminary investigations are set forth in the detailed formal filings made with the court.

It has been widely known for some time that there were internal disagreements among various officials on a number of independent counsel issues, particularly with respect to issues raised in the so-called "La Bella" memo. This of course, is neither new nor should it be unexpected; any group of lawyers grappling with complex legal and factual issues are bound to have disagreements, and the issues we faced were both complex and difficult. As you are aware, I disagreed with some of Mr. La Bella's recommendations. But I also agreed with Mr. La Bella on many occasions during the time that we worked together. We were both nonpolitical career prosecutors. We had different interpretations of some aspects of the Independent Counsel Act, but I certainly agree with his recent statement that the internal debate within the department was never about politics and that nobody at the Department was politically protecting anybody.

Now, if you have questions, I am prepared to answer them.

Mr. BURTON. Mr. Gallagher.

Mr. GALLAGHER. Mr. Chairman, with your permission, I do not have an opening statement. I am prepared to answer questions.

Mr. BURTON. Thank you, sir.

Mr. Esposito.

Mr. ESPOSITO. I also do not have an opening statement and am prepared to answer any questions you may have.

Mr. BURTON. Very good. We will proceed under the rules that were adopted at the beginning of the hearing.

The last thing in the world that I would like to be doing today is sitting here in front of three career government employees asking them questions about the internal deliberations of the Justice Department. But there were some real problems with what went on at Justice, and there is no doubt in my mind that congressional oversight is essential. That is why I think it is essential that some sunshine be allowed into the closed-door process that led the Attorney General to reject an independent counsel.

When the American people see what really went on, I don't think that they will be proud of what happened at Justice. I hope that all of the media reads the La Bella and Freeh memos in question, because we are not going to be able to cover all of that in detail today, and I think they speak for themselves.

It is no secret to anyone that I believe the way that the Justice Department has handled the campaign finance investigation has been disgraceful, and one of the things that bothers me is that it puts the career prosecutors and investigators on the task force in a very difficult position. They are good, decent, honest men and women. Unfortunately, the Attorney General has put them in a position where their work has been questioned and every decision is second-guessed.

It mystifies me that the Attorney General would hold herself out as the jury to make all of the tough calls that ended up giving the President, the Vice President and her political party a free ride. When you have a Chuck La Bella complaining about the Justice Department going through contortions to avoid investigating matters, when you hear about government prosecutors being involved in gamesmanship, when the head of a task force writes that this type of investigation and posturing in the context of this investigation is unseemly, then something has gone very wrong.

For some reason, though, known only to the Attorney General, she just didn't want to appoint an independent counsel to look into the activities of her boss and her political party. It wasn't the first time. She didn't want anyone to look into the Whitewater matter.

Everyone tends to forget how that investigation uncovered corruption that led to the conviction of Governor Jim Guy Tucker of Arkansas; and it led to the conviction of the President's eyes and ears at the Justice Department, Webb Hubbell. If Janet Reno had had her way, Webb Hubbell would probably still be running a large part of the Justice Department, and Jim Guy Tucker would never have been prosecuted. If the Attorney General had won the day, no one would have done anything about Henry Cisneros and the lies he told under oath to the FBI.

The Attorney General did win the day on the campaign finance independent counsel issue, and there will never be full confidence

that the Justice Department did the best job possible. The Attorney General guaranteed that there will always be a cloud over this matter, and that is abominable, and it borders on corruption.

Now I would like the witnesses to take a look at exhibit 1. I think we will put that up on the screen.

[Exhibit 1 follows:]

Memorandum

Dep. Dir. ____
Chief of Staff ____
Off. of Gen. Counsel ____
Asst. Dir.: ____
Crim. Inv. ____
CJIS ____
Finance ____
Info. Res. ____
Inso. ____
Lab. ____
National Sec. ____
Personnel ____
Training ____
Off. of EEOA ____
Off. of Public & Coorg. Affs. ____
Director's Office ____

To : MR. ESPOSITO Date 12/9/96

From : DIRECTOR, FBI

Subject : DEMOCRATIC NATIONAL CAMPAIGN MATTER

As I related to you this morning, I met with the Attorney General on Friday, 12/6/96, to discuss the above-captioned matter.

I stated that DOJ had not yet referred the matter to the FBI to conduct a full, criminal investigation. It was my recommendation that this referral take place as soon as possible.

I also told the Attorney General that since she had declined to refer the matter to an Independent Counsel it was my recommendation that she select a first rate DOJ legal team from outside Main Justice to conduct the inquiry. In fact, I said that these prosecutors should be "junk-yard dogs" and that in my view, PIS was not capable of conducting the thorough, aggressive kind of investigation which was required.

I also advised the Attorney General of Lee Radek's comment to you that there was a lot of "pressure" on him and PIS regarding this case because the "Attorney General's job might hang in the balance" (or words to that effect). I stated that those comments would be enough for me to take him and the Criminal Division off the case completely.

I also stated that it didn't make sense for PIS to call the FBI the "lead agency" in this matter while operating a "task force" with DOC IGs who were conducting interviews of key witnesses without the knowledge or participation of the FBI.

I strongly recommended that the FBI and hand-picked DOJ attorneys from outside Main Justice run this case as we would any matter of such importance and complexity.

We left the conversation on Friday with arrangements to discuss the matter again on Monday. The Attorney General and I spoke today and she asked for a meeting to discuss the "investigative team" and hear our recommendations. The meeting is now scheduled for Wednesday, 12/11/96, which you and Bob Litt will also attend.

LJF:wss (2)

CONTINUED--OVER

EXHIBIT 1

Memorandum to Mr. Esposito from Director, FBI
RE: DEMOCRATIC NATIONAL CAMPAIGN MATTER

I intend to repeat my recommendations from Friday's meeting. We should present all of our recommendations for setting up the investigation--both AUSAs and other resources. You and I should also discuss and consider whether on the basis of all the facts and circumstances -- including Huang's recently released letters to the President as well as Radek's comments--whether I should recommend that the Attorney General reconsider referral to an Independent Counsel.

It was unfortunate that DOJ declined to allow the FBI to play any role in the Independent Counsel referral deliberations. I agree with you that based on the DOJ's experience with the Cisneros matter--which was only referred to an Independent Counsel because the FBI and I intervened directly with the Attorney General--it was decided to exclude us from this decision-making process.

Nevertheless, based on information recently reviewed from PIS/DOC, we should determine whether or not an Independent Counsel referral should be made at this time. If so, I will make the recommendation to the Attorney General.

Mr. BURTON. By now, you are all pretty familiar with this document. If you have it before you, it is probably easier to read. It is a memo from Louis Freeh to Mr. Esposito. The date is December 9, 1996, which is very significant because that was right at the start of the campaign finance investigation.

Mr. Esposito, this memo describes a conversation you apparently had with Mr. Radek; is that correct?

Mr. ESPOSITO. Yes, sir.

Mr. BURTON. Where did that conversation take place?

Mr. ESPOSITO. In my office at the FBI headquarters.

Mr. BURTON. Who was there?

Mr. ESPOSITO. It was myself. My deputy was Neil Gallagher. He was there. Mr. Radek and one of his deputies named Joe Gangloff.

Mr. BURTON. Can you tell us how the meeting between you and Mr. Radek was set up?

Mr. ESPOSITO. I had called Mr. Radek earlier and asked him if he could stop by my office so we could have a discussion on two particular issues. The first issue was regarding a formal referral on the matter that was involving the finance campaign; and the second was to have some input into the FBI—FBI having input into the referral process when the Public Integrity Section makes a recommendation to the Attorney General.

Mr. BURTON. Can you tell us what happened at the meeting?

Mr. ESPOSITO. Yes. Mr. Radek and Mr. Gangloff showed up at my office. Mr. Gallagher and I met them. We had a conversation about the two points I just mentioned. The conversation was cordial, amicable. I don't recall any disagreements that we had at that time. It lasted less than 30 minutes, I think.

At the end of the meeting, just as I remember I was getting up and Lee was in the process of getting out of his chair, he made the statement that there is a lot of pressure on him, and the Attorney General's job could hang in the balance based on the decision he would make.

Mr. BURTON. Mr. Radek apparently indicated he was feeling pressure, and he said that her job could hang in the balance because of the pressure that was exerted on him and the decision she would make?

Mr. ESPOSITO. Right. I remember specifically the job could hang in the balance. Now, since it has been 3½ years, I don't remember whether the word was pressure or stress.

Mr. BURTON. Was there any doubt in your mind that Mr. Radek was linking the pressure that he felt and the Attorney General's job hung in the balance, was there any doubt about that?

Mr. ESPOSITO. No. It was said in the same sentence.

Mr. BURTON. Did Mr. Radek make it clear that he felt that the Attorney General's job hung in the balance as a result of the decision that the Public Integrity Section reached?

Mr. ESPOSITO. No, that was the extent of his statement.

Mr. BURTON. Mr. Gallagher, you were also at the same meeting.

Mr. GALLAGHER. Yes, Mr. Chairman.

Mr. BURTON. If you would, please, tell us what you remember about Mr. Radek's comment about his feeling pressure on the campaign finance investigation.

Mr. GALLAGHER. The memo that you have on the screen is accurate to the point that Lee Radek made a statement that he was under a lot of pressure. And to put it into context, at the time there was a lot of published reports that the Attorney General had not yet been named in the new Cabinet, and there was a statement to the fact that the Attorney General's job might be on the line.

Mr. BURTON. Was there any doubt in your mind that there was a linkage between the comment about pressure and the comment about the Attorney General's job hanging in the balance?

Mr. GALLAGHER. No, sir, there wasn't.

Mr. BURTON. Mr. Radek, before I ask you to respond, I want to put the Justice Department investigation in perspective. At the time of your meeting with Mr. Esposito and Mr. Gallagher, who was in charge of the Campaign Finance Task Force?

Mr. RADEK. At the time of the meeting, there was no task force that I am aware of. The concept occurred shortly after that meeting.

Mr. BURTON. Wasn't Laura Ingersoll in charge of the investigation at that time?

Mr. RADEK. I had assigned Laura Ingersoll to begin to gather evidence that consisted mainly of newspaper information and various allegations that were coming out. So, yes, to the extent that there was an organized effort in this effort, Ms. Ingersoll was in charge.

Mr. BURTON. And she was a subordinate employee of yours in Public Integrity?

Mr. RADEK. That's correct.

Mr. BURTON. How many attorneys were on the task force examining campaign finance matters or were working with her at the time?

Mr. RADEK. I don't recall. It would be an estimate to say two to three, maybe five.

Mr. BURTON. A recent GAO report says there were only about four attorneys investigating in January 1997. Were all of these people your subordinates?

Mr. RADEK. There were early detailees to the task force, but for purposes of this case they were my subordinates, yes.

Mr. BURTON. How many lawyers were there in the Public Integrity Section at the time?

Mr. RADEK. Probably around 25 trial attorneys.

Mr. BURTON. Going back to the meeting with Mr. Esposito and Mr. Gallagher, do you have any recollection of that meeting?

Mr. RADEK. I have no recollection of that meeting.

Mr. BURTON. So you don't make remember making that kind of statement about there being a lot of pressure on you and the Attorney General's job hanging in the balance?

Mr. RADEK. I certainly do not.

Mr. BURTON. Have you followed any of our hearings, Mr. Radek?

Mr. RADEK. I have followed some, Mr. Chairman, but not for some time.

Mr. BURTON. Have you noticed at our hearings there seems to be an epidemic of people not recalling or having memory loss?

Mr. RADEK. I have noticed that you have observed that on many occasions, yes.

Mr. BURTON. The last time we had a meeting, we had three counsels to the President. Every single one of them couldn't remember where the bathroom was.

Mr. RADEK. I can't speak for them, Mr. Chairman. I do not remember this meeting in any way; and Mr. Gangloff does not either, as he testified this morning in front of Senator Specter.

Mr. BURTON. He is the associate?

Mr. RADEK. He is my principal deputy chief.

Mr. BURTON. He doesn't remember either?

Mr. RADEK. No, sir.

Mr. BURTON. Gee, I wish I had him here so I could hear that.

You don't recall the meeting so you don't remember saying anything like that?

Mr. RADEK. That's correct. I am quite certain that I would not have said something like this because it simply would not have been true. I felt no pressure because of the Attorney General's job status.

Mr. BURTON. Why do you think two men of the stature of Mr. Esposito and Mr. Gallagher would lie?

Mr. RADEK. I have no explanation. The only explanation I can offer is that they must have misinterpreted something that I said. I was not in the habit of lying to them, and it would have been a lie. It is simply not true that I felt pressure because of her job status.

I felt a lot of pressure, and I was willing to tell anybody and everybody that. The pressure I felt was coming from you and the Attorney General and the Congress and the media to do a good job. And it was a pressure cooker, there is no doubt about it.

Mr. BURTON. But you don't remember the meeting or saying that or anything like that?

Mr. RADEK. No, I do not.

Mr. BURTON. In December 1996, it was being widely discussed that Attorney General Reno might not be reappointed; is that correct?

Mr. RADEK. There was a lot of press speculation to that effect, yes, sir.

Mr. BURTON. Those rumors were discussed in the press?

Mr. RADEK. Yes.

Mr. BURTON. Do you have any belief that individuals at the White House were seriously considering not reappointing the Attorney General for a second term?

Mr. RADEK. I don't believe everything that I read in the papers. I know that the papers were reporting it.

Mr. BURTON. On that one thing I think you and I agree.

Mr. Esposito, after your meeting with Mr. Radek, did you think that his comment was significant enough to tell anyone else?

Mr. ESPOSITO. After the meeting I went down and briefed the Director on the results of the meeting, including the statement that was made.

Mr. BURTON. And you told him exactly what happened?

Mr. ESPOSITO. I did.

Mr. BURTON. Do you know if Director Freeh told the Attorney General about the comment made by Mr. Radek?

Mr. ESPOSITO. He told me that he had.

Mr. BURTON. We have exhibit No. 1. In that the Director states on December 6, 1996, he advised the Attorney General of Mr. Radek's statement. Is that accurate, Mr. Esposito?

Mr. ESPOSITO. It is accurate that he told me that he put it in the memo, yes.

Mr. BURTON. Did Director Freeh tell you after his meeting with the Attorney General that he told her about Mr. Radek's statement?

Mr. ESPOSITO. Yes.

Mr. BURTON. Did he tell you what Ms. Reno's reaction was?

Mr. ESPOSITO. She said she would look into the matter.

Mr. BURTON. When you got this memo from Director Freeh, did you find it to be accurate? Did it reflect the discussion you had with Mr. Radek?

Mr. ESPOSITO. Yes, it did.

Mr. BURTON. Mr. Gallagher, do you know whether Mr. Esposito communicated this statement about pressure and the Attorney General's job hanging in the balance to anyone?

Mr. GALLAGHER. I was not party to that conversation between Mr. Esposito and the Director.

Mr. BURTON. Do you have any knowledge whether this statement was communicated to the Attorney General by Director Freeh?

Mr. GALLAGHER. Not beyond the existence of this memorandum.

Mr. BURTON. But you saw the memo?

Mr. GALLAGHER. Yes, sir.

Mr. BURTON. Do you have any information about what the Attorney General told Director Freeh she was going to do about this?

Mr. GALLAGHER. No, sir, I don't.

Mr. BURTON. Mr. Radek, were you ever contacted by the Attorney General or anyone else at Justice Department about whether you had made this statement about feeling pressure because the Attorney General's job hung in the balance?

Mr. RADEK. Not before the last several weeks, Mr. Chairman. When this memo came to light, I was asked whether I made the remarks. Just a couple of weeks ago.

Mr. BURTON. Mr. Esposito, were you ever contacted by anyone at Justice who was investing whether Mr. Radek made this statement?

Mr. ESPOSITO. Yes, I was.

Mr. BURTON. You were contacted. When was this?

Mr. ESPOSITO. Within the last month.

Mr. BURTON. In the last month. Who contacted you?

Mr. ESPOSITO. Deputy Attorney General Eric Holder.

Mr. BURTON. And you told him exactly what happened.

Mr. ESPOSITO. Yes.

Mr. BURTON. Did he have any reaction?

Mr. ESPOSITO. No. He said that he saw the memo and wanted my version since it was supposedly my conversation.

Mr. BURTON. He said that he would look into it or did he make any comments?

Mr. ESPOSITO. He said that they were getting ready to turn documents over, and this memo had just come to his attention.

Mr. BURTON. Mr. Gallagher, were you ever contacted by anyone at Justice who is investigating whether Mr. Radek made this comment?

Mr. GALLAGHER. No, sir.

Mr. BURTON. Mr. Radek, the Attorney General apparently told Director Freeh that she would look into the matter. It doesn't sound like she did, did she?

Mr. RADEK. I'm aware of no effort she took to look into the matter.

Mr. BURTON. You obviously denied that she ever made that statement. However, given the fact that the Deputy Director of the FBI and the other senior officials said you made the statement, don't you think there should at least be an inquiry into it?

Mr. RADEK. It seems to me that if the connotation that some put to this remark, and that is that I was under pressure not to do a good job, is—was part of this, that, yes, she would have had some duty to look into it.

I'm not sure that Mr. Esposito and Mr. Gallagher put that connotation to it, but—and I don't even know whether Director Freeh does. But if it was simply that I was under pressure to do a good job, maybe she wouldn't have been under such an obligation. It's hard to judge.

Mr. BURTON. The memo is pretty direct there. I can't understand why she didn't go ahead and start an investigation of this.

Since Mr. Radek made this statement to you at the beginning of the campaign finance investigation, Mr. Esposito, do you think he should have been recused from the investigation?

Mr. ESPOSITO. That was a decision between the Director and the Attorney General. My own personal opinion was no.

Mr. BURTON. Do you agree with Director Freeh, who stated that Mr. Radek's statement is an example of why Public Integrity in the Criminal Division should have been taken off the campaign fundraising case?

Mr. ESPOSITO. That's my understanding of the FBI's position, yes, sir.

Mr. BURTON. You agree with that?

Mr. ESPOSITO. Yes.

Mr. BURTON. Mr. Gallagher, do you think that Mr. Radek's statement was an example of why Public Integrity should not have been working on this case?

Mr. GALLAGHER. I would have to take the same position as Mr. Esposito that it was a—that's a decision between the Director and the Attorney General.

Mr. BURTON. In fact, in the brief time that you oversaw the task force, FBI agents before your promotion to Deputy Director, did you have any concerns, Mr. Esposito, with the way the Justice Department was handling the investigation?

Mr. ESPOSITO. We had concerns, but those concerns were aired on almost a weekly basis, and we tried to come to resolution.

I also was handed a note. I want to clarify for the record that also I was contacted by someone else at the Justice Department regarding this memo. I was contacted by the Attorney General herself.

Mr. BURTON. When was this?

Mr. ESPOSITO. This was within the last month.

Mr. BURTON. In the last month.

Did she indicate there was going to be any investigation or anything about this?

Mr. ESPOSITO. She just wanted to know my version of what happened.

Mr. BURTON. OK. I think I'll now yield to Mr. Shays, and I'll have more questions for these gentlemen later.

Mr. Shays.

Mr. SHAYS. Thank you.

Good afternoon, gentlemen.

Mr. Gallagher, are you aware of the problems that the task force had in receiving documents from the White House?

Mr. GALLAGHER. Would you repeat the question, sir?

Mr. SHAYS. Are you aware of the problems that the task force had in receiving documents from the White House? Are you familiar with the case of the White House videos? Are you familiar with the White House e-mails?

Mr. GALLAGHER. I am familiar with the White House e-mails and some of the earlier problems that we had receiving responses to subpoenas. It was a difficult process.

Mr. SHAYS. Did the problems that the task force had in getting timely compliance with the subpoenas to the White House further support the case for an independent counsel?

Mr. GALLAGHER. It would have advanced the investigation to receive a more timely and thorough response to the subpoenas provided to the White House.

Mr. SHAYS. Mr. Radek, it seems that you didn't think that the White House response to DOJ's subpoenas and requests were too bad. In your response to Mr. La Bella's memo you stated that, "The document production issues raised by the White House with the Department are the sort of routine give-and-take among executive branch agencies that occur all the time."

You continued and said, "They do indeed create some tensions and difficulties, but they're common and not the sort of conflict of interest that would justify a resort to the Independent Counsel Act."

Would you characterize the failure of the White House to search for thousands of missing e-mails as a routine give-and-take?

Mr. RADEK. I certainly would not, sir, given your statement of the facts. Of course, we were unaware of any failure to search for White House e-mails at that time.

Mr. SHAYS. It was reported within the last month that the President and Vice President were interviewed by the Campaign Finance Task Force, and I'd like to just ask you questions.

First, in 1996, was the Vice President asked about his role in the Buddhist temple fundraiser?

Mr. RADEK. I participated in an interview of the Vice President in 1996 which was a part of a preliminary investigation under the independent counsel statute, relating to phone calls made from the White House. During the time, the questions were confined to that subject and no questions were asked about the Shi Lai Temple.

Mr. SHAYS. In 1997, was the Vice President asked about his role in the Buddhist temple fundraiser?

Mr. RADEK. I was not in the decisionmaking process as to what would be asked, but I don't believe he was.

Mr. SHAYS. In 1998, was the Vice President asked about his role in the Buddhist temple fundraiser?

Mr. RADEK. I don't know.

Mr. SHAYS. In 1999?

Mr. RADEK. I don't know.

Mr. SHAYS. OK. Why wasn't he asked?

Mr. RADEK. I can tell you about 1996, when I participated in the interview, we were focusing in on an independent counsel statute with strict time limits; and we weren't ready to ask the overreaching questions about all of the campaign finance issues of which the Shi Lai Temple was a part.

Mr. SHAYS. Why weren't you ready?

Mr. RADEK. We simply didn't know all the facts yet.

Mr. SHAYS. Well, if you didn't know all the facts, wouldn't you start to ask questions?

Mr. RADEK. You don't ask them of the person who is presumably at the top of the pyramid.

Mr. SHAYS. So you didn't ask in 1996, you didn't ask in 1997, you didn't ask in 1998, you didn't ask in 1999 because you weren't ready.

Mr. RADEK. Again, I don't know that they weren't asked in 1998 or 1999.

Mr. SHAYS. Why don't you know?

Mr. RADEK. I wasn't involved in the questioning of the Vice President by the task force.

Mr. SHAYS. You weren't in charge of the Integrity Section.

Mr. RADEK. I was, but the task force was run separately and outside that section.

Shortly after Mr. La Bella's arrival, my management role diminished.

Mr. SHAYS. In 1996, was the President asked about his knowledge of foreign money in the Presidential campaign?

Mr. RADEK. Foreign money in the Presidential campaign, I can't remember. He may have been. But I don't recall that he was.

Mr. SHAYS. You think he may have been asked?

Mr. RADEK. I was just handed a note, sir, that there were no interviews in 1996. I think that's right. I think this thing didn't get started until the end of 1996. So I think the interviews you're talking about and the ones I'm talking about are in 1997.

Mr. SHAYS. So it didn't happen in 1996?

Mr. RADEK. I don't think there were any interviews in 1996.

Mr. SHAYS. In 1997, was the President asked about his knowledge of foreign money in the Presidential campaign?

Mr. RADEK. I'm not sure. He may have been, but I don't recall that he was.

Mr. SHAYS. And your testimony is, in 1998, he was not asked when Mr. La Bella was put in charge?

Mr. RADEK. Mr. La Bella arrived in September 1997. From that time on, my management role diminished, and I was not part of the interview process of the President or the Vice President; and during those later——

Mr. SHAYS. 1996 and 1997, was the President asked about his relation with Charlie Trie?

Mr. RADEK. I don't believe he was interviewed in 1996. We did not ask him about that in 1997.

Mr. SHAYS. So in 1996 certainly he wasn't asked. In 1997, was the President asked about his relationship with John Huang?

Mr. RADEK. No, sir.

Mr. SHAYS. In 1996, he wasn't interviewed, but in 1997 was the President asked about his relationship with the Riadys?

Mr. RADEK. I don't believe so.

Mr. SHAYS. Would you explain why you sought to use Commerce to investigate and bypass the use of the FBI in investigating campaign finance abuses?

Mr. RADEK. I've described myself as an experienced prosecutor, sir, so I can tell you I never sought to bypass the FBI. The John Huang allegation involved allegations against an employee of the Department of Commerce. And there were some allegations I think early on about a conflict of interest involving him at Commerce. My recollection is that the Commerce IG started that investigation themselves. We were still in the process of gathering all kinds of information. Part of that was the information from the Commerce IG's office.

We had informal contacts probably from myself to Mr. Esposito, but I can't recall specifically that we were getting the FBI involved. The usual process was to contact the FBI verbally, ask them if they would investigate and then follow that up with a formal procedure. I think some of the references in the Freeh memorandum that is exhibit 1 allude to the fact that we were asking the FBI to investigate and had not yet made a formal referral. Part of the meeting that Mr. Esposito described in the earlier testimony—he said part of the purpose of the meeting was to make a referral.

Mr. SHAYS. What boggles my mind is, you had a meeting with Mr. Esposito in 1996, December 1996. The fact that you don't remember it is another issue, but the meeting took place. You're not denying that the meeting took place?

Mr. RADEK. I'm not.

Mr. SHAYS. So the meeting took place; you just don't remember it?

Mr. RADEK. Yes, sir.

Mr. SHAYS. And in that we were talking about all those issues, they weren't issues that came up in 1998, they were issues that came up in 1995 and 1996?

Mr. RADEK. I'm sorry, sir, what issues do you mean?

Mr. SHAYS. With the Riadys, with the abuse of campaign finance, with John Huang, these are not new issues in 1996. Or if they were new, they were there sitting for you to deal with. And if you're not going to deal with them, then an independent counsel is going to deal with them.

And the irony is, no independent counsel is appointed and you're not dealing with those issues as you've testified.

Mr. RADEK. I don't believe I have testified that I wasn't dealing with any issues, because I was. I mean, we were beginning to conduct an investigation.

Mr. SHAYS. The—it was reported within the last month that the President and Vice President were interviewed by the Campaign Finance Task Force; is that correct?

Mr. RADEK. It has been so reported, yes.

Mr. SHAYS. Is it correct that this was begun last month?

Mr. RADEK. I believe so, but I'm not sure. I don't have any independent knowledge of it. I've read the papers.

Mr. SHAYS. We have requested those interviews and have been told that they are part of an ongoing case and therefore cannot be produced to the committee; is that correct?

Mr. RADEK. I don't know.

Mr. SHAYS. You don't know if it's an ongoing investigation?

Mr. RADEK. I don't know. I believe it's part of the e-mail investigation, but I'm not sure. I'm not part of that.

Mr. SHAYS. So you don't know if the President and Vice President are subject to an ongoing investigation?

Mr. RADEK. I don't know.

Mr. SHAYS. Should that be a responsibility in your position?

Mr. RADEK. We administer now what are called the independent counsel regulations or the special counsel regulations. If there were an issue that came to the attention of someone within Justice or the Attorney General that amounted to an allegation against the President or Vice President, I would assume that I would be informed, so that we could tee that up for the Attorney General.

Mr. SHAYS. Mr. Esposito, how many times has Mr. Radek met in your office? Is it a common occurrence?

Mr. ESPOSITO. Not in that particular office. I think that was probably one of the only meetings that we had in my office at that level. Mr. Radek and I had gotten together on several occasions in other offices I have occupied through years.

Mr. SHAYS. Are you in the same building?

Mr. ESPOSITO. No.

Mr. SHAYS. Separate building?

Mr. ESPOSITO. Separate building, yes.

Mr. SHAYS. Mr. Radek, have you reviewed any of your calendars to see if a meeting like this took place?

Mr. RADEK. I have reviewed my leave records. I was on leave the 2 days after that meeting. I don't have any calendars that indicate where I was that time. I don't save my calendars. I usually don't mark appointments down on calendars. They don't do much good. I have a secretary who reminds me, and they don't save the calendars either.

Mr. SHAYS. But you don't challenge the fact that the meeting took place?

Mr. RADEK. I do not challenge that fact. I've seen notes that it's on Mr. Esposito's calendar. I believe that.

Mr. SHAYS. You don't even challenge the fact that Mr. Esposito said this; you just don't remember it?

Mr. RADEK. I do not remember it. On the other hand, I'm reasonably confident that I would not have said what is attributed to me in that memorandum. I'm quite confident.

Mr. SHAYS. So how do you explain the difference between the two of you? You're obviously good friends.

Mr. RADEK. I cannot explain it except to say, they must have misunderstood something else I said.

Mr. SHAYS. Thank you, Mr. Chairman. I yield back to you.

Mr. BURTON. Let me go on. There's one matter referred to in the Freeh memo where the Justice Department was saying that they were using FBI agents to investigate an allegation when, in fact, they were using the Commerce Department IG agents. You know, we have heard the Justice Department say that the FBI was handling this investigation when in fact it was the Commerce Department.

Why is there that discrepancy?

Mr. RADEK. I don't know why there was that discrepancy. It was, from the very beginning, my intention and I think everybody on the Department of Justice side of Pennsylvania Avenue to get the Bureau involved as quickly and as deeply as we could. There was never any intention to circumvent or bypass them. You know, the fact that a formal referral may have been late is something that I have apologized for more than once.

Mr. BURTON. So this wasn't like when you sent U.S. Marshals over to take control of the Waco information directly from Director Freeh where you jerked it right out of his hands?

Mr. RADEK. I have no knowledge of that.

Mr. BURTON. Didn't have anything to do with that? That's not comparable to that?

Mr. RADEK. I don't know.

Mr. BURTON. I see.

Mr. RADEK. I'm not a part that process, sir.

Mr. BURTON. In early 1997, this committee was starting to try to get documents from the White House. We had to threaten the White House counsel with contempt of Congress before we got the documents. Did the FBI, Mr. Esposito, ever have that kind of problem with getting documents from the White House?

Mr. ESPOSITO. The only problems we had were the same problems that Mr. Gallagher and Mr. Radek had just talked about. There had been subpoenas issued and we were waiting for the documents to come back.

Mr. BURTON. Did you get them?

Mr. ESPOSITO. I think eventually they got them. But——

Mr. BURTON. But it was a long time. You didn't get them in compliance with the subpoena.

Mr. ESPOSITO. The person that would be more appropriate from the FBI standpoint to answer that is Mr. Parkinson, who is here. And he is the General Counsel and followed this investigation. I retired in 1997, so I don't know what happened after that.

Mr. BURTON. Was the Public Integrity Section and Mr. Radek supportive of efforts that you were putting forth to try to force the document production from the White House, did they help you out?

Mr. ESPOSITO. We had several meetings to discuss the production of documents from——

Mr. BURTON. What happened at those meetings? Did they help you? Were they trying to be cooperative or were they an impediment?

Mr. ESPOSITO. No. Most times they were helpful.

Mr. BURTON. So you got the documents?

Mr. ESPOSITO. We did not get the documents until later on.

Mr. BURTON. How long? How much later?

Mr. ESPOSITO. I don't really know when the documents arrived. I mean, I didn't come to this hearing to—I'm not prepared.

Mr. BURTON. You're not prepared for that. OK. It appears that my time has run out. I'll now yield to Mr. Lantos for his time.

Mr. LANTOS. Thank you, Mr. Chairman. As I was listening to your questioning and the questioning of my friend, Mr. Shays, the titles of two books came to my mind. One, I think it was a best seller by Deborah Tanner, entitled "You Just Don't Understand"; and the other by John Gray, entitled "Men Are From Mars, Women Are From Venus." Both of these, in different ways, deal with fundamentally semantic issues.

There is very little doubt in my mind that all three of you gentlemen are telling the truth under oath as you remember it. I personally find it far less surprising than apparently the chairman does that not everybody is blessed with a photographic memory.

In this town, we spend much of our lives going to meetings and listening to people; and as we do this, many hours a day, 5 days a week or more, some details just vanish. And I think it might not be inappropriate for the committee to take a somewhat less malign and perhaps more benevolent interpretation of the apparent conflict that is here.

I would like to begin my part of the questioning in a fairly systematic fashion. Today's hearing focuses on disagreements within the Department of Justice regarding whether an independent counsel should have been appointed to investigate the 1996 Clinton-Gore campaign. This is the third hearing this committee has held to criticize the Attorney General for not appointing an independent counsel.

Let me, by the way, associate myself with the extremely laudatory comments concerning Attorney General Reno that we saw on the film clip by the Director of the FBI. I don't think there is a Member of Congress or there is a member of this or past administrations who has more integrity than Janet Reno. And I think when her record will be looked at with some degree of historical perspective this will be obvious even to her most hardened critics.

With all the attention and criticism being focused on the issue of the independent counsel, some people watching this hearing may be under the impression that the campaign finance allegations against the Clinton-Gore administration have not been thoroughly investigated. Now, if this were true, it would be a serious matter. But the facts don't support this allegation. As I mentioned in my opening statement, FBI Director Louis Freeh has repeatedly reassured this committee that the Department of Justice's campaign finance investigation has been both aggressive and thorough.

Let me read a quote from Mr. Freeh regarding the Department of Justice's Campaign Finance Task Force. On December 9, 1997, the Director of the FBI told the following to this committee: "I can assure you, Mr. Chairman, that the FBI is not being impeded in any way in conducting our investigation. The task force was formed last December. Their marching orders are to go wherever the evidence leads them."

On August 4, 1998, Mr. Freeh reiterated this point. In response to a question from the ranking member, he said that the FBI and the Department of Justice had conducted the investigation in the same manner as an independent counsel would. Here is his exchange with Mr. Waxman.

Mr. WAXMAN. So it's fair to say in substance that you have conducted the campaign finance investigation in the same way that you would expect an independent counsel to conduct the investigation. Is that accurate?
Mr. FREEH. Yes.

Now, my question to you, Mr. Radek, is, do you agree with Director Freeh's statement that the FBI and the Department of Justice have conducted a thorough investigation of the allegations of campaign finance abuse?

Mr. RADEK. Yes, sir, I do. It's been some time since I've been involved with the direct management. But when I was involved and for those periods of time when I was an advisor I thought that the strategy and the effort put out by the Campaign Finance Task Force was exemplary. In fact, Mr. La Bella's differences with me have been criticized, but I thought that the way he sought to build the case and the way he went about it was very good, and I agreed with his strategy. And I think that the people who are running it now are doing a good job.

Mr. LANTOS. Thank you very much.

Mr. Esposito, same question to you. Do you agree with Director Freeh's statement that the FBI and the Department of Justice has conducted a thorough investigation of the allegations of campaign finance abuse?

Mr. ESPOSITO. I left the FBI in October 1997. And when I first became involved in this matter, which was late 1996, I thought we had put in as much resources as we possibly could; and if we needed to add resources we did. I think both made a valiant effort to do whatever they could to get the job done.

Mr. LANTOS. Thank you very much.

Mr. Gallagher, same question.

Mr. GALLAGHER. At the end of the investigation, I think that is a very accurate statement.

Mr. LANTOS. Thank you very much. In fact, the Campaign Finance Task Force has looked into every credible campaign finance allegation, ranging from conduit contributions to foreign contributions. Where it has found violations of law, it has punished them. To date, the task force has indicted 25 individuals and one corporation of campaign finance violations, including such prominent Democratic fundraisers as John Huang, Charlie Trie and Johnny Chung.

The task force has also looked into a number of sensational allegations from various sources and found them without merit. It looked into an allegation by our former colleague Jerry Solomon that John Huang had committed espionage. The task force found that Mr. Solomon's allegation was based on nothing more than gossip at a congressional reception.

According to the Los Angeles Times, "A GOP Congressman who said in 1997 that he had 'evidence' former Democratic fundraiser John Huang had passed classified information to an Indonesian company never received such reports." Notes taken by FBI agents

who investigated the case show that "Solomon, who headed the House Rules Committee when he made the charge, had based it on a casual remark by a Senate staff member, not on intelligence reports as he claimed at the time," from the Los Angeles Times.

[The information referred to follows:]

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Los Angeles Times
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Friday, December 17, 1999

National Desk

FBI Notes Dispel 'Evidence' of Security Breach by Huang Allegation: Casual remark, not intelligence reports, called basis of ex-congressman's widely publicized claim of 'economic espionage.'

ART PINE; ALAN C. MILLER
TIMES STAFF WRITERS

WASHINGTON -- A GOP congressman who said in 1997 that he had "evidence" former Democratic fund-raiser **John Huang** had passed classified information to an Indonesian company never received such reports, according to FBI documents made public Thursday.

Notes taken by FBI agents who investigated the case show that former Rep. Gerald B.H. Solomon (R-N.Y.), who headed the House Rules Committee when he made the charge, had based it on a casual remark by a Senate staff member, not on intelligence reports as he claimed at the time.

In 1997, amid heightened suspicions about Huang's activities when he worked as a political appointee at the Commerce Department, Solomon said he had "received reports from government sources" saying there were "electronic intercepts which provide evidence confirming . . . that **John Huang** committed economic espionage and breached our national security by passing classified information to his former employer, the Lippo Group."

Solomon's charge, leveled in a statement issued by his office and in an interview on CBS television, escalated the scandal over the Clinton administration's fund-raising activities among foreign and Asian-American contributors.

The accusation marked the first time that a prominent official publicly suggested intelligence sources had obtained evidence that Huang--who left Commerce to become a Democratic Party fund-raiser--had stolen government secrets. The next day, some of the nation's leading newspapers, including The

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12/17/99 LATIMES A36

T'es, carried stories about Solomon's charge.

The Solomon allegation was raised Thursday by Rep. Henry A. Waxman (D-Los Angeles) during the second day of Huang's testimony before the Government Reform Committee. Waxman called it a case of a lawmaker leveling a serious allegation with little or no substantiation.

Huang has pleaded guilty to violating campaign-financing laws but has consistently denied that he passed secrets to the Lippo Group or any other foreign entity.

Solomon, now retired from Congress and a partner in a Washington lobbying and consulting firm, did not return repeated telephone messages Thursday.

Waxman, the committee's ranking Democrat, made public notes from FBI agents' interviews with Solomon in August 1997 and the following February, in which the former New York lawmaker denied ever having received classified information from the Department of Commerce.

Rather, the documents say that Solomon told the FBI he had obtained the information from a comment by a Senate staff member at a Capitol Hill reception. The comment apparently did not mention Huang specifically. Solomon told the FBI that he "could not recall the staff member's name but might recognize him if he saw him again."

Waxman said the FBI notes showed that Solomon had been "basing his allegations on gossip." He said neither Solomon nor anyone else involved in the incident had ever corrected the record publicly.

Huang told the Government Reform panel that he had been the victim of "people seeking publicity" who had "lied about me repeatedly in the press and even before this committee without consequence."

"For example, a former member of this body, Mr. Solomon . . . accused me of 'economic espionage' on the basis of what I am advised was an anonymous source at a cocktail party who, it turned out, did not even mention my name."

Meanwhile, committee Republicans made public a separate set of documents showing that FBI agents failed to ask President Clinton and Vice President Al Gore about the influx of illegal campaign contributions from abroad when they interviewed them at the height of the scandal.

Rep. Dan Burton (R-Ind.), the panel's chairman, released a letter he had

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v tten to Atty. Gen. Janet Reno demanding an explanation. He said that the agents failed to ask Clinton any questions about Huang, Little Rock, Ark., fund-raiser Yah Lin "Charlie" Trie or Lippo vice chairman James T. Riady. All three had been friends of Clinton before he was elected president.

The documents also show that the FBI agents did not ask Gore about the controversial fund-raiser at the Hsi Lai Buddhist Temple in Hacienda Heights, Calif., which drew the vice president, who had spoken at the event, into the scandal.

In a prepared statement, Reno said Thursday: "The Department of Justice has conducted a vigorous investigation into allegations concerning campaign finance violations. In the past three years, it has prosecuted 22 individuals and obtained 15 pleas. That investigation continues."

Reno said that interviews "have been conducted so as to focus on the matters then under review." The FBI agents conducted the interviews as part of preliminary investigations of Clinton's and Gore's fund-raising activities to help Reno determine whether there was enough evidence to require the appointment of a special counsel.

Charles LaBella, the former head of the Justice Department's campaign finance task force, said Thursday that, during the FBI's November 1997 session with Clinton, "it was the attorney general's decision that it would be a focused interview" limited to the fund-raising phone calls.

LaBella, who sat in on the interview along with Justice officials, said he "always figured we'd have other chances" to question the president about his relationship with key fund-raisers after developing cases against them. LaBella left the task force before a second FBI interview was done in late 1998.

But Burton was more critical. "What am I to think . . . of an investigation that has failed to ask key witnesses any questions about the most important subjects in what has allegedly been one of the largest investigations ever undertaken by the Department of Justice?"

Times staff writer William C. Rempel in Los Angeles contributed to this story

---- INDEX REFERENCES ----

COMPANY (TICKER): Lippo Group (P.LPG)

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Mr. LANTOS. The task force also investigated widely publicized allegations that the Clinton administration allowed the transfer of sensitive technology to China by the Loral Corp. in return for campaign contributions. In fact, in a speech on the House floor, the chairman raised the possibility that the administration had engaged in treasonous conduct relating to that corporation. The task force concluded that this allegation had no basis in fact.

The Los Angeles Times wrote an excellent account about that investigation. It wrote that several department officials, including Charles La Bella, felt that the Loral accusations were baseless. According to the Los Angeles Times, Mr. La Bella felt that Loral's chief executive was a victim of Justice Department overreaching.

[The information referred to follows:]

Los Angeles Times

TUESDAY, MAY 23, 2000
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Internal Justice Memo Excuses Loral

■ Inquiry: Task force found no wrongdoing between Clinton and firm that sought to launch satellite in China. Focus has been on counsel in case.

By WILLIAM C. REMPEL and ALAN C. MILLER
TIMES STAFF WRITERS

WASHINGTON—When Sen. Arlen Specter recently obtained the internal Justice Department memo of former campaign finance task force chief Charles G. LaBella, the Pennsylvania Republican used it to resurrect a favorite partisan target: President Clinton's approval for Loral Space and Communications Corp. to launch a satellite from China two years ago. At the time, Loral Chairman Bernard L. Schwartz was among the Democratic Party's biggest individual donors.

During a May 2 hearing, Specter commented that LaBella had pushed, in his still-sealed memo, to have an independent counsel investigate the Loral matter, suggesting that the case remained ripe for serious criminal inquiry. And Specter reinforced that impression, urging the Senate to subpoena Loral-related documents.

But the impression was wrong.

The LaBella report and related documents, which were obtained earlier this year by The Times, tell quite a different story. In fact, by the time LaBella delivered his report to Atty. Gen. Janet Reno in the summer of 1998, the task force had effectively excused Schwartz and Loral from the campaign finance investigation.

LaBella's team of federal prosecutors turned up "not a scintilla of evidence—or information—that the president was corruptly influenced by Bernard Schwartz," according to one internal document.

Far from urging an investigation of Schwartz, the documents show, LaBella regarded the Loral executive as a victim of Justice Department overreaching. He criticized ranking Justice officials for relying on "a wisp of information" to justify their initial Schwartz inquiry.

And in an addendum to his original report, LaBella flatly advised that the Schwartz case "was a matter which likely did not merit any investigation."

"Poor Bernie [Schwartz] got a bad deal," one former task force investigator said in an interview. "There never was a whiff of a scent of a case against him."

Loral officials welcomed this news. A spokesman issued a brief statement repeating the company position that there was no wrongdoing by Schwartz or Loral, and "there are no grounds for an investigation."

LaBella testified at the Senate hearing convened by Specter but declined to discuss specific cases and commented only "hypothetically" on the Loral matter.

Two years ago, the Loral case was among the most sensational allegations to emerge from the campaign finance scandal. Press accounts revealed that a presidential waiver permitting the cooperative satellite launch with China had benefited a major Democratic supporter.

Such waivers were required on all satellite ventures in China as a lever against human rights abuses by Beijing after the Tiananmen Square massacre in 1989. But, while similar waivers were granted routinely by both Clinton and Republican President Bush, key circumstances fanned the Loral controversy.

First, Loral already was under investigation over allegations it had improperly shared restricted technology with Beijing. Second, the waiver came to light amid the mushrooming campaign finance scandal.

There were charges that Schwartz had bought White House influence with his donations to Democrats exceeding $1.3 million. Congressional hearings were scheduled. And the Justice Department ordered its campaign finance task force to investigate the Loral chairman.

Amid partisan wrangling, Republicans questioned whether the White House had risked national security to advance a political supporter's commercial interests. Rep. Dana Rohrabacher (R-Huntington Beach) called the Loral waiver "this possible violation of law, this betrayal of our country."

However, the Justice task force investigation produced no further legal actions.

GOP congressional leaders have since pressed for access to LaBella's report. Those efforts were renewed in March after The Times obtained a copy of the restricted document and reported that it also accused senior Justice officials of engaging in "gamesmanship" and legal "contortions" to avoid an independent inquiry of top White House officials.

The report cited information LaBella called sufficient to justify an outside probe of Clinton, Vice President Al Gore and even First Lady Hillary Rodham Clinton, but the task force chief took a decidedly different view of only one case—the Schwartz matter.

While advising that a Schwartz investigation was unmerited from the outset, LaBella did recommend that the case be disposed of by a special counsel. He told Reno that, because the underlying allegations of a possible *quid pro quo* ultimately involved the president, an independent prosecutor should act on the matter to spare Justice from accusations of "a political motive for its determination."

LaBella reserved his harshest criticism on the matter for Justice officials who ordered the Schwartz probe while specifically excluding Clinton from the investigation.

Specter seized on that point in the hearing but omitted any reference to LaBella's debunking of the merits of the Schwartz investigation. Consequently, the Specter hearing prompted misleading stories and headlines about LaBella's failed efforts to get an outside prosecutor to investigate Schwartz and the president.

The Washington Times described it as "a startling revelation." An editorial headline called it "LaBella's Bombshell." Associated Press and the New York Times published more cautious but still significantly incomplete accounts.

Mr. LANTOS. The RNC, the Republican National Committee, is running political commercials about the Vice President's appearance at a Buddhist temple during the 1996 campaign. But this issue was also thoroughly investigated by the FBI and the Department of Justice. An excellent summary of the facts about this investigation was recently published in the "American Lawyer" and summarized by Stuart Taylor in the "National Journal." According to the American Lawyer, "The evidence is now overwhelming that the temple event wasn't supposed to be a fundraiser." The article notes that the Vice President's statements on the subject have been honest, accurate and consistent, and notes that press accounts of the issue, as well as accusations leveled against the Vice President, all hinge on fuzzy thinking, malevolent assumptions and the intransigent refusal to credit exonerating evidence.

I would like to make these articles part of the record Mr. Chairman.

Mr. BARR [presiding]. Hearing no objection, so ordered.

[The information referred to follows:]

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Temple In a Teapot
Seeking enlightenment behind the illusion of the Gore campaign finance case
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"Om" is no longer the mantra we associate with Buddhist temples. Rather, the one uttered by Governor George W. Bush that was played over and over on at least 23 network or cable news programs in March. Although variants abound, the mantra in its purest form goes like this: "It's amazing that Vice President Gore is talking about campaign funding [reform], when he's the person who went to a Buddhist temple to raise money from people who made a vow of poverty."

Remind me, again, why Bush is hammering Al Gore, Jr., for that visit to the Buddhist temple in 1996.

Is Bush's point that it was illegal for the Democratic National Committee to schedule a fund-raiser at a temple? Can't be. There's no such law. A religious order would risk losing its tax-exempt status if the IRS thought it were playing partisan politics. But the DNC wouldn't be breaking any law by staging a fund-raiser at a church or temple; obviously, neither would its guest speaker.

Is Bush arguing, then, that holding a fund-raiser at a temple was unseemly, and Gore wasn't forthcoming in admitting to reporters that the event was a fund-raiser? Those aren't viable claims anymore, either. Gore's obviously not the straightest shooter to ever venture into public life, but the evidence is now overwhelming that the temple event wasn't supposed to be a fund-raiser. Moreover, Gore's descriptions of it have been honest and accurate -- even consistent. The confusions about the nature of the temple visit are simple to explain, and I'll do that in a moment.

Perhaps, then, Bush's argument goes something like this: Gore knew that temple monastics, who had sworn vows of poverty, were being used to launder campaign contributions from forbidden sources. No, it can't be that, either. That incident's been scrutinized for more than three years by prosecutors, congressmen, and journalists, and not one shred of evidence indicates that Gore knew that anything illegal was happening at the temple. (For the record, the temple's monastics don't take vows of poverty, but I'll get to that, too.)

Is Bush then banking on the temple serving as a symbol of all the fund-raising shenanigans Gore allegedly engaged in during the 1996 campaign? Gore must have done something shady, right? After all, according to a front-page article in the March 11 issue of The New York Times, "senior Justice Department officials twice urged Attorney General Janet Reno to appoint an independent counsel to investigate." Well, I suppose the temple has, in fact, come to symbolize all of those allegations. But the Times -- like all the media organizations propping up the sagging case against Gore -- has overstated both the degree and the import of the dissension

among Reno's advisers. Those intramural disagreements have little to do with the strength of the case against Gore, and a great deal to do with the inanity of the independent counsel statute. The dilemma was this: Could Reno dismiss the charges immediately, or was she obliged to pass them along to an independent counsel knowing that they would almost certainly be dismissed months or even years later?

Back in 1997, journalists' and Republicans' suspicions of wrongdoing by Gore were fueled by the fact that John Huang and many other key people then under scrutiny had, on advice of counsel, invoked their Fifth Amendment rights. Accusers could indulge in free-associational defamation without danger of anyone coming forward and setting the record straight. That's no longer the case. At least 22 of the key people who originally took the Fifth -- including Huang, Yah Lin "Charlie" Trie, and Johnny Chung -- have now either pleaded guilty, or been immunized, or both, and they have been debriefed and deposed at great length by congressmen, FBI agents, and numerous prosecutors. At last count, the House Committee on Government Reform, chaired by Indiana Republican Dan Burton, had issued 883 subpoenas, deposed 161 witnesses, and gathered 1.5 million documents during its 42-month-and-counting investigation. The Senate's 1997 inquiry was almost as searching, and the Justice Department's ongoing Campaign Financing Task Force inquiry, which has so far led to 24 indictments and 14 convictions in six states, appears to be broader still.

Today we can reach some conclusions. Investigators have amply proven that Huang, a DNC vice-chairman of finance during the 1996 elections, followed an unacceptably reckless "don't ask, don't tell" policy when it came to determining the origin of donations he solicited from the Asian American community. (So did Haley Barbour, then chairman of the Republican National Committee and now a Bush adviser.) The practice was particularly suspicious given that, from 1992 to 1994, Huang had himself helped launder at least $156,000 in illegal donations on behalf of his then employer, Indonesian billionaire James Riady, when Huang served as an officer for a California bank owned by Riady's Lippo Group. (Riady had met then-governor Bill Clinton in the early 1980s, when Riady lived in Little Rock, where Lippo co-owned the Worthen Bank.) Huang, who pleaded guilty to those crimes in August, has been cooperating with prosecutors for more than a year, and has implicated himself and Riady in illegally reimbursing an additional $700,000-$800,000 in donations to the DNC made by American Lippo executives during the 1992-94 period.

But Huang -- who career prosecutors now believe is telling the truth -- continues to maintain that neither Gore nor anyone at the DNC knew of his earlier, then unsuspected, wrongdoing when he was appointed to the DNC in December 1995, and no independent evidence indicates otherwise. Interestingly enough, Huang did not continue to raise money from Riady during the 1996 election cycle, while he was with the DNC. Indeed, no evidence indicates that Huang knowingly solicited any illegal contributions while he was with the DNC, let alone that any of his DNC superiors did. And certainly none suggests that Gore did.

Conspiracy theorists, of course, now blame Attorney General Reno and scores of career Justice Department and FBI staffers for failing to confirm their intuitions of higher-level wrongdoing. But at this point, sober-minded observers ought to start entertaining an alternative possibility. Even politicians are entitled to the presumption of innocence.

A skeptical look at the key charges that have been leveled against Gore --whether by reporters, editorial boards, political opponents, or conspiracy buffs -- reveals that they all hinge on fuzzy thinking, malevolent assumptions, and the intransigent refusal to credit exonerating evidence. There may be plenty of good reasons to oppose Al Gore for president. But his apparently clean participation in a crooked system isn't one of them.

In March 1996 Master Hsing Yun, the head of the Taiwan-based Fokuangshan Buddhist order, was touring America's East Coast. Hsing is a well-known spiritual leader in Taiwan with reportedly more than 1 million followers worldwide. At the request of Maria Hsia, a Democratic fund-raiser who was an immigration consultant for the order, John Huang arranged for Master

Hsing to meet Vice President Gore at the White House on March 15. During the ten-minute social call, Master Hsing invited Gore to visit him at his order's California temple. Hsing's California branch, known as the International Buddhist Progress Society, was no obscure, shady cult set up to front for foreign bribe-makers. Its 15-acre Hsi Lai Temple compound in Los Angeles -- the largest Buddhist monastery in the Western Hemisphere, according to the order -- serves as a community center for much of Southern California's Chinese community, whether Buddhist or not. (About 50,000 people visited the temple during the three-day Chinese New Year celebrations earlier this year, according to temple spokesperson Cherry Lai.) Gore accepted Hsing's invitation. He was already planning to go to California in late April to do fund-raisers in Los Angeles and San Jose -- timed to overlap with the passing of the Olympic torch in Los Angeles --although specific times and places had yet to be set. He therefore asked his staff to sandwich in a visit to the temple while he was there, according to Huang, who testified before Congress in December and, again, as a prosecution witness in the criminal case against Hsia in February. (Am I going to rely solely on Huang's account? No. But since Huang set up the event, his version is a logical place to start.)

Huang initially planned two events. The first was to be a fund-raising luncheon at the Harbor Village Restaurant in Monterey Park, California, on April 29, 1996, for which Huang planned to charge $1,000-$5,000 per ticket. After the fund-raiser, Gore's entourage would then drive to Hacienda Heights, about 20 minutes away, and hold a "community outreach event" at the Hsi Lai Temple. At a community outreach event, as opposed to a fund-raiser, no tickets are sold and no fund-raising takes place. In accented English, Huang explained at the Hsia trial why he set up the visit. "There is no senior government official ever visit our community," he said. "I was hoping through this can inspire a lot of constituents in our community to be drawn to the Democratic side. ... By doing that I hope some of the wealthy Asian Americans can open up their wallet to make contribution. ... Not necessarily that time. Maybe down the road in the future."

Hsia confirmed these arrangements in a letter to Gore, dated March 23. She explained that she and Huang hoped he would attend "a fund-raising lunch event," and that "after the lunch, we will attend a rally at Hsi Lai Temple where you will have the opportunity to meet representatives from the Asian American community and visit again with Master Hsing Yun".

But on or about April 3, Gore schedulers told Huang that Gore would not have time for two separate events. Accordingly, Huang canceled the Harbor Village Restaurant fund-raiser, he testified. But Huang had already invited people to the Harbor Village, including some loyal DNC contributors. He had even already sold some tickets. So he invited those guests to a luncheon with Gore at the temple dining hall after the formal ceremonies. Huang asked his boss, DNC finance director Richard Sullivan, for permission to do this. "You can't do a fund-raiser at a temple," Sullivan told Huang, according to Sullivan's 1997 deposition. But Huang assured Sullivan that it wouldn't be a formal fund-raiser, according to both Huang and Sullivan. Rather, it would be a community outreach event and a donor maintenance event. People who had already contributed would get to meet Gore. In addition, Huang would later go back and solicit attendees for contributions after the event. In essence, Huang tried to collapse the two events into one, and to finesse the whole thing. It wouldn't be a fund-raiser, but Huang intended to solicit funds anyway, both before and after the event. (Not a great idea in hindsight, but nothing illegal about it.)

Is there any real difference between a fund-raiser and a community outreach event? Finance director Sullivan and DNC chairman Donald Fowler both readily acknowledged in their 1997 testimony that, obviously, whenever the DNC finance committee schedules a community outreach event, it hopes that there will ultimately be a fund-raising payoff. Attendees will feel grateful afterward, and, if solicited, will more likely contribute. Nevertheless, it was not what either of them considered a formal fund-raiser. Though the distinction was attenuated, they testified that it was common to throw DNC community outreach events at, for instance, Jewish community centers or black churches or labor union facilities, while it might be considered unseemly to throw formal fund-raisers at these same facilities.

While it would be helpful to know whether the Republican National Committee has ever drawn comparable distinctions, Fred Thompson's Senate Committee on Governmental Affairs limited inquiries into Republican campaign practices, feeling that such pursuits would distract the committee from the pressing issues before it.

Gore's deputy chief of staff, David Strauss, and chief scheduler, Kimberly Tilley, both testified to having had essentially the same understandings as Sullivan and Fowler about the differences between community outreach events and fund-raisers. At the same time, however, Tilley noted that Gore staffers were not careful in conversation or e-mails about these nice distinctions. "I think that there was a certain sloppiness in the terms we were using, whether it was finance or fund-raising," she testified.

What was Gore told? The man who briefed him, then-deputy chief of staff David Strauss, says he told Gore that the temple visit was a community outreach event. "I was the person who was solely responsible for telling the vice president what this event was," he testified in 1997. "I take full responsibility for the vice president's knowledge about this event."

Okay -- maybe Strauss is falling on his sword for his boss. But Gore's briefing materials corroborate Strauss's account. So does the 1997 deposition testimony of Gore's scheduler in charge of that event, Ladan Manteghi. Seemingly unreceptive to Manteghi's recollections, Senator Thompson's committee refused to permit her to testify at its highly publicized hearings in 1997, rejecting the unanimous request of the Democrats on the committee. Senator Thompson argued that her testimony was unimportant because "she was brought in after everything had really been arranged."

Although the luncheon was, undoubtedly, a DNC event -- Fowler was one of the people who introduced Gore --no tickets were sold, no campaign materials displayed, and no table set up to solicit or accept contributions. Gore's five-minute speech -- which is preserved on audiotape -- is about brotherhood and religious tolerance and mentions nothing about fund-raising.

In October 1996 donor Charlie Woo told The Washington Post that Huang had told him there was a charge to attend the event, and that he had, accordingly, showed up at the temple with a check in his pocket. Woo's damning account was, naturally, disseminated by then-RNC chairman Barbour in subsequent press releases. But when Senate staffers interviewed Woo in 1997, he gave a fuller version that put events in a markedly different light. He said Huang had originally invited him to the Harbor Village Restaurant fund-raiser, but had later canceled that event and redirected him to the temple. He said he found it "weird" that, once he got to the temple, there was "no mention of money at the event."

Though Gore made no mention of contributions, there is some dispute about whether any of the other speakers did. Six attendees deny any such references, but two say that there were. A Boston Globe reporter who attended the event, John Aloysius Farrell, wrote in September 1997 that while the two speakers who introduced Gore "warmed up the audience with political rhetoric" and thanked people for their "support," Gore's own remarks were "nonpartisan and restrained." Wrote Farrell: "Gore's own words and actions at the Buddhist temple ... give credence to the vice president's assertion that while he knew there was a fund-raising component to the event, he viewed it more as a goodwill visit with Asian American leaders."

Of the 42 checks that Huang later associated with the temple event in DNC records -- since there was no longer any other event to associate them with -- 27 came from people who never attended the luncheon. (As it turns out, 12 or 13 of those came from monastics, as I'll discuss later.) Only 15 checks came from people who were among the 100 or so who actually attended the luncheon. Huang has testified that he accepted no checks at the event itself.

When Gore was first asked about the lunch on October 22, 1996, he told NPR's Nina Totenberg that it was "not billed as a fund-raiser" but, rather, as a "community outreach event." Though

he acknowledged that funds had, in fact, been sent in "too soon after the event to say that it was anything other than an event directly tied to that," he asserted, "I did not know that at the time."

On January 15, 1997, the Boston Globe reported that Gore had "reversed" his position. But the sole basis for the article's dramatic claim was simply that a Gore spokesperson had acknowledged that Gore knew the luncheon was a "finance-related" event. The spokesman had reiterated that Gore had not known that any funds were being collected at the time.

Obviously, there had been no actual reversal. The luncheon was supposed to be a community outreach event set up by the DNC finance committee and intended, in part, to reward loyal contributors. That was obviously a finance-related event, but it was not a formal fund-raiser. Fowler, Sullivan, Tilley, Strauss, and Manteghi all testified that they understood such an event to be different from a fund-raiser. Gore wasn't being cute or legalistic or Clintonesque. Reporters were questioning him using terms of art, and he was answering using the same terms of art.

Once you understand what happened -- that Huang, an inexperienced DNC official, had collapsed two perfectly acceptable events into one confusing hybrid --things begin to look pretty innocent. Even a little comic. It was therefore crucial to Gore's accusers in 1997 to assert that no Harbor Village Restaurant fund-raiser had ever really been contemplated. Accordingly, Republicans insisted that the DNC had planned a fund-raiser at the temple all along and that there had never been any departure from that original plan.

In the 83-page chapter of the Senate majority report entitled "The Hsi Lai Temple Fund-raiser and Maria Hsia," the Harbor Village event is mentioned for the first time on page 76, and then only to be swiftly dismissed as a fabrication invented by Hsia. (Hsia had told Los Angeles Times reporters about the Harbor Village plan in late 1996, when the press first began asking questions.) Because the restaurant said that it found no record of a reservation for the abortive event, the majority members of the committee decided that Hsia had made it up, and that she also must have forged a printed invitation to that event (on DNC stationery) which she provided to the committee.

If you didn't know that a formal fund-raiser had originally been scheduled at the Harbor Village Restaurant, lots of damning correspondence seemed to suggest that the DNC and Gore staffers had been planning a fund-raiser at the temple for many months, making it unlikely Gore could not have known. E-mails or memos included lots of vague references to an upcoming "fund-raiser" in "L.A." in "April," and one of those memos even mentioned a ticket price of "$1,000/$5,000."

But now that Huang has testified, precious little remains of the tale of the Hsi Lai Temple fund-raiser. Gore had not yet even been invited to the temple when some of the first memos about the L.A. "fund-raiser" were written. Others were written during the period when two distinct events were planned. Later memos reflected staffers' confused understandings of a confusing situation after Huang collapsed the two events.

Of course, Huang might still be lying -- even though he has pleaded guilty, cooperated, and been granted immunity. But you need more than perjury by Huang to sustain the fiction of the temple fund-raiser. You need perjury by contributor Woo, who said that he had originally been invited to the Harbor Village; perjury by Huang's boss Sullivan, who remembered Huang canceling a formal fund-raiser at "a home or a restaurant" and then promising him that the temple luncheon would just be a community outreach event; and perjury by Fowler, Sullivan, Strauss, Tilley, and Manteghi, who testified that they all thought it was a community outreach event, and that such an event was different from a fund-raiser. Moreover, Hsia and the DNC and Gore's staff would have had to forge not just the printed invitations to the Harbor Village, but Hsia's March 23 letter to Gore confirming the original two-event plan, Gore's briefing materials, and even the audiotape of Gore's non-fund-raising speech. And then you'd still have to explain

away the Globe reporter.

At a certain point, don't accusers have to come up with something more concrete than the hypothesis that all of the most knowledgeable witnesses are lying, and that all of the corroborating documents are counterfeit?

Of course, a crime evidently was committed at the temple, though there's no evidence Gore knew about it. Here's what happened. When Huang had originally scheduled the Harbor Village restaurant event, he had hoped to raise $200,000, he has testified. Even after he canceled the formal fund-raiser, he had evidently hoped to solicit significant sums of money both before and after the temple event. But when Huang spoke to Hsia the day before the temple visit, she had still only raised about $45,000 from the Asian American community, while Huang had only raised about $40,000-$60,000 himself. Two days later, obviously disappointed and embarrassed, Huang told Hsia he had hoped Hsia would be able to raise at least $100,000. Hsia promised to do what she could. That night, on his way to the airport to return to Washington, Huang stopped at the temple to pick up what Hsia had collected. Hsia gave him a sealed envelope, which, she said, contained checks worth about $100,000.

And it did. But according to evidence believed by the jury at the Hsia trial in February, what Hsia had done in the interim was a crime. She had gone to a temple official, who had arranged for the temple to donate $55,000 to the DNC. Indeed, it turns out that, on several occasions in the past dating back to 1993, Hsia had obtained reimbursement from the temple for smaller political contributions she had given to the DNC either in her own name or saying that she had raised the funds from others. (There's no evidence Huang knew that Hsia had ever done this, and Huang says he didn't.) Another temple official had then asked 11 monastics to write out checks for $5,000 each, reimbursing them with temple funds. (The temple had also reimbursed one or two monastics who contributed before the event.) It is illegal to make a donation in someone else's name, and, in addition, a tax-exempt organization such as the International Buddhist Progress Society is barred from contributing to a political campaign. (In March, Hsia was convicted of making secretly reimbursed contributions to various Democratic political committees and candidates on five occasions between July 1995 and October 1996.)

When Huang got back to Washington, D.C., he opened Hsia's envelope. In his congressional testimony, Huang acknowledged realizing then that some of the checks came from nuns or monks. But he explained that some monastics come from wealthy families and have access to private wealth. Indeed, the Hsi Lai monastics do not take vows of poverty, according to a multitude of sources, including a statement the monastics provided to Congress in 1997, a nun's testimony for the government at the Hsia trial in February, and temple spokesperson Cherry Lai, who was interviewed for this article. Though some monastics do donate all their money to the temple -- in which case the temple takes care of all their personal expenses -- others don't. They either maintain bank accounts outside the temple, or they allow the temple to hold personal money for them in separate so-called futien accounts.

In any event, although Huang obviously should have asked questions about Hsia's checks, he didn't. Was his failure to inquire so suspicious as to prove criminal knowledge on his part? I doubt you could win a criminal case on that premise, but let's suppose, for the sake of argument, that you could. How do you then go on to prove -- or even responsibly assert --criminal knowledge on the part of Huang's boss, Sullivan? Or, on the part of Sullivan's boss, Fowler? And if you can't get that far, how do you proceed to impute criminal knowledge to one of the DNC's beneficiaries, Gore?

Is it because Gore had "an extremely close relationship" with Hsia, as the majority members of Senator Thompson's committee asserted in their final report in 1997, that we can safely assume that he must have known what Hsia was doing? But Gore wasn't a close friend of Hsia's. Hsia was a Democratic fund-raiser and organizer who met Gore in 1989 and saw him at maybe a dozen political events thereafter. He once wrote her a thank-you note, cited by the Thompson committee, that said, "You are a wonderful friend." Is someone seriously suggesting that from a

note like that we are to infer that Gore knew Hsia's innermost, allegedly criminal thoughts?

But, some people ask, why would Hsia commit a crime to help Gore unless Gore was in on it? Unfortunately, fund-raisers have ample selfish incentives to pad their legitimate donations with illegal funds. The biggest fund-raisers are the ones who get access to government officials, who get the best tables at the galas, who rub shoulders with the big shots, who get their pictures taken with the candidates, and who get to imply to business clients that they have political clout. There's no reason to believe, for instance, that former senator Robert Dole knew that a vice-chairman of his 1996 presidential campaign, Simon Fireman, had illegally laundered $120,000 in federal campaign donations through his employees, including $69,000 to the Dole campaign. (Fireman pleaded guilty in October 1996.) Similarly, consider the situation that arose when Japanese American businessman Michael Kojima contributed $500,000 so that he and 23 guests, including ten foreign nationals, could attend a 1992 fund-raiser with President George Bush. Although Kojima was notorious for then owing more than $1 million in unpaid judgments to former wives and creditors, there was no reason to jump to the conclusion that RNC officials realized that Kojima's donation might have come from illegal Japanese sources. As Republican Party spokesman Rich Galen told the Associated Press at the time, "There's no requirement in practice or in law that a political organization ... get any kind of statement from a donor as to the origins of the money." Bush attorney general William Barr declined to appoint an independent counsel to look into the Kojima case after the department found "no personal or Department of Justice conflict of interest."

So if Gore's so clean, how come Reno's top aides wanted to appoint an independent counsel, according to that March 11 Times article? The Times editorial board even commented that same day: "Several extraordinary and heretofore secret documents were disclosed that suggested the lengths to which Janet Reno and her top aides went to protect Vice President Al Gore and other senior officials from a thorough, independent investigation into their fund-raising activities in the 1996 campaign." And that language was mild, of course, compared to that of numerous columnists and other editorial boards --most notably The Wall Street Journal's two days later.

Let's focus on the alleged disclosures in the Times article first, and work our way backward into the rest of the case against Gore.

The key new document the Times revealed was a November 1, 1996, letter from Lee Radek, the chief of the Justice Department's public integrity section, to Stephen Mansfield, the assistant U.S. attorney who had then been assigned to look into the Hsi Lai Temple matter. According to the Times article, the letter reflected "an early, pivotal decision" by senior Justice Department officials to order Mansfield "to cease his investigation and turn over any information he had gathered to prosecutors in Washington because Gore was covered by the independent counsel statute." In an interview Mansfield told the reporters that he had "wanted to move very quickly, to gather evidence by issuing subpoenas, interviewing witnesses, and considering the execution of search warrants," but, instead, the case "got yanked off my desk and, as far as I know, nothing happened for many, many months. The consequence of a strategy of sitting back and doing nothing means you effectively make the matter go away." No wonder the Times editorial board concluded that Reno and Radek deep-sixed the investigation!

But now watch these defamatory accusations vanish.

First off, Radek's memo to Mansfield was a routine exercise of long-standing Justice Department policy. (Poof.) Look at the events that led up to it. On October 17, 1996, *The Wall Street Journal* and *The Los Angeles Times* had broken the story that Hsi Lai Temple monastics had made suspicious donations to the DNC. On October 29, 1996, Senator John McCain and the chairmen of the four House committees all wrote Attorney General Reno demanding appointment of an independent counsel.

How, then, was Attorney General Reno to determine whether the congressmen's demand had merit? The law said that the attorney general should decide whether to seek an independent

counsel by performing a "preliminary investigation." According to the statute, during that preliminary investigation the Justice Department "shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas" -- i.e., just the sorts of things Mansfield told the Times that he was eager to do.

To decide whether this sort of formal "preliminary investigation" was required, both law and logic dictated that some sort of even more rudimentary inquiry had to take place first. According to Radek, the law's restrictions on the Justice Department's powers during a preliminary investigation have always been applied during these initial inquiries as well. The public integrity section of the Justice Department, which Radek heads, has always administered the independent counsel statute. Radek helped found the section in 1976, when it was established as a post-Watergate initiative. Radek has spent 22 of his 29 years at Justice in the public integrity section.

Radek says he can recall "maybe a dozen" instances in the past when he has had to suspend a U.S. attorney's investigation to inquire into whether an independent counsel might be required, including, for instance, the 1981 federal investigation of former Labor secretary Raymond Donovan in New York. (That matter was ultimately referred to an independent counsel, who decided not to bring charges; Donovan was later prosecuted by the state and acquitted.) Though Radek has usually given these instructions orally, he says, the Los Angeles U.S. attorney's office requested that he put it in writing.

The L.A. office understood at that time, Radek adds, that if the public integrity section ultimately found that no independent counsel was required, the case would be retained by the Justice Department rather than returned to Mansfield. Attorney General Reno decided early on, Radek explains, to consolidate all the campaign finance investigations stemming from the 1996 campaign, except for those that were already in advanced stages. Rather than having separate U.S. attorney's offices in Los Angeles, Little Rock, Washington, New York, Newark, and elsewhere independently pursuing different aspects of the case -- and, perhaps, failing to see overarching connections, patterns, and conspiracies -- she consolidated all the investigations under a single Campaign Financing Task Force. If she hadn't, the Times could have written a much more convincing expose demanding to know why.

Richard Drooyan, who was then chief of the criminal division for the U.S. attorney's office in Los Angeles, and Robert Litt, who was then a high official with the Justice Department, corroborate Radek's account. "I certainly never thought there was anything sinister about the department's decision, and we accepted," says Drooyan, who is now a partner at Los Angeles's Munger, Tolles & Olson.

Finally, Radek notes, when Radek asked Mansfield to send any evidence he had already gathered, the Los Angeles office wrote back that there was nothing to send, since the investigation was still in the planning stages -- which Mansfield, in an interview, confirms.

"I don't have information indicating that [Radek's] decision was motivated by improper reasons," Mansfield continues. And he adds that he knows nothing about how the case was handled after it was removed from Los Angeles. But Mansfield does insist that there must have been a way to carry out the independent counsel law without interrupting a high-profile investigation in its crucial early stages. Yet Mansfield had never previously handled a case with independent counsel implications, while Radek has been involved in almost every one there's ever been. Like Mansfield's supervisors at the time, I'm going to defer to Radek on this one.

Doesn't Mansfield have a point, though? Wouldn't the independent counsel law disrupt investigations if it prevented prosecutors from moving quickly in the critical early stages? Yes, and that may be yet another flaw in that now-discarded statute. That would not mean, however, that, by carrying out that law's dictates, Radek, a 29-year public servant, should be presumed to be protecting a potential target of an investigation out of political bias -- the unmistakable, defamatory implication of the *Times* article and editorial. Moreover, the *Times*' apparent belief

that the temple investigation was fatally sabotaged by Reno's failure to unleash Mansfield is puzzling. The seemingly most culpable party in the temple conduit contribution scheme, Maria Hsia, was indicted in February 1998 and then, after protracted appellate litigation, convicted this past March. If she starts cooperating and implicates anyone else, the investigation can still proceed upward (or to an independent counsel). The other leading candidate for prosecution so far, John Huang, pleaded guilty to other charges in August 1999, and provided the testimony that helped convict Hsia. The task force even indicted two nuns for failing to appear and testify at Hsia's trial. So it's unlear whom the *Times* still wishes to indict. More Nuns?

Here is an insuperable problem with discussing the only other purportedly "extraordinary" recent disclosure relating to Gore -- the claim that, as *The Los Angeles Times* first revealed, former White House chief of staff Leon Panetta told investigators that Gore was "attentively listening" at a meeting when matters were discussed that, two years later, Gore said he did not remember. These charges simply cannot be fairly weighed without going into great detail about what campaign finance junkies have come to refer to as the Gore I and Gore II allegations. The Gore I allegations concern the (preposterous) claim that certain phone calls Gore made to potential donors from the White House might have violated a law that had never, in its 114-year history, been invoked in such circumstances, while the Gore II allegation is the (wispy, feather light) claim that Gore may have made a false statement when being debriefed by FBI agents about the ludicrous telephone allegations. After the task force interviewed about 250 witnesses, Reno issued detailed and, in my opinion, persuasive explanations for not seeking an independent counsel in two memos totaling 48 pages that have been filed publicly with the special three-judge court that hears independent counsel matters. (The Gore II filing is on the department's Web site at http://www.usdoj.gov/criminal/publications/gorefiling.htm; the Gore I filing does not appear to be posted.) Although I'm certain that many of you would still disagree with her decisions, the one thing I can tell you with absolute confidence is that you have never read any journalistic account that begins to do justice to her perspective.

Why? First, given the tortured complexity of the allegations, a fair summary of Reno's reasoning requires more column-inches than any reporter's editor will ever grant, including mine. Second, Reno's conclusions make for a crummy story (there was no wrongdoing). Third, such reporting contains no scoop (her filings are public).

Still, I do owe the skeptical reader an answer to at least one urgent question he or she will want to put to me. If the case against Gore is really as pathetic as I claim, why did Reno have to "overrule her advisers" in order to dismiss the case against Gore, as *The New York Times* put it on March 11?

The answer is twofold. First, she didn't overrule her advisers. The clear majority of her advisers always recommended that no independent counsel was required, according to two people involved in the process. A great many people participated in those decisions, including the attorney general, the deputy attorney general, the assistant attorney general for the criminal division, the deputy assistant attorney general supervising the Campaign Financing Task Force, the chief of that task force, the chief of the public integrity section, all of those individuals' staffs, and representatives of the FBI and its general counsel's office. We now know that former Campaign Financing Task Force chief Charles La Bella and FBI director Louis Freeh favored appointment of an independent counsel in Gore I, and we now also know, thanks to the Times revelations, that Freeh and former principal associate deputy attorney general Litt favored one in Gore II. (David Vicinanzo had replaced La Bella as chief of the task force by the time Gore II was decided; Robert Conrad, Jr now heads it.)

Significantly, on April 2, La Bella acknowledged on "Meet the Press" that even he does not assume that Attorney General Reno's reasons for dismissing the charges were "political." This is not to say that he chalks up all his disputes with the Justice Department to good-faith disagreements over the law. On the contrary, he bitterly complained about "bureaucratic agendas," and it's clear that his chief combatant in many of these turf battles was Radek.

But while journalists predictably side with the maverick prosecutor in his gladiatorial clashes with the bureaucracy, the press consistently fails to appreciate that Radek's opinions also matter. The public integrity section, which includes the election crimes bureau, is the central federal authority on election crimes, as well as the central authority on the independent counsel statute. While La Bella was more conversant with the details of his investigation, Radek was more conversant with the relevant laws and their historical application.

But why did Bob Litt disagree with Reno during the Gore II deliberations? Litt, who is now a partner at Washington's Arnold & Porter, is generally regarded as one of Reno's defenders. To answer that question, you have to remember the narrowness of the inquiry. The only issue was whether the technical requirements of the independent counsel had been triggered --not whether there was anything like probable cause to believe that a crime had been committed. La Bella himself stressed this point on Meet the Press in April. "There's been a misunderstanding here," La Bella said. "What we were saying was, there should be an investigation. ... [We were] not suggesting in any way, shape, or form that charges were going to be brought, [or] that charges were even appropriate."

When the crime being alleged was a false statement made to a federal official -- as it was in the Gore II charges -- the statute's strictures approached irrationality. Ostensibly, the law forbade the attorney general from taking into account the "state of mind" of the accused -- a prohibition that, given its broadest interpretation, would require appointment of an independent counsel anytime a high-level official innocently misspoke while talking to a federal agent or Congress. Reno refused to give the law such an absurd reading. Instead, she allowed herself to observe that numerous other participants in that meeting shared Gore's misunderstandings of the financial minutiae discussed at a meeting in November 1995. She also allowed herself to consider that Gore had no motive to lie, since the factual inaccuracies of his recollections were superfluous to establishing his innocence of the telephone solicitation charges. Finally, she also took into account affidavits filed by the lawyer who had represented Gore at the time of the alleged false statement, former Watergate special prosecutor James Neal, of Nashville's Neal & Harwell. Neal swore that he had advised Gore of the misunderstandings contained in his recollections before he recounted them to investigators, and had even shown Gore documents, addressed to him, that were already in the possession of Reno's investigators, that demonstrated the inaccuracy of those recollections. Gore had nevertheless insisted on relating his actual, imperfect memories, Neal swore, because they were "the truth." Finding that "the vice president was expressly aware that he had little to gain and much to lose in admitting his misconception of the true facts," Reno found "no reasonable prospect that these facts could support a successful prosecution" and declined to appoint an independent counsel. Whether or not you would have done the same thing, it is a big leap to assume, as so many pundits and editorial boards have, that Reno and anyone who agrees with her -- including the majority of her advisers -- must be crooked.

Certainly Litt doesn't feel that way. He told me several months ago that Reno made her independent counsel decisions strictly on the up-and-up ["Fort Reno," March]: "If she thinks [the law] applies, she'll do it. If she doesn't, she won't. Nobody has ever come up with the slightest shred of evidence that political considerations entered into her decisions. It's just not so."

The crimes of Riady, Huang, Trie, and others make speculation about "cultural differences" between East and West tempting. Yet the more you study the campaign finance charges, the clearer it becomes that these particular Asian-born individuals understood our system better than we did. What they failed to appreciate is how seriously we take our fig leafs. They understood correctly that our system is corrupt. The part of La Bella's memorandum to which we should be paying closest attention is his reportedly savage critique of our existing campaign laws and the administrative framework for enforcing them -- perhaps the most noteworthy portion of his report, since it went so far beyond the requirements of his assignment.

Similarly, some of the most remarkable testimony in this entire affair came last September, when Radek explained to Senator Thompson's committee that many of the disputes the task force prosecutors were having with FBI agents stemmed from the agents' failure to understand the counterintuitive fine points of the campaign laws. Radek explained, for instance, that agents were having trouble comprehending that while it might be a crime for a federal officeholder to sell access for money, it was not a crime for him to sell access for campaign contributions.

Significantly, when Radek -- congressional punching bag that he has become -- gave this almost unbelievable testimony, no one quarreled with him.

Whoever did would be urging personal indictment. Every $500-a-plate fund-raiser would instantly become felonious. So would the 1995 RNC brochure that promised Republican Eagles -- those who give $15,000 annually -- that they could participate twice yearly in "strategy and issue committee sessions with prominent elected Party leaders from the U.S. Senate and House on such topics as the budget and tax reform, international trade and regulatory reform, health care, and foreign policy." So would the RNC's 1994 "Team 100" brochure, which promised that contributors who agreed to give $175,000 over a four-year period would get to meet with "Bob Dole, Phil Gramm, Trent Lott, Newt Gingrich, Dick Armey, Lamar Alexander, Richard Lugar, Jack Kemp, Dick Cheney, and other Republican leaders."

So legislators who believe that this bureaucrat Radek doesn't know what he's talking about had better watch their step. If they ever win one of these arguments, the next session of Congress may convene in the exercise yard of the Federal Correctional Institution in Danbury, Connecticut.

Mr. LANTOS. For those who doubt the thoroughness of the FBI and Justice Department investigation, we must not forget that nearly every allegation, no matter how credible, has also been investigated by this committee. This committee has issued over 900 subpoenas, 450 formal document requests, taken sworn testimony from 200 individuals and spent over $8 million investigating allegations as wide ranging as foreign contributions, Indian casinos, influence peddling, coal deposits in Utah, conduit contributions and the First Lady's trip to Guam.

No one has stopped Chairman Burton from investigating any subject that he wants. In fact, with the consent of every single Democrat on this committee, he immunized three key witnesses in the campaign finance investigation—John Huang, Charlie Trie and Johnny Chung—and brought them before our committee. Yet none of them had any evidence implicating any senior White House or DNC official in intentional wrongdoing.

The fact of the matter is, the 1996 elections have been thoroughly investigated at a cost of millions and millions of taxpayer dollars. The question of whether or not an independent counsel should have been appointed may be an interesting legal issue, but ultimately it has no bearing on the facts. Director Freeh, who strongly disagreed with the Attorney General's decision not to seek an independent counsel, told our committee, "On issues of fact, the Attorney General and I do not disagree."

As a result of the discussion we are having here today with our witnesses, it is little more than an academic exercise designed to embarrass the Attorney General. It has no bearing on whether credible allegations were properly investigated.

Now, I have some questions for you, Mr. Radek. The Attorney General has been accused of deliberately misinterpreting the law in order to avoid appointing an independent counsel to investigate allegations of Democratic wrongdoing. Chairman Burton accused her of, "protecting the President and his friends. Janet Reno has defied the spirit and the letter of the independent counsel statute." In fact, from the documents that the Department of Justice provided our committee, the Attorney General appears to have applied the Independent Counsel Act in a uniform manner regardless of who the target of the investigation was.

One may agree or disagree with her reading of the law, but it is simply inaccurate and untrue to say that she has not applied the law even-handedly. In seven cases, including that of Interior Secretary Bruce Babbitt, she has determined that the evidence supports the appointment of an independent counsel. In other cases, including cases involving the FBI Director, former White House Deputy Chief of Staff Harold Ickes, CIA Director George Tenet, and Vice President Gore, the Attorney General has decided that the evidence does not support the appointment of an independent counsel. But it appears that the legal standard was the same in each case.

Mr. Radek, it is evident that there were vigorous arguments about whether to appoint an independent counsel in these cases. According to the testimony of FBI Director Freeh, these disagreements were the result of a good-faith disagreement as to legal standards. Do you agree?

Mr. RADEK. I do agree.

May I say with respect to your comment about being even-handed, in all of my conversations with the Attorney General, she was always concerned about an even application of that statute. And in each and every instance she would tend to go over previous appointments by both herself and other Attorneys General and compare the decision that she was going to make on what was in front of her, so that she could consider whether she was engaged in an even application of that statute.

Mr. LANTOS. Thank you very much.

Mr. Esposito, what is your view on this subject?

Mr. ESPOSITO. I really have no view on it as far as the—I'm not familiar with all the referrals that she made and did not make.

I can say this: My dealings with the Attorney General was quite extensive, especially in my last year in the FBI. I found her to be a person of high integrity, a person who would do the right thing.

Mr. LANTOS. Thank you.

Mr. Gallagher, same question.

Mr. GALLAGHER. On the issue of the interpretation of the statute, I would defer to the FBI General Counsel, who is available should you want to pursue that issue further.

With respect to the discussion between the FBI and the Department of Justice, yes, we did disagree on interpretation of the statute. We had weekly meetings with the Attorney General that—we had the opportunity, and she did invite our comments. We had debates with Lee Radek.

There was 1 day in April 1997, a day and a half, I recall, that they had—we had about a 12 to 14-hour discussion on the independent counsel statute. So we did debate; we did disagree, but we had our opportunity to speak our opinion.

Mr. LANTOS. Much has been said of the La Bella memo. I want to read a letter from Charles La Bella to the Attorney General dated July 20, 1998.

And I want to make this whole letter part of the record, Mr. Chairman.

Mr. BARR. Hearing no objection, so ordered.

[The information referred to follows:]

U. S. Department of Justice

Campaign Financing Task Force
Criminal Division

1001 G Street, NW
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Washington, D.C. 20530

(202) 307-0655
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July 20, 1998

The Honorable Janet Reno
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Madam Attorney General:

I want to begin by reiterating what I have said on numerous occasions to you and others. During my stay in Washington, you have been courageous, diligent and inspirational in the discharge of your duties. It has been a privilege to watch you in action. You have the keen instincts and sound judgment of a seasoned prosecutor, as well as a command of the law that any appellate lawyer would envy.

When I arrived I promised you that I would investigate aggressively the matters before the Task Force. I also promised that I would keep you apprised about the evidence so that you could make informed decisions concerning Task Force matters when called upon to do so. I have tried to keep those promises. However, because the investigations were primary, I have not been able, until very recently, to step back and develop an overview. Rather, my focus was on each case and each series of allegations in the context of a single investigation. My weekly reports to you were reflective of that investigative focus.

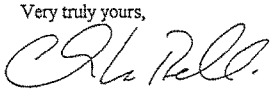
I have always wanted the luxury of time to step back and review the entire fabric of evidence and the applicable law without regard to a specific allegation or investigation. Now that I feel confident that the investigations are well in hand, I, together with Jim DeSarno, have done just that. During the course of this review, it became evident that "the big picture" provided a new context within which to reconsider whether a need exists for the appointment of an Independent Counsel. While I recognize that this is an issue which you have always had before you, there is amassed now a body of evidence, much of it new, much of it woven together for the first time, which is relevant to your determination.

The memorandum which I gave you last week is our best effort to compile all the evidence into one analytic framework. The exercise of doing this has been a valuable opportunity to reassess our ongoing investigation in its entirety. The cumulative weight of the information

available, when the various investigations are interwoven, has been greater than we recognized when we focused on the individual allegations.

I can ask no more than that you review the evidence afresh. Based upon my experience since coming to Washington, it is clear to me that emotions run high whenever we begin a discussion of the Independent Counsel Act or the need to commence a preliminary inquiry. Everyone has an opinion and they tend to be emotionally guarded and advanced. I am sure that to the extent the report, or its substance, is shared within the Department, the process will become adversarial. I do not think we are capable of the type of collegial exchange which would be beneficial. However, despite the inevitable adversarial process ahead, I have complete faith that you will consider the recommendation in our memorandum fairly and apply to it your seasoned judgment. I have felt always that you have been receptive and welcoming of my viewpoint, and I appreciate enormously your willingness to consider my position and advice. I know that you will consider carefully and impartially the views presented in the memorandum given to you last week. You have never been, and I believe cannot be, swayed by the inordinate political pressures which this high-visibility investigation carries. Whatever you decide, I am deeply grateful that you have given me the opportunity to serve on this Task Force. It has been an privilege to work with you.

Very truly yours,



Charles G. La Bella

Mr. LANTOS. "Dear Madam Attorney General, I want to begin by reiterating what I've said on numerous occasions to you and others. During my stay in Washington, you have been courageous, diligent and inspirational in the discharge of your duties. It has been a privilege to watch you in action. You have the keen instincts and sound judgment of a seasoned prosecutor, as well as a command of the law that any appellate lawyer would envy."

Now, let me return to the case of the Vice President, because for obvious political reasons this is now much in the media. In the case of the Vice President, it appears that—it appears clear that everyone agreed that no case should be brought against him. The only dispute was about whether the technical requirements of the independent counsel law were triggered.

Charles La Bella, in a November 1997 memo to Mark Richard, wrote, "Ten out of ten prosecutors would decide that no further investigation would be warranted."

In another memo to Mark Richard on November 30, 1997, Mr. La Bella wrote, "On the whole, I find the Vice President to be credible and forthcoming."

Similarly, Mr. Litt, another experienced prosecutor at the Justice Department, wrote to the Attorney General on November 22, 1998, "As a prosecutor, I would not bring this case."

Now, I have a question, Mr. Radek. Given these quotes, it seems to me that we are not talking about a situation where anyone was trying to protect the Vice President. This was simply a legal dispute among lawyers and people of good faith as to whether the final decision not to bring a case should be made by the Attorney General or an independent counsel.

Would you agree with this?

Mr. RADEK. Yes, that's the way most of us felt. That was the import of the decision. But that still required us to make an analysis under the statute. We were bound by the law.

Mr. LANTOS. Do you have any comment on this, Mr. Esposito?

Mr. ESPOSITO. No. The investigation of the Vice President and the memos you referred to came about after I left the FBI.

Mr. LANTOS. Mr. Gallagher.

Mr. GALLAGHER. No, Mr. Lantos.

Mr. LANTOS. Now, Mr. Radek, Chairman Burton recently stated, "Janet Reno has been blatantly protecting the President, the Vice President and their party from the outset of this scandal." But what this statement ignores is that the Attorney General applied the same standard to Republicans as she did to Democrats.

Has the Attorney General ever declined to appoint an independent counsel in any cases involving Republicans?

Mr. RADEK. Yes, she has.

Mr. LANTOS. What were those cases?

Mr. RADEK. I'm not at liberty to say, sir.

Mr. LANTOS. It appears to me that if this Attorney General were trying to further a partisan agenda, she would have appointed an independent counsel in those cases involving Republicans rather than declining to do so under the same standards she did with respect to the President and the Vice President.

There have been allegations that Haley Barbour, then chairman of the Republican National Committee, participated in a scheme in

1994 to obtain nearly $2 million in illicit foreign funds for the Republican National Committee.

Mr. Radek, did the Attorney General consider appointing an independent counsel in that case?

Mr. RADEK. I don't recall a formal decision on whether an independent counsel should conduct that investigation or not. But during the weekly meetings with the Attorney General, matters were brought to her attention that would necessarily require a decision on her part as to whether or not she felt there was a conflict either on her own part or on the part of the Department of Justice. If she did, then she could consider those under the discretionary clause of the independent counsel statute. Mr. Barbour is not a covered person under the independent counsel statute so the mandatory provisions would not apply.

Mr. LANTOS. What is the status of the Haley Barbour investigation?

Mr. RADEK. I believe it's closed, but I haven't been involved in it in some time.

Mr. LANTOS. Charles La Bella states in his July 16, 1998, memo as follows:

> For its part, the Republican National Committee had its fair share of abuses. The Barbour matter is a good example of the type of disingenuous fundraising and loan transactions that were the hallmark of the 1996 election cycle. In fact, Barbour's position as head of the Republican National Committee and the National Policy Forum and the liberties he took in these positions make the one $2 million transaction even more offensive than some concocted by the DNC. Indeed, with one $2 million transaction, the RNC accomplished what it took the DNC over 100 White House coffees to accomplish.

Mr. Radek, Mr. La Bella's point seems to be that what Mr. Barbour did was similar to, if not more offensive than, what Democrats were alleged to have done.

Did the Attorney General apply the same standards to that Barbour matter as to the alleged Democratic abuses?

Mr. RADEK. In terms of investigating and a decision to prosecute, absolutely. In terms of independent counsel issues, the Attorney General would not be required to make an independent counsel decision on someone who is not a covered person, although she could utilize the statute under the discretionary clause.

But I can say that with that, as with all matters, independent counsel statute or otherwise, one thing the Attorney General was always concerned about was the even application of the law, the criminal law, and the independent counsel statute.

Mr. LANTOS. Mr. Esposito, do you agree that the Attorney General acted even-handedly?

Mr. ESPOSITO. I have no comment, because I'm not familiar with the matter that you're discussing.

Mr. LANTOS. Do you have any reason to doubt that she acted even-handedly?

Mr. ESPOSITO. No, in all matters that I've dealt with her on, she acted very even-handedly.

Mr. LANTOS. Mr. Gallagher.

Mr. GALLAGHER. All matters that I observed, she—the Attorney General certainly acted even-handedly.

Mr. LANTOS. Among the numerous documents that the Department of Justice has provided to this committee in connection with

the 1996 campaign finance investigations is a memo written by you, Mr. Radek, dated September 25, 1998, to Assistant Attorney General James Robinson of the Criminal Division. In that memo you state, "The issues in the Republican National Committee investigation are largely identical to the issues in the Democratic National Committee investigation. The principal difference is that the facts of the RNC media project have not been fleshed out as much."

Did you think these issues were similar?

Mr. RADEK. I thought the issues were similar. That's not to say I thought they should have been fleshed out. I thought that the entire Common Cause allegation was—did not allege a crime; and for that reason, from the very beginning, I thought all arguments that it should be investigated or that it should have an independent counsel appointed on that issue were—just had no merit.

For purposes of clarification, let me say the Common Cause issue is that both the Republicans and the Democrats engaged in a pattern of using soft money to pay for issue ads, which ads were for the purpose of helping them in the election. And Common Cause argued that those caused those to become, in their character, Federal money expenditures or hard money expenditures.

Mr. LANTOS. In a November 22, 1998 memo, Robert Litt wrote that a lesser standard of imputed knowledge was apparently applied to the Director of the FBI, regarding whether he testified falsely to Congress on March 5, 1997, and to the Vice President. Specifically, Mr. Litt states, "In the Freeh matter, there was evidence from which one could have inferred that Director Freeh knew his statement was false, yet the Attorney General found this outweighed by other evidence showing that he did not."

Mr. Radek, do you see a difference between how the Attorney General handled the decision about whether to appoint an independent counsel to investigate Director Freeh and how she handled the decision about whether to appoint an independent counsel to investigate the Vice President?

Mr. RADEK. I see no difference. I think they were quite similar, and I thought she considered one when applying the statute to the other.

Mr. LANTOS. Now, over the past several years, Chairman Burton and others have followed the pattern of making sensational allegations before the facts have been gathered. Further investigation has shown that many of these allegations turned out to be unsubstantiated. I wish to offer a few examples of these unsubstantiated allegations.

In November 1995, Mr. Burton suggested on the House floor that Deputy White House Counsel Vince Foster had been murdered. What are the facts? Investigations by the Federal Park Police, Robert Fisk, and Kenneth Starr have all concluded that there was no evidence of any wrongdoing connected to Mr. Foster's suicide.

An allegation was made in January 1996 by Mr. Burton, stating that the White House had illegally contacted the IRS to harass fired White House employees. What are the facts? Investigations by the General Accounting Office, the Department of Justice and the Department of Treasury all concluded that there was no improper contact between the White House and the IRS.

In June 1996——

Mr. BARR. The gentleman's time has expired. The Chair recognizes the majority counsel for 30 minutes.

Mr. WILSON. Good afternoon. I know it's been a fairly long day, and I've got a lot to cover and I'll go as quickly as I can.

A couple of preliminary things: Mr. Radek, I wanted to ask you about a number of specific memos, but just some housekeeping matters.

Does the Public Integrity Section, Mr. Radek, now handle matters that relate to appointments of special counsels under the Department of Justice regulations?

Mr. RADEK. We will administer—but we haven't had the opportunity to do so yet—the special counsel regulations, yes, sir.

Mr. WILSON. Are there any pending decisions that pertain to appointing special counsels in any campaign finance matters?

Mr. RADEK. There are none.

Mr. WILSON. Mr. Radek, in July 1997, I believe July 6, 1997, you gave an interview to the Sunday New York Times Magazine, and you went on the record as saying, "Institutionally, the independent counsel statute is an insult." Prior to your statement the Attorney General had supported the statute both very publicly and under oath.

At the time you made the statement in 1997, were you authorized to make that statement by anybody at the Department of Justice?

Mr. RADEK. Not specifically. I was authorized to give that interview by the Department.

Mr. WILSON. But specifically, on taking the point about the independent counsel statute being an insult, did you ask anybody in the Department of Justice whether that was an appropriate official position of the Department?

Mr. RADEK. I did not, but of course I wasn't giving an official position of the Department; I was giving my own opinion.

Mr. WILSON. Did you ask anybody in advance of giving that position?

Mr. RADEK. I did not.

May I say, sir, that with respect to that remark, while it—maybe the use of the word "insult" is unfortunate. What I said and what I meant is a position that has been agreed with by many. Most particularly, when the statute was being reenacted time before last, Associate Attorney General Rudy Guiliani testified before the Senate Committee on Governmental Affairs against the reenactment of the statute, and he said,

> The system depends quite properly on the integrity of the Department of Justice personnel. The assumption upon which the special prosecutor law is premised that the Department of Justice should not be trusted to investigate or prosecute certain Federal offenses is simply unfounded. There is no basis for assuming that the Department of Justice personnel cannot fairly and thoroughly investigate crimes by public officials. The conduct of such investigations and prosecutions should be returned to those professionals in the Department of Justice who are best equipped to handle them.

Mr. WILSON. I understand that there are many people that object to the various parts of the independent counsel statute. But what I was asking is, when the Attorney General had taken a very public position under oath about the statute, whether you had asked in advance of going out and making that statement whether that

was an appropriate statement to make. But let me move on to something else.

Exhibit 60—there is no need to turn to it; I will ask a very specific question about it—is a memorandum from your deputy to Assistant Attorney General Robinson. It notes that, "Lee J. Radek, Chief, Public Integrity Section, has been recused from this matter." And he was discussing matters pertaining to investigations of Harold Ickes.

And the simple question is, why were you recused from that matter?

[Exhibit 60 follows:]

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

December 14, 1998

MEMORANDUM TO THE ATTORNEY GENERAL

Through: THE DEPUTY ATTORNEY GENERAL

From: James K. Robinson
Assistant Attorney General - Criminal Division

Re: Preliminary Investigation of Harold Ickes

Attached hereto is a memo to me from Principal Deputy Chief Joseph E. Gangloff of the Public Integrity Section which contains additional information concerning the preliminary independent counsel investigation of Harold Ickes. This additional information was requested by the Attorney General. Mr. Gangloff, based upon his review of the supplemental factual and legal analysis summarized in his memo, recommends that "the preliminary investigation of Mr. Ickes' alleged perjury should be closed without the appointment of Independent Counsel." This recommendation provides additional factual and legal support for my November 23, 1998, recommendation to the Attorney General not to seek an Independent Counsel. In my view, the Attorney General should determine, based upon a careful review of the facts and the law, pursuant to 29 U.S.C. § 592(b), "that there are no reasonable grounds to believe that further investigation is warranted" with respect to the possibility that Mr. Ickes committed knowing and willful perjury during his September 22, 1997, deposition.

Enclosures

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

December 14, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General

FROM: Joseph E. Gangloff
Principal Deputy
Public Integrity Section

SUBJECT: Additional Information Concerning Preliminary Investigation of Harold M. Ickes

This memorandum and its attachments provide supplemental information in connection with the pending Independent Counsel Act preliminary investigation of a perjury allegation against Harold M. Ickes.[1]

On November 30, 1998, the Attorney General obtained a 60-day extension of the preliminary investigation of Ickes in order to consider the potential significance of new information provided by Independent Counsel Carol Elder Bruce, which Bruce had uncovered in the course of investigating a perjury allegation against Interior Secretary Bruce Babbitt. In addition, during discussions with the Attorney General on November 30, 1998, questions were raised about: (1) whether Ickes's congressional testimony suggested a pattern of attempting to conceal instances in which Ickes and the White House sought to assist important constituents or contributors, including labor unions; (2) whether other matters that have been investigated by the Campaign Financing Task Force indicate a pattern of conduct by Ickes that might provide a motive to

[1] Lee J. Radek, Chief, Public Integrity Section, has been recused from this matter.

conceal the Kantor call; (3) the status and significance of former Teamsters official Bill Hamilton's unwillingness to provide an interview or proffer; and (4) whether the questioning of Ickes was so fundamentally ambiguous that criminal prosecution would be precluded as a matter of law. Each of these issues is addressed below and in the attached materials.

In addition, after the November 30th extension, we offered Ickes's principal counsel, Robert S. Bennett and Amy Sabrin, of Skadden, Arps, an opportunity to make a supplemental submission and specifically suggested that they address the issue of whether Ickes's other congressional testimony evidenced an intent or motive to conceal Administration efforts to court important contributors and constituents. Their submission, dated December 10, 1998, argues: (1) that Ickes's other testimony shows that he had no motive to lie about White House contacts with organized labor or other constituents; (2) that "all witnesses confirm that the underlying events were not especially memorable;" (3) that "there is no reasonable prospect that the facts could support a successful prosecution;" and (4) that "there is no conflict justifying the exercise of the Attorney General's Discretionary Authority." The Skadden, Arps supplemental submission is Attachment A hereto.

Information from Carol Bruce. Attachment B hereto is a Memorandum dated December 8, 1998, from [redacted] Trial Attorney, Public Integrity Section, and [redacted] Trial Attorney, Campaign Financing Task Force, to me and David A. Vicinanzo, Supervising Attorney, Campaign Financing Task Force, summarizing [redacted] December 2, 1998, meeting with prosecutors from Bruce's office about information they had uncovered about Ickes. The memorandum concludes that none of the evidence gathered by Bruce about the Hudson casino matter or any of the other three matters discussed in her November 24, 1998, draft letter provides any support for the theory that Ickes had a motive to lie about Diamond Walnut. Nor did Bruce's office have any information suggesting that Ickes had attempted to conceal his role in attempting to assist important contributors or constituents by arranging meetings or checking on the status of matters pending within executive branch departments or agencies. To the contrary, with respect to the Hudson casino matter, Ickes acknowledged in congressional testimony that he had talked to Fowler about the casino application and recalled that he asked Jennifer O'Connor to follow-up with the Interior Department to determine the status of the matter.

attorney names

Testimony by Ickes about Constituent and Labor Courting Matters. The Skadden, Arps submission highlights a number of instances in which Ickes provided congressional testimony about special favors that he and others within the White House

provided for important constituents and contributors. We have verified the accuracy of the excerpts they quoted. Moreover, as detailed in the attached memorandum dated December 14, 1998, from [redacted] Deputy Chief, Public Integrity Section and [redacted] to you (see Attachment C hereto), our independent review of Ickes's 30 hours of congressional testimony confirms the basic claim made by Skadden, Arps, that Ickes repeatedly provided -- and in some cases volunteered -- testimony about constituent and union courting activity by the White House, which included not only special perks, but also facilitating access to high-level officials and checking on the status of pending matters. Accordingly, in my view, the totality of Ickes's testimony strongly suggests that he had no motive and no intent to conceal information about the Kantor call from the Senate Committee.

Information about Ickes Uncovered by the Campaign Financing Task Force. Attachment D is a memorandum from David A. Vicinanzo, Supervising Attorney, Campaign Financing Task Force, to Assistant Attorney General James Robinson, which concludes that although Ickes was a central figure in many aspects of the 1996 DNC and Clinton/Gore campaigns, the Task Force is unaware of any information indicating a general pattern of illegal or improper conduct by Ickes that might reasonably suggest a motive for Ickes to feign a diminished recollection about the Diamond Walnut matter generally, or the Kantor call specifically.

Status of Bill Hamilton. Teamsters political director Bill Hamilton was the only witness of any potential significance who did not provided us an interview or a proffer. Hamilton is currently under indictment in the Southern District of New York for perjury and other charges in connection with the Teamsters contribution swap investigation. Hamilton's attorney, Robert Gage -- who does not seem to be familiar with the unique dynamics of a preliminary investigation under the Independent Counsel Act -- has refused to provide us a proffer and has expressed concern that if Hamilton's proffer did not "say what the Justice Department wants it to say" we might seek to charge him with false statements or obstruction of justice.

According to Assistant U.S. Attorney Michael Horowitz from the Southern District of New York, Gage has recently proposed that Hamilton would be willing to provide a proffer that would include exculpatory information about Ickes's involvement in the Diamond Walnut issue in exchange for a downward sentencing departure under § 5K1.1 of the U.S. Sentencing Guidelines (departure for providing substantial assistance to law enforcement). We have told Horowitz that he should not promise Hamilton any sentencing concessions in exchange for information relating to Ickes and Diamond Walnut, but if the USAO and Hamilton were to reach a cooperation agreement based on his

substantial assistance relating to other matters, we would be interested in hearing what Hamilton has to say about Diamond Walnut and Ickes. The latest word from Horowitz is that negotiations with Hamilton have stalled.

For the reasons set forth in the original Radek/Vicinanzo Memorandum, I believe there is no need to wait for a possible Hamilton proffer before resolving the preliminary investigation. It seems unlikely, even if Hamilton were inclined to provide a statement, that he would be able to provide any credible evidence that would add to what we already know about the potential falsity of Ickes's professed inability to recall. The Southern District of New York has allowed us to review the contents of Hamilton's personal computer, which was searched during their investigation. We have also received by subpoena from the Teamsters and Podesta Associates all documents in their files relating to Diamond Walnut, including any documents evidencing contact with the White House or Ickes on the issue. The information in these contemporaneous documents makes clear what other Teamster officials and the Teamsters lobbyists have corroborated, i.e., that Diamond Walnut was an important issue to the Teamsters and one that they discussed on several occasions with Ickes and his staff. There is no reason to believe that Hamilton -- who presumably would be a bit gun-shy about possibly being charged with additional lies -- would say anything inconsistent with his own contemporaneous documentation or with the consensus recollection of his colleagues.

I do not believe that Hamilton's current unwillingness to give his reportedly "exculpatory" proffer about Ickes warrants delaying a decision to close the preliminary investigation without appointment of an independent counsel. If, however, the Attorney General were inclined to seek appointment of an independent counsel -- either because we have not heard from Hamilton or for other reasons -- it would make sense to wait to see if Hamilton's potentially exculpatory information might make a difference.

Appellate Analysis of Legal Ambiguity Issue. Attachment E hereto is a Memorandum dated December 2, 1998, from Patty M. Stemler, Chief, Appellate Section, Criminal Division and [redacted] Attorney, Appellate Section, Criminal Division, to Robert S. Litt, Principal Associate Deputy Attorney General. The memorandum analyzes whether the questions posed to Ickes were so "fundamentally ambiguous" as to preclude prosecution as a matter of law. The Stemler/[redacted] memorandum concludes that there is "a good chance" that a court would dismiss a perjury indictment (or grant a Rule 29 motion) in this case as a matter of law based solely on the ambiguity of the question.

CONCLUSION

In my view, the supplemental factual and legal analyses summarized above further confirm that the preliminary investigation of Ickes's alleged perjury should be closed without the appointment of an independent counsel. Ickes's congressional testimony is replete with instances in which he provided -- and on multiple occasions volunteered -- information about situations in which he and the White House courted the Teamsters, other labor unions, and other important donors and constituents with perks, special access, and status calls. To the extent that Ickes's other testimony sheds light on Ickes's motive and intent to lie about Diamond Walnut it strongly suggests that he had no motive or intent to conceal. Nor is there anything in the information uncovered by the Campaign Financing Task Force or the Office of Independent Counsel Bruce that suggests that the Kantor call to Diamond Walnut was anything more than an innocuous and inconsequential attempt to mollify the Teamsters, i.e., there is no reason to believe that the Kantor call was part of larger pattern of illegal or improper conduct by Ickes or the Administration.

Finally, the Appellate Section memorandum convincingly explains why the questions posed to Ickes were so vague and ambiguous that it is likely that a court would dismiss a potential perjury charge as a matter of law. It should be noted that the Appellate Section's analysis does not even reach the factual issue of whether Ickes's characterization of his lack of recollection was actually true. The futility of attempting to prosecute Ickes's alleged perjury is even clearer when the legally defective questioning is combined with the following facts: (1) the underlying conduct -- the Kantor call -- was not illegal, improper, or even politically embarrassing (as evidenced by the fact that the Administration had previously intervened in the strike in a very public way); (2) Ickes repeatedly volunteered information about the Diamond Walnut issue, the Teamsters, labor unions, and important constituents generally; (3) all the other witnesses involved in the Kantor call describe it as an inconsequential, routine matter, i.e., not a matter Ickes would likely have remembered two and a half years later; (4) Ickes had no reason in advance of the deposition to anticipate questioning about Diamond Walnut; and (5) the Administration steadfastly refused to do what the Teamsters really wanted, which was to alter substantive trade, agricultural, and environmental policy for the purpose of pressuring Diamond Walnut.

Applying the Independent Counsel Act standard as articulated in the recent filing relating to Vice President Gore, I recommend that the Attorney General conclude here "that there is no reasonable prospect that these facts could support a successful prosecution" (see In re Albert Gore, Jr.,

Notification of Results of Preliminary Investigation, 11/24/98, at 18).

Attachments

TABA

Mr. RADEK. I was involved in the Ickes independent counsel matter up till close to the end. Near the end of the investigation, Independent Counsel Carol Bruce contacted—who had been in touch with the task force, because there were some related matters—indicated that there might be a close connection between the investigation that was ongoing with respect to Mr. Ickes and her investigation of Mr. Babbitt.

I was recused from the Babbitt investigation because the subject of that investigation was a close friend of my wife's family.

Mr. WILSON. During the last couple of years, the committee has had some interest in some investigations, internal investigations, within the Department of Justice of leaks about sensitive campaign finance matters or statements that have been made by senior Department of Justice officials. And we are well aware that the Department of Justice Office of Professional Responsibility has conducted a number of leak investigations within the Department of Justice.

First of all, Mr. Radek, have you been questioned in any of these leak investigations?

Mr. RADEK. I have been asked to sign affidavits or statements, sworn statements, in a number of leak investigations, some related to campaign finance, yes.

Mr. WILSON. That sounds like the answer is, no, you've not been questioned; you've just been presented with an affidavit to sign.

We can move a bit faster if you'll just answer the simple question.

Mr. RADEK. The answer is, I don't recall being interviewed, but I would have to check my records. I would rather check with OPR to be sure; I don't recall.

Mr. WILSON. Are you aware of whether the Department of Justice has identified the sources of any of the leaks about the campaign finance investigations that have been ongoing?

Mr. RADEK. No, I'm not aware.

Mr. WILSON. I'll put an example up of something, and then I want to ask you a few questions about that.

On October 2, 1998, the following statement appeared in the Washington Post, "And a senior Justice Department official said that some investigators have concluded that John Huang does not have information that would support the prosecution of the Democratic officials who received and spent the funds he raised or the White House officials who promoted his career in Washington."

Now, I'm well aware that the Department of Justice has conducted an investigation about this leak. If I were a defense attorney, I would be very happy to receive information about this, because it talks about the substance of the investigation. It's a tipoff. And if I were a defense attorney, I would understand at that point that I could hang tough, and I wouldn't have to provide much cooperation because it says that senior DOJ officials have come to the conclusion.

Now, when you were making determinations about whether to recommend an independent counsel appointment, did you ever take any of these leaks into account when you made your recommendations?

Mr. RADEK. In what way?

Mr. WILSON. Well, that it was a matter that perhaps necessitated an outside look at the investigation?

For example, if the individual privy to sensitive information is leaking information to defense counsel, that stands for the proposition perhaps that somebody from outside should be in charge.

Mr. RADEK. I can't say that I took any leak into consideration as the basis of a conflict of interest for the Department, no. I don't recall any leaks that were detrimental to the investigation on any of the particular independent counsel matters. There may have been some; I just don't recall. But I agree with your statement that leaks are just devastating, and they can be—they can just derail an investigation as quick as anything. And it was quite upsetting to see leaks in this matter as well as any other.

Mr. WILSON. From our perspective, one of the things you said in the New York Times interview comes to bear here, and that is, when you were quoted, you took a very public position in the New York Times. You said, "The statute is a clear enunciation by the legislative branch that we cannot be trusted on certain species of cases. And when you have individuals who are leaking information that's beneficial to defense attorneys, that in some respects goes to support the underlying proposition."

Mr. RADEK. Well, sir, what you're saying is that the Department of Justice prosecutors who are trying to do these cases are responsible for the leaks, and I wouldn't make that leap of faith. I don't know who is responsible for them, but I don't think it was anybody on the investigative and prosecutive teams.

Mr. WILSON. But therein lies the question for us. It's somebody privy to the information, and that person is providing the information in a public way, and it ultimately gets back to defense counsel.

I think you answered the question. The question was, did you take this into account when you were considering whether somebody independent should handle these cases; and your answer was no. So that's a fair characterization.

Mr. RADEK. Right.

Mr. WILSON. One of the things that's been troubling—this is a small point, and I'll move away from it—you've been very public. You attended the White House correspondents dinner, the radio and television correspondents dinner.

Just some brief help on whether you think it's appropriate for the head of the Public Integrity Section which—all of the Department of Justice should be nonpolitical, but to be the guest of media while there are ongoing leak investigations and there are sensitive investigations of public corruption matters, is it an appropriate thing for the head of the Public Integrity Section to go to events like that?

Mr. RADEK. I thought it was appropriate or I wouldn't have gone. I don't leak, and I think my reputation in the Department is solid enough that people aren't going to believe that I'm leaking. And so I didn't feel many qualms about going to such events, where I saw you, I believe, at one of them.

Mr. WILSON. One of the things that you had said earlier about the meeting with Mr. Esposito and Mr. Gallagher was, you were not in the habit of lying to them, and consequently, that stands for the proposition you wouldn't have made something up when you

were talking to them. I want to focus on a few things that came out in memoranda that you wrote—and not theories or legal theories or speculative aspects, but some factual matters that were put down in memoranda that you wrote—and then there were responses to those factual matters from other individuals.

And the first one I wanted to take a look at, and I think there's a book there in front of you, exhibit No. 7 in front of you. It's a memo from yourself to the acting Assistant Attorney General Mark Richard, and the subject of the memo is, "The Position of the Office of Legal Counsel on Legal Issues Relevant to the Independent Counsel Matter Involving Vice President Gore."

[Exhibit 7 follows:]

U. S. Department of Justice

Washington, D.C. 20530

October 2, 1997

MEMORANDUM

TO: Mark M Richard
Acting Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Position of the Office of Legal Counsel on Legal Issues Relevant to the Independent Counsel Matter Involving Vice President Gore

Criminal Division attorneys conferred with attorneys of the Office of Legal Counsel (OLC) on October 1, 1997, to obtain OLC's views regarding our memorandum dated September 29, 1997, which analyzes 18 U.S.C. § 607 as applied to Vice President Gore's alleged conduct in making fund-raising telephone calls from his White House office.

The OLC attorneys made clear at the outset that they have only had a few days to think about the issues presented in our memorandum and that they have not reached a consensus among themselves on most of the relevant issues. Thus, the OLC attorneys indicated that they were in a position to share their individual thoughts and concerns with us but not to articulate a formal OLC position as to the various relevant issues. The following describes the OLC attorneys' major concerns and clarifies our views on these issues.

Proof of a "Hard Money" Solicitation

The OLC attorneys expressed concern that our memorandum implies a solicitation of a "hard money" contribution by Vice President Gore could be proved entirely by the fact that portions of at least two checks were deposited by the Democratic National Committee (DNC) into a hard money account.

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EXHIBIT 7

We agree that a conviction could not be obtained under section 607 merely by establishing that the Vice President asked donors to send checks to the DNC and that portions of those checks subsequently were deposited into hard money accounts. We did not mean to imply anything to the contrary in our memorandum. The fact that portions of checks the DNC received from the Vice President's solicitees were deposited into hard money accounts is neither necessary, nor by itself sufficient, to prove that the Vice President violated section 607. However, this fact, when combined with the facts known prior to the publication of the September 3 Washington Post story, led to the conclusion that the Department had received sufficient information to warrant further inquiry into whether the Vice President may have violated section 607.

In the course of our thirty-day initial inquiry into this allegation, we have discovered evidence from which it can be inferred that the Vice President may have known at the time he made his fund-raising telephone calls that the DNC needed hard money to keep its message on the airwaves. See Memorandum at 15-16. In addition, one donor, Robert Johnson, recalls that in the course of their brief telephone conversation during which Vice President Gore asked him to donate $30,000 to the DNC, the Vice President spoke of facing a tough election and asked him to help in getting out the Democrats' message. See Memorandum at 10. Moreover, investigation has verified that portions of at least two donations resulting from the Vice President's solicitations -- including Mr. Johnson's donation -- in fact were deposited into DNC hard money accounts.

While the above evidence by itself would in our view be insufficient to secure a conviction of Vice President Gore under section 607, we are not deciding whether to indict; we are merely recommending whether further investigation is warranted. The evidence described above supports an inference -- weak as it is -- that the Vice President may have solicited contributions to benefit federal candidates. This inference leads us to conclude that the information available to the Department at the present time is sufficiently specific and credible as to warrant the opening of a preliminary investigation. In this preliminary investigation, we will continue to gather facts relevant to the determination of whether the Vice President, while in his White House Office, may have asked any individual to make a hard money contribution to the DNC.

Constitutional Considerations and the 1979 OLC Opinion

The OLC attorneys expressed concern that, similar to the 1979 OLC Opinion, our memorandum does not analyze whether application of section 607 to the President would interfere with his constitutional prerogatives.

Our analysis of the question whether the Vice President (as well as the President) qualifies as "any person" under section 607 relies, in part, on a statement in OLC's 1979 opinion that "the prohibition in [section 607] is to be universally observed." See Memorandum at 19 (quoting OLC Opinion at 4). The present OLC attorneys noted that this statement is dictum, given that OLC concluded in 1979 that section 607's predecessor did not apply to President Carter's conduct because the meeting in question occurred in a White House room not "occupied in the discharge of official duties."

We understand that, within the next ten days, OLC will explore in more depth whether section 607 can constitutionally be applied to the President and the Vice President. The OLC attorneys indicated that the analysis could differ with respect to the President and the Vice President, inasmuch as the Vice President has fewer constitutionally committed functions than the President.

United States v. Thayer

Several OLC attorneys expressed concern that our memorandum gives too much weight to United States v. Thayer to the extent it suggests that Thayer may "mean[] that section 607 is only violated when a solicitation is directed to an individual inside the federal workspace." Memorandum at 32 n.46.

We recognize in our memorandum that Thayer "involved facts that are the reverse of those in issue here." Memorandum at 30. However, we continue to believe it possible -- indeed likely -- that a court analyzing section 607 would afford Thayer considerable weight in deciding whether a fund-raising telephone call originating inside a federal office and directed to a person not located on federal property would be considered a solicitation "in" a federal office.

The OLC attorneys suggested that further research be done with respect to other statutes banning certain forms of "solicitation" to determine where a telephonic solicitation is considered to "occur." We agree that this would be helpful. The Appellate Section of the Criminal Division is in the process of analyzing this issue.

Whether a Case Against the Vice President Would Be Prosecutable Given the Complex Legal Issues Presented by the Analysis of Section 607

The OLC attorneys suggested that, in light of the numerous complexities presented by our analysis of the elements of section 607, we should additionally consider whether a prosecution of the

Vice President could survive a motion to dismiss on due process or other grounds.[1]

Our role in the initial thirty-day period is to determine whether we have specific and credible information suggesting that the elements of a section 607 violation may have been met. Our understanding of the Independent Counsel Act is that, if the answer to this question is in the affirmative, the Attorney General should open a preliminary investigation under the Act, unless it is otherwise apparent that the Vice President has an absolute defense to prosecution, such as a valid claim that the statute of limitations has run. It is not clear to us at the present time whether the due process concerns inherent in a prosecution of the Vice President under section 607, if any, are serious enough to rise to the level of providing the Vice President with such an absolute defense to prosecution.

As noted in footnote 48 of our memorandum, the Appellate Section of the Criminal Division will consider in connection with a preliminary investigation whether the Department has an established policy not to prosecute technical 607 violations where the solicitation in question is received by prospective donors not present on federal property. We would welcome OLC's input on this question in the course of a preliminary investigation.

The Conversion Allegation

In light of the Independent Counsel Act's provision that an established policy of the Department may be taken into account in the context of a preliminary investigation, OLC questioned whether it was appropriate for us to state at this time that we do not intend to pursue further the section 641 allegation with respect to Vice President Gore because "[f]ederal prosecution of such a small conversion would be contrary to established Departmental policy." Memorandum at 2 n.1.

We agree that it would be premature for the Attorney General to formally find that further investigation of the conversion allegation is precluded by an established Departmental policy. Footnote one of the Memorandum was intended to explain why we do not plan to further investigate the conversion allegation in the course of a preliminary investigation.

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[1] In this regard, Martin Lederman of OLC noted that the portion of our election law manual which states that "[p]rosecutable violations of section 607 may arise from solicitations that can be characterized as 'shakedowns' of federal personnel," U.S. Department of Justice, Federal Prosecution of Election Offenses 68 (6th ed. Jan. 1995), may imply a belief that a prosecution in another situation, such as that presented here, would not survive a due process challenge.

DOJ-VP-00116

Memorandum

Subject	Date
Consultation with Public Integrity	October 2, 1997

To	From
Lee J. Radek Chief Public Integrity Section Criminal Division	Dawn Johnsen Acting Assistant Attorney General Office of Legal Counsel

We have received a copy of the memorandum of today's date from you to Mark Richard on the subject "Position of the Office of Legal Counsel on Legal Issues Relevant to the Independent Counsel Matter Involving Vice President Gore." As I have already expressed to you, we have several serious concerns about this memorandum, which I will briefly describe below.

First, OLC lawyers participated in the meeting in order to provide background information and ideas that might be helpful to your office in its work. We expressly noted that we had taken no positions with respect to any of the issues that might be discussed at the meeting. Despite the disclaimer in the memo's second paragraph, both the title of the memo and the subsequent discussion (and, indeed, the existence of the memo itself) suggest that OLC stated some positions to which your office needed to respond in writing. Such a suggestion is inconsistent with both OLC's intention and the comments actually communicated in the meeting. We made clear at the beginning of the meeting that it was to be a brainstorming session in which we could discuss issues freely without taking any positions, formal or informal. Your memo unfortunately leaves a different, and incorrect, impression.

Second, to the extent that the memorandum attempts to report remarks made by OLC lawyers at the meeting, it does so incorrectly and incompletely. Thus, not only did the memorandum leave the mistaken impression that "OLC positions" were expressed, it also mischaracterized the comments that individual lawyers offered in during the meeting. Given the freewheeling and unstructured exchange of ideas that took place, it is not surprising that many comments were inaccurately reported, and we certainly do not mean to suggest that the inaccuracies were in any way intentional, but it further underscores the inappropriateness of the memorandum given the nature of the meeting it tries to describe.

Finally, on a positive note, we are more than willing to continue a dialogue with you and your lawyers on these complicated issues. We think that constructive cooperation is essential in a

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case like this one. We trust, however, that our participation will not again be characterized as it was in today's memo.

Mr. RADEK. I'm sorry, exhibit 7?

Mr. WILSON. Exhibit 7, yes.

Mr. RADEK. I have it. I'm sorry.

Mr. WILSON. There's—I'm off on this subject that I just described. If you turn five pages into the exhibit, there's another memorandum, and it's from the acting head of the Office of Legal Counsel to yourself——

Mr. RADEK. Yes.

Mr. WILSON [continuing]. And it was drafted on the same day as your memorandum to Mr. Richard. And I just wanted to read a couple of quotes from this memo and ask you some things about them.

At the end of the first paragraph, the head of Office of Legal Counsel states, "As I have already expressed to you, we have several concerns about this memorandum which I will briefly describe below."

She goes on—at the end of the second paragraph, she goes on to state, "Your memo unfortunately leaves a different and incorrect impression."

And then following from that at the start of the third paragraph—again that's the acting head of the Office of Legal Counsel who states, "To the extent that the memorandum attempts to report on remarks made by OLC lawyers at the meeting, it does so incorrectly and incompletely." Thus, not only did the memorandum leave the mistaken impression that, "OLC positions," were expressed, it also mischaracterized the comments that individual lawyers offered during the meetings—during the meeting, singular.

Do you recall whether Dawn Johnsen spoke to you about this memorandum?

Mr. RADEK. I don't recall whether she spoke to me about this memorandum. She spoke to me about these issues.

Mr. WILSON. Now, Ms. Johnsen was a Clinton appointee, correct, head of Office of Legal Counsel?

Mr. RADEK. Yes. I'm not sure she was a political appointee. She was acting at this time, but she was head of Office of Legal Counsel.

Mr. WILSON. OK. Well, moving to another subject and——

Mr. RADEK. Aren't we going to put this memo in context as to what it is? It's an argument among some people who said some things at a meeting. And the fact is that OLC didn't want to be put on the record as taking any position. So it was in Dawn Johnsen's interest to take off the record what my memorandum said that they had said. In fact, I double-checked with several people at the meeting who agreed with me that my memo was accurate.

Mr. WILSON. So you dispute her characterizations?

Mr. RADEK. I do, and did at the time.

Mr. BARR. Would counsel yield? I'm glad that Mr. Radek's memory is a little bit better. Maybe we can go back to something else and see if your memory is better.

We talked earlier about the memorandum from the Director of the FBI to Mr. Esposito, dated December 9, 1996, and the meeting between Mr. Esposito and yourself that you acknowledge took

place, although you apparently have no recollection of what was said there.

Have you ever seen this memo before, December 9, 1996, from the Director of the FBI to Mr. Esposito?

Mr. RADEK. Yes, I saw this memo for the first time on the 4th of last month.

Mr. BARR. When?

Mr. RADEK. The 4th of last month.

Mr. BARR. You never saw it before then?

Mr. RADEK. No.

Mr. BARR. Did you ever hear about it before then?

Mr. RADEK. No.

Mr. BARR. You're quite sure?

Mr. RADEK. Yes.

I heard about it the day before. I'm sorry.

Mr. BARR. So your memory is very clear on the fact as you sit here today your testimony is that you never saw this memo before, never even heard about this memo before just recently?

Mr. RADEK. Yes.

Mr. BARR. At the time—you now say you first saw this memo just recently—did you place a memo into the record to the Director of the FBI, to the Attorney General, to Mr. Esposito or anyone else disputing the characterization of your meeting and your comments with Mr. Esposito?

Mr. RADEK. I did not.

Mr. BARR. OK. Why not?

Mr. RADEK. The one thing is, I can't even remember the meeting, so it's difficult for me to categorically deny something at a meeting that wasn't there.

Mr. BARR. So you're not categorically denying these comments then?

Mr. RADEK. Yes.

Mr. BARR. You are?

Mr. RADEK. Oh, yes.

Well, I'm not categorically denying them. I'm saying that I don't remember the meeting and I don't remember saying them. And it is not something I would have said.

Mr. BARR. I thought earlier you said you remembered the meeting, you just didn't remember the comments.

Mr. RADEK. I do not remember the meeting.

Mr. BARR. We're getting somewhere, I suppose, now. I would like to place in the record a copy if we could have somebody give these copies to the witnesses. This is a page—I believe, Mr. Esposito, you can testify to this when you see it, of your calendar. Even though other people say that they don't keep calendars, apparently, you find them useful.

Mr. ESPOSITO. Well, I just happened to look through some boxes and actually found my 1996 calendar.

Mr. BARR. And this page is in fact, is it not, an accurate photocopy of a page from your calendar from the month of November 1996, the date of November 20, 1996?

Mr. ESPOSITO. Yes, it is.

Mr. BARR. Is it an accurate photocopy of the original?

Mr. ESPOSITO. Yes.

Mr. BARR. Was it kept, at the time, in the normal course of business?

Mr. ESPOSITO. Yes, sir, by either myself or my secretary.

Mr. BARR. At 4:30 p.m. on November 20, does it not indicate your meeting with Mr. Radek and his deputy?

Mr. ESPOSITO. Yes.

Mr. BARR. Mr. Radek, does this refresh your recollection in any way?

Mr. RADEK. It does not. I saw this this morning.

Mr. BARR. So you still maintain under oath that you have no recollection of that meeting having taken place?

Mr. RADEK. That's correct.

Mr. BARR. But you do state that you never made statements such as related to the Director of the FBI to Mr. Esposito in the middle of the memo dated December 9, 1996, that you were under pressure and that the Attorney General's job might hang in the balance?

Mr. RADEK. I don't recall the meeting. I don't recall the conversation. I am sure that——

Mr. BARR. Is it possible that you made those statements?

Mr. RADEK. It is not possible. Not the statement that you just said but the statement in the memo that says I was under pressure because the Attorney General's job hangs in the balance.

Mr. BARR. That is not what it says. All I'm saying is whatever these statements were, I am not characterizing them in any way, whatever the statements were, as reflected in this memo, by the head of the FBI to Mr. Esposito, reflecting also the fact that the Director of the FBI related these statements to the Attorney General, you have, one, no recollection of your having made them and you dispute them; is that accurate?

Mr. RADEK. The statements in this memo, yes, sir.

Mr. BARR. Now, therefore, when you first saw this memo and you saw statements attributed to you that you apparently very strongly disagree with, you took no steps to correct the record?

Mr. RADEK. I informed the Deputy Attorney General of what I just told you.

Mr. BARR. You took no steps verifiable on the record to correct the record? You didn't send anybody a memo?

Mr. RADEK. I told the Deputy Attorney General that I did not remember the meeting and this is not something I would have said.

Mr. BARR. You didn't relate that to the head of the FBI?

Mr. RADEK. No, I don't usually talk to the head of the FBI?

Mr. BARR. You don't usually talk to the head of the FBI?

Mr. RADEK. That's correct.

Mr. BARR. You met with Mr. Esposito?

Mr. RADEK. I deal with Mr. Freeh's subordinates.

Mr. BARR. Do you take exception or umbrage to these statements attributable to you?

Mr. RADEK. I do. They are not correct in my opinion.

Mr. BARR. You have taken no steps on the record to correct them?

Mr. RADEK. I have informed the Deputy Attorney General that they were incorrect in my opinion.

Mr. BARR. Counselor.

Mr. WILSON. Just going back to our previous discussion, effectively you have said that the head of the Office of Legal Counsel is misstating, in fact lying. She said very clearly that your memorandum mischaracterized comments of individual lawyers offered during the meeting. It also says that the reports of remarks made by OLC lawyers in the meeting does so incorrectly and incompletely and you obviously dispute that?

Mr. RADEK. Yes, I do.

Mr. WILSON. Just turning briefly to the Common Cause allegations, when were the Common Cause allegations formally closed out?

Mr. RADEK. That is a matter of some dispute. It was my impression that when the Attorney General testified before Congress saying that she had closed them out, that that ended the matter. But you have to understand that the Attorney General had one working command throughout the campaign finance investigation, and that is leave no stone unturned. If we heard it once, we heard it a thousand times, and I am sure that these gentlemen along side me will support that.

When Mr. La Bella came on board and brought Mr. Clark with him from San Diego, they chose to reexamine——

Mr. BARR. Is that Mr. Steve Clark?

Mr. RADEK. Yes, it is.

Mr. BARR. Thank you.

Mr. RADEK. They chose to reexamine that issue, so it was probably never closed for this reason. The Attorney General said that she was not going to close anything unless the Director of the FBI signed off on it. I am sure that he never signed off on the Common Cause allegations. To the extent in my answer to Mr. La Bella's memo I said that it had been disposed of, technically I was incorrect.

Mr. WILSON. You said in your memorandum, "The Common Cause allegations were thoroughly considered, analyzed at length and closed on their merits." There is no ambiguity there. Apparently 20 days after you made this very strong pronouncement, the head of the Criminal Division, which would be your boss, said that there should be preliminary investigation to possibly consider appointment of an independent counsel and it surprises me that you have taken a very strong position in a memorandum to a superior of yours about something being closed and yet 20 days later a superior of yours is saying that we should do an independent counsel investigation. You said it wasn't closed.

Mr. RADEK. But there is an intervening event which was that the auditors of the FEC came out that this could violate the statute. This is the first time that the FEC had given any hint that this might be a violation.

Mr. WILSON. We still have you saying the allegations were thoroughly considered, analyzed at length and closed on their merits. If there was an ongoing investigation, perhaps that is not accurate.

Mr. RADEK. The FEC is not the Department of Justice, and it was my position that it was up to the FEC to decide whether this was a violation. It was my opinion at the time I wrote that that it was closed. I overlooked the fact—I was aware that Mr. La Bella had been revisiting the issue. Yet the Attorney General had testi-

fied that she had resolved the matter. In my mind that resolved it. The fact that Mr. Robinson reopened it was due to an intervening fact and that was the audit report. Mr. Robinson's memo in my opinion were not inconsistent, but my opinion was inaccurate because I had ignored the fact that Mr. La Bella and Mr. Clark had been reexamining it. I apologized to Mr. La Bella after I made that mistake and he pointed it out.

Mr. WILSON. This is important for us to go through. There appears to be a series of these types of errors or misrepresentations, and one of the concerns we have is that you are providing advice on appointment of independent counsel, and one would hope that the advice you are providing was accurate and full.

Mr. RADEK. That's correct.

Mr. WILSON. And there appears to be a problem with this one.

Exhibit 11 is a memo from yourself to the Acting Assistant Attorney General Mark Richard, the head of the division which the Public Integrity Section is in. The memo is dated November 21, 1997. On page 5 of this memo you state very clearly, "It is worthy of note that the four prosecutors who participated in the interview each found the Vice President to be credible and forthcoming."

[Exhibit 11 follows:]

U. S. Department of Justice

Washington, D.C. 20530



November 21, 1997

MEMORANDUM

TO: Mark M Richard
Acting Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Independent Counsel Matter: Vice President of the United States Albert Gore, Jr.

INTRODUCTION

The Public Integrity Section has completed a preliminary investigation based on information suggesting that Vice President of the United States Albert Gore, Jr., a covered person under the Independent Counsel Act Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have solicited campaign contributions from his White House office in potential violation of 18 U.S.C. § 607, in connection with fundraising telephone calls he made on behalf of the Democratic National Committee (DNC). Section 607 makes it a felony for any person to solicit or receive a so-called "hard money" contribution (i.e., a contribution intended to influence a federal election) in federal office space. It is not illegal under section 607 to solicit "soft money" -- i.e., non-federal -- contributions in a federal office.[1]

[1] Such solicitations would, of course, be Hatch Act violations for virtually all executive branch employees. The President and the Vice President are specifically exempted from the Hatch Act.

In a separate memorandum, we have analyzed several legal issues presented by application of section 607 to the conduct of the Vice President (as well as the President). In a second memorandum, we have discussed whether, assuming that the Vice President may have technically violated section 607, a written or other established policy of the Department would bar a prosecution of the Vice President (or the President) under section 607, given the facts as we know them. We will not repeat the legal discussion of those issues here; rather, for the purposes of this memorandum, we will assume that section 607 can be applied to telephone calls made by the Vice President from his official workspace and that no written or other Departmental policy exists which would forestall a prosecution of the Vice President based on those facts. All of these issues remain open, at the time of this writing, for your decision, and will affect the nature of the final report to the Special Division of the Court.

Given the facts known to us at the initiation of the preliminary investigation, we determined it was appropriate to explore two possible scenarios that might hypothetically support a section 607 theory. First, the Vice President may have been directly requesting a hard money contribution from some of these donors -- "I hope you'll make a contribution to support my reelection effort." Second, the Vice President may have known about the DNC's practice of depositing a portion of large contributions into hard money accounts, and therefore, when he made vague or ambiguous requests for support, without specifically referring to the campaign or the reelection effort, he was soliciting hard money because he knew that a portion of whatever he raised would be so designated.

In the course of our investigation, we have discovered substantial evidence that Vice President Gore asked several prospective donors to make soft money contributions to the DNC during telephone solicitations made from his White House office. We have no direct evidence that the Vice President asked any prospective donor to make a hard money contribution in the course of his telephone solicitations. There are a few circumstances and a few ambiguous descriptions by donors of their conversations with the Vice President which raise the question of whether he may have been asking for what could be characterized as hard money contributions. However, in each of these instances, an opposite, and more likely inference can be drawn. That is, the same evidence can be viewed as leading to the stronger contrary inference that the Vice President was asking the donor in question to make a soft money contribution. Moreover, to the extent that an argument can be made that the Vice President could be viewed as having objectively asked for hard money in any of these instances, there is, we believe, clear and convincing evidence that the Vice President subjectively intended to ask only for soft money.

We conclude that further investigation of these allegations is not warranted because an independent counsel would not be able to demonstrate that the Vice President knowingly solicited any hard money contributions from his White House office. Accordingly, we recommend that the Attorney General decline to seek the appointment of an independent counsel in this matter.

The Attorney General needs to reach her decision on this matter no later than December 2, 1997, 90 days after the Department of Justice received a letter from a majority of the Majority Party members of the Committee on the Judiciary for the United States House of Representatives requesting that she seek appointment of an independent counsel in this matter. 28 U.S.C. § 592(a)(1). Because we do not yet know the decision on our recommendation with respect to the legal issues forwarded to you earlier, and in order to give the Attorney General as much time as possible to consider this decision, we are not attaching draft documents to be filed with the Special Division of the Court to this recommendation, although we are proceeding to prepare these documents immediately.

II. SUMMARY OF SECTION 607

In relevant part, section 607 provides as follows:

> (a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

The elements of this statute seem deceptively straightforward: in order to make out a violation of section 607, the government must establish that: (1) "any person," (2) solicited or received, (3) any "contribution" within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 (FECA) (i.e., any "gift . . . made by any person for the purpose of influencing any election for federal office"), (4) in any room or building occupied in the discharge of official duties, (5) by any person mentioned in 18 U.S.C. § 603. Each of these elements are discussed in our earlier memorandum, mentioned above.

The element at the heart of the factual investigation in this matter is whether the Vice President's solicitations were

for a "contribution within the meaning of section 301(8) of the FECA"; in other words, whether they were for hard money.[2]

III. SUMMARY OF FACTS[3]

On September 3, 1997, the Washington Post reported that records made available by the White House revealed that the Vice President had solicited political contributions by telephone from his West Wing Office. Of the donations received as a result of these calls, the Post reported that more than $120,000 were deposited into the DNC's federal, or "hard money," account. The Post went on to report that the DNC had reimbursed the U.S. Treasury in the amount of $24.20 for fundraising telephone calls apparently made from the Vice President's office. The article implied that the Vice President may have violated section 607 by making fundraising solicitation calls from his West Wing Office which resulted in "hard money" contributions.

Based on the fact that a plausible inference could be made that if hard money contributions had been made by a donor, the solicitor may have asked for a hard money contribution, it was determined that it was necessary to conduct an inquiry to determine whether the Vice President may have solicited hard money contributions from his White House office. We undertook to conduct the legal research described above to consider whether section 607 would apply under these circumstances, and at the same time undertook an investigation intended to fully explore the facts of this matter.

Our investigation has conclusively established, and indeed the Vice President freely admitted in the course of our interview of him, that the telephone calls in issue were placed from his office in the White House, and that the primary purpose of the calls was to further the fundraising interests of the DNC. Thus, the primary factual matter at issue in this investigation was whether the Vice President solicited hard -- as opposed to soft -- money contributions in the course of his conversations with prospective donors.

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[2] Because the FECA defines a "contribution" in terms of its intent to influence a federal election (as opposed to state or local elections), these funds are generally categorized by the Federal Election Commission (FEC) and by political committees as "federal" and "non-federal." The popular press and common parlance frequently refer to the funds as, respectively, "hard" (regulated contributions intended to influence a federal election) and "soft" (all other political donations).

[3] The FBI has reviewed the facts set out in this memorandum and concurs with their accuracy.

A. THE INTERVIEW OF THE VICE PRESIDENT

As you know, as part of our preliminary investigation, we interviewed the Vice President. A summary of the information provided by him is included to provide an appropriate context within which to consider the remainder of the investigative results. Although we do not put undue weight on the statements of the subject of an independent counsel preliminary investigation in reaching our factual conclusions, it is worthy of note that the four prosecutors who participated in the interview each found the Vice President to be credible and forthcoming. A copy of the Report of Interview is attached to this memorandum.

According to the Vice President, in the Fall of 1995, he and the President volunteered to make fundraising telephone calls for the DNC media fund in order to decrease the number of fundraising events away from Washington, D.C., that would have been both time-consuming and physically exhausting. He stated that it was his intent to solicit soft, non-federal money from the people he called. Indeed, he believed at the time, in error, that by law an individual could not give any more than $2000 in federal money to the DNC per election cycle. He was not aware that the DNC had a practice of allocating the first $20,000 given by a donor in a calendar year into a hard money account. He was also unaware of any prohibition against making fundraising solicitations from his West Wing Office so long as the calls were not being paid for by taxpayer dollars.

This last point is important when reviewing the interview results of the donors. He states that he was not consciously avoiding mention of hard money or seeking to make it clear in all conversations that he was discussing only soft money, as he might have if he had been aware that section 607 barred solicitation of hard money contributions from his office. Rather, he was consciously seeking to raise soft money, a fact which he made explicitly clear in a number of conversations to encourage contributions, but which he was unaware was necessary to make the solicitations legal.

A more detailed description of the interview of the Vice President follows:

1. Inception of the Fundraising Call Plan

In response to a pressing need for additional funds to keep the DNC media ads on the air, the Vice President and the President volunteered to make telephone solicitations during the

Fall of 1995.[4] It was understood by him at the time that money for the DNC's ads could be raised more easily if both the Vice President and the President were personally involved in the fundraising efforts. The Vice President remembers first discussing the topic of the calls during what he termed a "small group" meeting with the President and close aides.[5] He believes he may have advocated for the phone call project since phone calls were an easier, less expensive, and less time-consuming way of raising funds than out-of-town fundraising events.

Soon after the "small group" meeting, the topic of fundraising phone calls for the media fund was again raised during a November 21, 1995 meeting attended by the President, Vice President, several close aides, and DNC Finance officials in the White House Map Room. Several documents discussed during this meeting show that the media fund, originally budgeted at $10 million for calendar year 1995, was in need of several million dollars to stay afloat through the end of the year.[6] Another memo discussed during the meeting suggests a plan for raising "an additional 4 million to be applied to paid television" by the end of the year that includes additional events and "18-20 calls by POTUS/10 calls by VPOTUS" projected to yield $1.2 million. Significantly, a document entitled "DNC Budget Analysis -- 11/21 POTUS PRESENTATION" provides a more precise description of the additional funds needed at the time:

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[4] The Vice President described the media fund as an undertaking to help raise money for the media campaign, a series of television and radio ads first suggested by Dick Morris and begun in the Spring of 1995. The primary goal of the ads, according to the Vice President, was to prepare for an anticipated battle with Speaker of the House Newt Gingrich and congressional Republicans over the federal budget. He also admitted that a secondary goal of the media campaign was to frame the Democratic position for the Clinton/Gore reelection effort in 1996. The Vice President, who early on became an advocate for the campaign, would take part in deciding, among other things, the content of the ads that would be aired.

[5] The Vice President does not recall the date of the "small group" meeting when the calls were first discussed. Nor does he remember who was in attendance, although he states that Leon Panetta and Harold Ickes were frequently invited to this type of meeting. He recalls many of the meetings as impromptu sessions that did not appear on his schedule.

[6] A memo by Harold Ickes dated December 18, 1995 and addressed to the President, among others, describes several of the documents and memorializes the fact that they were discussed during the Map Room meeting.

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5. To increase the media budget from $10.0 million to $13.0 million, the DNC needs to raise or borrow an additional $3.0 million. Approximately $1.0 million, or 35% of this money must be hard.

6. To meet this need, the DNC plans to raise an additional $2.2 million with new events in December 1995, and borrow the remaining $0.8 million.

7. Assuming $1.0 million of this new $2.2 million raised for the media budget is hard, the DNC will end the year with . . .

(Emphasis in the original).

While the Vice President believes that the fundraising phone calls probably would have been discussed during the November meeting in the Map Room, he does not think it would have been anything but a passing reference to the need to make the calls. He stated that the number of phone calls was not discussed at this or any other meeting. He also claimed that the location from which the calls were to be made did not come up during meetings held at this time.

The Vice President does recall that the general topic of the media budget being increased was raised and discussed during the November meeting. He does not recall a discussion at this or any other meeting about the DNC's specific need, at this time, for both hard and soft money in order to keep the ads on the air. In fact, the Vice President recalls that he believed, at the time, that the ads were paid for with non-federal money, claiming that he was not aware that there was a hard money component to the media fund.[7]

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[7] As discussed more fully below, when shown the memos from Harold Ickes discussed during the meeting, the Vice President stated that as a general rule he did not read Ickes's memos since, among other things, the memos usually advocated a position on an issue that would invariably be discussed at length at a meeting anyway. In the Vice President's view, these memos were ideological tracts used by Ickes in his struggle with Morris over DNC funding priorities. Specifically, the memos were designed to show that Morris's extravagant funding plans would bankrupt the DNC. The Vice President explained that for these reasons he would typically move them from his in-box to his out-box without further review. He added that the absence of "checkmarks" on any copies of the Ickes documents, often used by the Vice President to note that he had read a document, was a further indication that he had not read these documents.

2. The Calls

The Vice President admitted that he made telephone solicitation calls from his West Wing Office on several occasions beginning in the end of November or early December of 1995 and continuing into May of 1996. He confirmed that on some occasions Peter Knight sat in the office with him. According to the Vice President, David Strauss was present once or twice and Heather Marabeti, his Executive Assistant, may have sat in on some of the calls.

The Vice President stated that the phone call sessions, which were entered on his daily schedule during this period, would begin with an assistant handing him a stack of DNC call sheets. He claimed that he rarely read these sheets until his assistant announced that a prospective donor was on the line. Once contact was made, the Vice President would read the call sheet, noting spouse information and additional items often as he was inquiring about the health of the spouse or other family members. The Vice President said that he would often, although not always, launch immediately into his "pitch," asking the prospective donor for his or her support.

The Vice President, in some instances, remembered specific conversations. For example, he recalled that Robert Johnson suggested that the DNC buy advertising time on black-owned radio and television stations. Similarly, he recalled talking to Peter May about making an appearance at the Simon Weisenthal Center. For the most part, though, his memory was limited to confirming that certain notations that he, David Strauss, or Peter Knight made on the call sheets accurately set forth what was said at the time.

When shown two such notations referring to "soft money" and, in one case, "non-federal money," the Vice President stated that he often mentioned "soft money" in his pitch to prospective donors. By way of explanation, he said he understood "soft" or non-federal contributions as being most often--"90%"-- corporate contributions. Thus, he felt that the people he was talking to would be more likely to give if they were specifically told that he sought "soft" money since they would know that they could give from corporate or business assets instead of their own personal money. He added that since he believed, at the time, both that individuals were unable to give more than $2000 in federal contributions to the DNC per election cycle and that the DNC needed non-federal money to run the media campaign, he never asked for federal contributions. Moreover, asking only for soft money corresponded to his belief that the media campaign was to be funded entirely with soft money.

3. Knowledge of the Law

The Vice President said that the first time he became aware that his telephone solicitations from the West Wing Office may have violated a federal statute was March 2, 1997, the Sunday that Bob Woodward's story of his fundraising telephone calls ran in the Washington Post. After reading Woodward's account, the Vice President recalls watching as Sunday talk show guests speculated that his calls, reported by Woodward that morning, may have been prohibited by the Pendleton Act if made from a government office. Before that, he had not been advised that soliciting from a government office may be a problem. To the contrary, he was left with a vague impression from the Ethics Committee training he received while in Congress that section 607 does not apply to telephone calls made from federal space.

The Vice President explained that the "advice" he mentioned during a press conference related to advice on how the calls would be paid for and had nothing to do with the legality of making calls from the White House. Specifically, he recalls asking his Executive Assistant, Heather Marabeti, "if it is alright" to initiate and dial the calls from his White House office. This question, according to the Vice President, was posed before one of the first scheduled phone call sessions when he learned that calls would not be routed from, and, therefore billed to, Peter Knight's office as had been done with previous "thank you" calls in 1995. Upon hearing from Marabeti that a calling card would be used, the Vice President believed that the calls could be legally made from his West Wing Office.

The Vice President explained that his concern, at the time, over the charges for the calls was tied to his knowledge of the House and Senate rules that barred outgoing fundraising calls from government offices but allowed incoming calls. According to the Vice President, the congressional rules regarding fundraising phone calls concerned the reimbursement issue, not where the call was actually made. As he understood the rules, so long as the call would not be billed as a government expense, it could take place on a phone in an official office. By way of example, he pointed out that he was advised, while in Congress, that if he left a message for a prospective donor, it was fine to leave his office number. When the party called him back he could then make a solicitation over his office phone since there would be no charge to the taxpayer. The Vice President claimed that he followed these rules closely while in the House and the Senate.[8] His understanding of these rules also led him to raise the

[8] At least two other witnesses interviewed during our 60-day investigation confirmed that then-Senator and Congressman Gore would leave his office and go to an apartment rented by his parents to handle campaign-related matters.

reimbursement issue when he began making fundraising calls from the White House.[9]

B. THE DNC'S ALLOCATION PRACTICE

As will be explained in more detail below, in four or five instances donors made contributions to the DNC as a result of the Vice President's solicitation calls, and a portion of those contributions was deposited into the DNC hard money account. As you are aware from the results of the 30-day initial inquiry, we confirmed that the deposit of a portion of several donors' contributions into hard money accounts was not a result of their request, but rather was done by the DNC without their knowledge. This, of course, significantly undercuts the basis for the reasonable inference on which this investigation was initially founded, that a hard money contribution may have been made as a result of a solicitation for hard money. Nevertheless, we explored the circumstances of this diversion practice in order to permit an informed consideration of a possible theory that if the Vice President was aware of the DNC's practice, and then made vague or ambiguous solicitations for a political contribution, in general terms without specifying whether the contribution was to be hard or soft, this conduct could be considered to violate section 607.

Based on the results of our investigation, there is little, if any, reason to believe that the Vice President had any awareness of the DNC's practice. As set out above, he states that he was unaware of it, and that, in fact, he believed that hard money donations to the DNC were severely limited to relatively small sums. No witness states that he or she had any knowledge or reason to believe that the Vice President was aware of the allocation practice. Furthermore, each of the White House staff we interviewed denied any knowledge of the allocation practice, and Bradley Marshall, the only DNC official involved in the allocation process at the DNC who had any contact with the White House, does not recall ever discussing the issue with anyone at the White House. Only the Ickes/Marshall memoranda, described in detail below, provide any support even for an inference that he may have known of the allocation practice.

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[9] When asked why he made similar fundraising calls from the offices of the DNC shortly before the 1994 elections, the Vice President explained that he went to the DNC on that occasion primarily to boost morale among young DNC staffers who were (justifiably) concerned that the Democrats might be about to lose control of the Congress. This explanation is consistent with that of Terry McAuliffe, who was interviewed in the course of the initial inquiry. The Vice President stated that he did not make these calls from the DNC out of a concern that it might be unlawful to place them from his White House office.

Moreover, even if it could be demonstrated that the Vice President read the memoranda, which he denies, this fact, by itself, does not support an inference that the Vice President asked any donor to make a hard money contribution.[10]

1. Background

Sometime after the 1994 election, the DNC, in an effort to maximize its federal contributions, began a practice of splitting large checks into federal and non-federal components if the donor's preference was not made clear on the checks.[11] Once split, the portion of the gift designated as federal was deposited into the DNC's federal account until the donor objected to this allocation on a form attached to a "redesignation letter" or otherwise communicated his or her wishes to the DNC.[12] Because the DNC failed to send "redesignation letters" from late 1995 through the first half of 1996, however, portions of several of the contributions solicited by the Vice President that were deposited initially into the DNC's federal account remained federal contributions.

2. March 1995 to November 1995

From March through November 1995, Christine Scullion, as Director of Finance Operations, handled the incoming contributions at the DNC. Before Scullion was given a contribution, a three-part check tracking form was partially completed by the Finance Department fundraiser responsible for the gift. Once the top portion noting name, address, date of birth, and other details about the donor and the second portion noting information on how, when, and where the gift was made was

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[10] The DNC's allocation practice continues under review by the campaign financing task force, which is exploring it as a possible fraud. Should that ongoing inquiry develop evidence that the Vice President or any other covered person participated in the practice, we will reconsider at that time its implications under the Independent Counsel Act.

[11] Prior to this, when DNC fundraisers wanted to raise large donations, they typically asked donors to provide two checks, one up to $20,000 for the federal portion, and the other for the remaining amount to be deposited into a non-federal account.

[12] According to Joe Sandler, General Counsel of the DNC, in his testimony before the Senate Governmental Affairs Committee, this practice of "parking" funds in the DNC's federal account until the donor provided final approval was "grounded, at least by analogy, in sections 102 and 103 of the FEC regulations." The merits of this position will be explored in the course of the task force's review of the allocation practice.

filled in, the check was attached to the form and turned over to Scullion personally or left on her desk for processing.

Once Scullion received a check and tracking form, it was her job to make the initial determination of how to allocate a contribution. Normally, she would make this determination from the check itself. For example, if the check were a corporate check, she would direct that it be applied to a non-federal corporate account. Similarly, if the check were drawn on a personal account but had "non-federal" written on it, it would be directed to a DNC non-federal individual account. Scullion entered her allocation determination on the bottom portion of the tracking form.

Next, Scullion would enter the data into a temporary "hold file" in the DNC's AS400 computer system. Scullion would then send the original check and tracking form to Accounting Department employee Michelle Pollard who would check the information in the computer against the hard copy provided to her. If all matched, Pollard would take the transaction out of the "hold file" and "post it" to the general database. Pollard then readied the check for depositing into one of several DNC accounts.

Soon after she began, Scullion was told by Neil Reiff, Deputy General Counsel of the DNC, that a portion of any check over $20,000 could be allocated into the federal account so long as a form letter was sent out asking the donor's permission for the allocation.[13] It was Scullion's job to determine which of the contributions received by the DNC could be split into federal and non-federal contributions. As part of this job, she would send the "redesignation" letters, signed by Richard Sullivan, Director of the Finance Department, to each donor whose gift was being split. She also informed the Accounting Department by first e-mailing a list and later sending a copy of the letter itself along with the contribution check.[14]

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[13] It was Scullion's understanding that the DNC sought federal money from its contributors but she does not recall being told to try to maximize a contributor's federal gift.

[14] Scullion believed at the time that funds which she designated for splitting were deposited into a non-federal account and kept there until the donor approved the "split." As a result, Scullion apparently did not tell the Accounting Division when donors failed to return their redesignation forms. This lack of communication may have resulted in funds remaining in the DNC's federal account without the approval of the donors.

3. November 1995 to March 1996

In November 1995, Susan Ochs took over Scullion's duties in the DNC's Finance Department. Ochs was trained to process incoming contributions by Scullion, her predecessor, and by Neil Reiff. As part of this training, Ochs was instructed by Scullion and Reiff to split or "redirect" contributions from individuals who had not exceeded their annual contribution limit of $20,000 for federal money into the DNC federal account. Like Scullion, it was Ochs's impression that the DNC sought federal contributions from its donors. She understood that the policy of splitting the contributions was implemented to achieve this goal.

In implementing the directions she was given to split or "redirect" contributions, Ochs would first determine if a donor providing a large check had given less than $20,000 in federal contributions to the DNC. If so, Ochs would make a mark next to the non-federal individual box on the check tracking form and then write "redirect?" -- sometimes with a dollar amount entered -- to indicate to Michelle Pollard in Accounting that the contribution was eligible to be split, with a portion to be deposited into the DNC's federal account. She would then forward the check and the tracking form to the Accounting Department.

While Ochs was told that she was responsible for asking donors to agree to the splitting of their contributions, she believed, throughout her time on the job, that Pollard and the Accounting Office would inform her when the contributions were, in fact, split. Apparently unknown to Ochs, though, each contribution noted with a "redirect?" was deposited into the DNC federal account by Pollard, and her supervisors Maria Galdo and Bradley Marshall, the DNC's Chief Financial Officer, without getting back to her to let her know this had occurred. As a result, numerous contributors were not made aware of the final disposition of their contributions.

The DNC's practice apparently caused several donors, including Andrew Morse, Robert Johnson, and E. Blake Byrne, all solicited by the Vice President, to exceed their federal contribution limits for calendar years 1995 or 1996. Because these contributors were unaware that the DNC had allocated $20,000 of their gift to a hard money account, they did not know that additional federal contributions made to other candidates or committees and totalling more than $5000 would cause them to exceed their annual federal contribution limit of $25,000.

Scullion, Ochs, Pollard, Galdo, Marshall, and Reiff have all admitted to being involved in the DNC's allocation practice. None of these witnesses, though, claimed to have any knowledge or information that the Vice President or anyone else at the White

House was aware of the practice of reallocating funds into hard money accounts.[15]

4. The Ickes/Marshall Memos

The only evidence that could be construed to suggest that the Vice President was aware of the allocation practice is a February 22, 1996, memorandum from Harold Ickes addressed to the President and the Vice President, with an attached memorandum from Bradley Marshall, the DNC's Chief Financial Officer. The Marshall memorandum, while ambiguous, suggests the fact that the DNC was engaging in the allocation practice. The Ickes memo, entitled "DNC media funds," details the "mix of money" required for the media buys for which the Vice President is soliciting funds. According to the memo, a combination of 34% federal, 31% non-federal corporate, and 35% non-federal individual is needed for the ad campaign.[16] The Ickes memo also refers to the attached "Confidential Memorandum" from Marshall.

It should be kept in mind, however, as discussed in more detail later, that the Vice President states that he has no memory of reading these memoranda, and that it was his practice at the time not to read Ickes' voluminous memoranda. There is no evidence to the contrary.

Marshall's two-page memo, dated February 21, 1996, describes a shortage of non-federal, or soft funds.[17] Within this context, Marshall makes the following observation:

> I understand that Finance has raised and is currently processing, $1.2 million. At this point, I do not know how it will breakdown between Federal vs Non-Federal and Corporate vs Individual.

In an apparent reference to this "breakdown," he adds the following information three paragraphs later:

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[15] Of these six DNC employees, only Marshall ever had dealings with White House personnel. Marshall does not recall ever discussing the DNC's allocation practice with any members of the White House staff.

[16] Joe Sandler has testified before the Senate Governmental Affairs Committee that the "mix" was determined by referring to FEC regulations.

[17] Our September 29 memorandum contained a typographical error, incorrectly describing the Marshall memo as making out a shortage of "federal" funds.

> Definition of Federal and Non-Federal monies (from the DNC perspective):
>
> Federal money is the first $20,000 given by an individual, ($40,000 from a married couple). Any amount over this $20,000 amount from an individual is considered Non-Federal Individual. An individual can give an unlimited amount of Non-Federal Individual money.

Marshall concludes his memo with a discussion of labor, corporate, and federal PAC contributions.[18] When the memorandum is read knowing of the DNC practice, it appears that it reflects the allocation practice. However, we believe that it is not reasonable to assume that someone reading this memorandum without an independent knowledge of the practice would have understood it to mean that the DNC was automatically, without obtaining prior approval, allocating a donor's contribution to hard money. Indeed, both Ickes and the President state that they too, like the Vice President, were unaware of the allocation practice, and it is beyond dispute that Ickes read and thought about the Marshall memorandum.

In an additional series of memos addressed to the President and Vice President, Ickes detailed the way in which the DNC media campaign was funded throughout this period. Like the Marshall memo forwarded to the President and Vice President in February, 1996, Ickes's other memos show that the ads were paid for during most of this period with a combination of approximately 60% soft and 40% hard money. Moreover, these memos and attached DNC budgetary documents indicate that from November, 1995, through January, 1996, the media fund suffered from a shortage of federal (hard) funds. According to Ickes and the language of the memos, this shortage was significant since the DNC's soft money could not be used for the ads if the hard money component was unavailable. Ickes states that he believes that had the Vice President read and understood the documents directed to him, he would have known that the DNC needed to raise federal funds in order to keep the media fund afloat through much of this period.[19]

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[18] Marshall, when interviewed, remembered several meetings held in the White House where DNC budgetary issues were discussed. On two occasions the President and Vice President were present. The terms federal and non-federal dollars were used during the discussion and the participants noted how difficult it was to raise federal funds.

[19] Ickes does not recall discussing any of the topics directly with the Vice President. He believes his memos would have been routed through the "staff secretary" to the Vice

The Vice President claimed that he was unaware that the DNC was "splitting" some large contributions and depositing up to $20,000 into the federal account. He does not recall seeing the Ickes/Marshall memoranda that appear to set forth this practice. He added that it is unlikely that he would have read the memo, even though it was addressed to him among others, since he did not, as a general practice, read Ickes' work product. By way of further evidence that he had not seen the Marshall statement, the Vice President said that he remained unaware, throughout this period, that the DNC's media campaign was being funded, in part, with federal contributions.

The Vice President explained that when Ickes started producing these types of memos, he would take them out of his in-box and set them aside without reading them, believing that Ickes was simply stating his position in an ongoing battle with Dick Morris over tactics. Specifically, the Vice President felt that the memos were designed to show why Morris's plans, especially regarding the media campaign, were extravagant and would eventually bankrupt the DNC. The Vice President felt that his Chief of Staff, Ron Klain, would inform him of anything that he needed to see in the memos. He also assumed that the subject matter in the memos would be raised in his presence during various meetings he would attend.

Based on the uniform statements of the DNC officers and employees who were actually responsible for the allocation practice that they had no knowledge or reason to believe that the Vice President knew of the practice, and the lack of evidence that the Vice President read the Ickes/Marshall memoranda, or if he read them, that he understood them to suggest that the DNC was splitting contributions without the knowledge of the donors -- which they do not say -- it is our view that there are no reasonable grounds to investigate further this matter based on the theory that the Vice President may have been deliberately seeking contributions without making it clear whether he was soliciting hard or soft funds, knowing that a portion of the contribution would be allocated to hard funds.

This leaves the question of whether the Vice President directly solicited hard money contributions during any of his conversations with potential donors.

C. THE DONOR INTERVIEWS

A total of 216 prospective donors were identified from call sheets and lists provided by the White House, the DNC, and Peter Knight. Based on our interview results, at least 43 of these

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President's in-box. He does not know whether the Vice President read the memos.

prospective donors had telephone conversations about political contributions with the Vice President.[20] As many as five of the

[20] 154 people who were interviewed or otherwise provided a statement said that they did not recall receiving a telephone call regarding political contributions from the Vice President. Another seven were not available to be interviewed, because of illness, travel schedules, or because they did not respond to our efforts to contact them. Nine prospective donors declined to provide a statement of any kind on the topic. Finally, we interviewed four individuals who received telephone solicitations from the Vice President in the Fall of 1994. However, those calls were made from DNC offices, and thus raise no questions of impropriety.

It is our view that the fact we have not been able to speak with 16 people whose names appeared on call sheets does not foreclose our ability to recommend that this matter be closed now. First of all, we are still expecting that most of these individuals will be interviewed before the end of the preliminary investigation period. Furthermore, of the 16, the documentary evidence -- phone records and notes on call sheets -- suggests that only a handful of the 16 were actually called. As to one of those, Eric Becker, we are confident that we have a full understanding of the conversation based on the copious notes taken during the conversation by David Strauss. In light of the consistency of the investigative results, it is our view that the likelihood that the few remaining donors would offer new evidence sufficiently compelling as to affect our recommendation is remote.

If it is nevertheless felt that we cannot close this matter without speaking to all prospective donors, it is our recommendation that we should seek the permission of the court to extend the preliminary investigation another 60 days. This preliminary investigation period has already been truncated to an even briefer period than normal by the fact that it was the subject of a letter from the majority members of the House Judiciary Committee. While the FBI has done a remarkable job of conducting a very large number of interviews in this foreshortened period, we have not had the luxury of time to try to persuade reluctant witnesses or to track down individuals who are traveling. An extension would give us the opportunity to try to complete the record.

It is not entirely clear whether the Congress intended the extension period to be available when a matter is pending pursuant to a Judiciary Committee request. We see nothing in the statute or the legislative history that would clearly bar such an extension, however, and believe that seeking an extension would be preferable to seeking an independent counsel simply because a

43 were solicited by the Vice President and gave a gift that was deposited, in part, into the DNC's federal account. Another 11 were solicited and provided contributions to the DNC; their gifts were deposited into a non-federal account. Eight prospective donors were solicited but declined to give. The remaining 19 remember the purpose of the call as a thank you rather than a solicitation. Donations of three of these 19 individuals subsequently were split and partially deposited into a DNC federal account without their knowledge.

We will discuss here in detail only those telephone conversations that raise colorable issues as to whether the Vice President may have solicited hard money, or that provide useful context to interpreting the calls. An addendum to this memorandum will outline in chart form the results of the remainder of the interviews with donors.

1. Solicitations That Led to Contributions Deposited Into a DNC Federal Account

As mentioned above, this investigation was predicated on the plausible inference that if a donation was made to the DNC that was deposited into a hard money account, then it may have been that the solicitor of the funds requested a hard money donation. Our investigation has established that the Vice President made four telephone solicitations from the White House which resulted in donors contributing funds to the DNC that were thereafter deposited into a DNC hard money account. A fifth is strongly suggested by the circumstantial evidence.

As explained above, we have concluded that because the investigation established that the deposit of the funds into a federal account was accomplished without the donors' prior consent or knowledge, the mere fact that these donors made contributions a portion of which was deposited into a hard money account does not in and of itself suggest that they were solicited for a hard money contribution. Furthermore, four of the five describe the solicitation as having been for the "DNC media fund" or more generically for a DNC advertising campaign, rather than for any particular federal election.[21] Recall that the Vice President explained that he believed that the media campaign was funded solely with soft money, and thus, he explained, when he requested support for the media fund, in his mind he was expressly requesting soft money contributions.

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few interviews remain outstanding.

[21] The fifth donor in this category, Peter Angelos, does not remember whether the Vice President referred to the media fund or even whether the Vice President asked him to contribute.

In addition to the fact that a portion of their contributions were deposited into a hard money account, the donations of two of the five raise an additional issue. These two recall some mention of elections in the course of the conversation; Robert Johnson recalls that the Vice President mentioned facing a "tough election," and William Dockser recalls a discussion of the fact that the recent elections had gone badly. Because hard money contributions are defined as those intended to influence a federal election, such references in a fundraising conversation must be closely examined. The implications of these references will be discussed in more detail later in this memorandum.

a. Robert Johnson

On February 5, 1996, the Vice President telephoned Robert Johnson, President of Black Entertainment Television (BET), from his West Wing Office in the White House.[22] The DNC Finance call sheet prepared in anticipation of this call notes that Johnson gave $50,000 in both 1993 and 1994 and $20,000 of a $50,000 commitment in October of 1995. It also notes that Johnson is a strong Clinton/Gore supporter. Beside the heading "Reason for the call," the Vice President is told to "[a]sk him to write $30k for the media campaign."

Johnson received his call from the Vice President while in his BET office in Washington, D.C. According to Johnson, the Vice President spoke of facing a tough election. He noted the need to get the Democrats' message out on issues such as health care. Within this context, Gore asked Johnson to contribute $30,000 to the DNC. Johnson told the Vice President that he would give this amount. He believes he asked his secretary to send the check which was written on his personal checking account.

After the call, Ann Braziel at DNC headquarters prepared a form letter containing the following language:

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[22] Because Johnson was called at his office in Washington, we do not have a telephone bill showing that the call was made from the White House. Telephone bills from February 5, 1996 do confirm that several other numbers which appear on the Vice President's call sheets were phoned on that date from 4:00 to 5:00 p.m. In addition, the Vice President's schedule for that date shows that he was scheduled to make phone calls from the "West Wing Office" from 4:00 to 5:00 p.m. Secret Service records show that Peter Knight entered the White House just prior to the scheduled phone session on February 5, 1996. Knight has a vague recollection of being present in the West Wing Office when the Vice President called Johnson.

> It was a pleasure to speak with you today. President Clinton and I thank you for your continued support and contribution to the Democratic National Committee. We appreciate your dedication to our Administration and your help at a time when needed. Thank you for your commitment to make an additional contribution of ____.

The pledged amount was filled in and the letter was sent by courier to the White House for the Vice President's signature.

Johnson gave $30,000 soon after the call. According to Johnson, he made the contribution with the understanding that the money was for advertising and "putting the message out." At that time, Johnson did not realize that the DNC could accept any hard money from individuals.

A copy of the check provided by Johnson, as well as check tracking forms and DNC computer records, indicate that the DNC deposited Johnson's $30,000 check into a federal account. A DNC Finance official tasked with the job of keeping track of the Vice President's project made an entry in the computer program entitled "Gore calls": "$30k IN."[23] DNC records indicate that $10,000 was eventually allocated into a non-federal account. Federal Election Commission records further reflect that the DNC's allocation of Johnson's gift may have caused him to exceed the $25,000 annual limit for federal contributions in 1996.

b. William Dockser

Also on February 5, 1996, the Vice President telephoned William Dockser, a real estate developer from Rockville, Maryland.[24] The call sheet prepared on Dockser notes that he gave $35,000 in 1995; $20,000 in 1994; and $10,000 in 1992. Under "Reason for the call" the DNC Finance staff states that he "has expressed an interest in making another major contribution to the DNC this year." The Vice President is told to "[a]sk him to send in $25,000 to fund the media campaign."

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[23] Another entry made by Ann Braziel soon after the call was made reads: "YES-PK to follow up," an apparent reference to Peter Knight. Robert Johnson does not recall a follow-up to the Vice President's call by Peter Knight or anyone else at the DNC.

[24] Like the call to Johnson, the Vice President's call to Dockser does not appear on a telephone bill. As explained above, however, circumstantial evidence and Peter Knight's recollection of the Johnson call suggest that Vice President Gore made fundraising calls on February 5, 1996 from his West Wing Office in the White House.

Dockser too received his call from the Vice President while in his office. He recalls that the Vice President explained that because the recent elections had gone badly, the Democrats were in need of a media campaign. These ads were being run outside of the Washington area, according to the Vice President, and were designed to promote "Democratic issues." The Vice President asked for $25,000 for the campaign and Dockser agreed to contribute in this amount. He recalls now that his gift was in response to the Vice President's request.

The witness did not recall the Vice President mentioning the terms "soft money" or "hard money" but he was under the impression at the time that the request was for "soft money." Dockser based that impression on his prior knowledge of the media campaign and a belief that the campaign was being funded by "soft money" gifts. Dockser believed that soft money, by law, could be used for "issue oriented" ads and that hard money was used directly in "election campaigns."

A thank you note to Dockser containing the same language as set forth above was prepared for the Vice President's signature following the call. After consulting with DNC fundraiser Ari Swiller, Dockser sent the DNC a personal check in the amount of $25,000 made out to "D.N.C.-Media Fund." Once the DNC obtained the check, a check tracking form was completed and the funds were deposited into two accounts: $20,000 into the federal account and the remaining $5,000 into a non-federal account. An entry showing "25k in" was also noted on the "Gore Calls" computer program.

c. E. Blake Byrne

Also on February 5, 1996, the Vice President telephoned E. Blake Byrne, President of Argyle Television, from his White House Office.[25] The DNC Finance call sheet, prepared in anticipation of this call, notes that Byrne gave $25,000 in April of 1995 and another $25,000 in September of 1995. It also notes that "this is an easy call-he is very concerned about the Radical Right and its effect on the rights of Gay Americans." Beside the heading "Reason for the call," the Vice President is told to "[a]sk him for $25,000 to fund the media campaign."

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[25] Clinton/Gore calling card records indicate that a 2 minute and 18 second phone call to Byrne's office from the White House occurred on February 5, 1996, at 4:39 p.m. As noted above, the Vice President's schedule for that date shows that he was scheduled to make phone calls from the "West Wing Office" from 4:00 to 5:00. Byrne recalls his office forwarding the call to Grand Rapids, Michigan, where he travelling on business.

During the conversation, the Vice President asked Byrne to contribute $25,000 to the DNC media fund. Byrne was familiar with the fund from his work and agreed to make what he believed to be a soft money donation to the media fund. The Vice President instructed Byrne on how to fill out his contribution check. The contribution request was the only topic during a short conversation.

On February 12, 1996, Byrne wrote a check to the "Democratic National Committee Media Account" for $25,000. A DNC check-tracking form was completed but no revenue code was checked. The DNC deposited $20,000 into a federal account; the remaining $5,000 was deposited into a non-federal account. A DNC Finance official tasked with the job of keeping track of the Vice President's project made an entry in the computer program entitled "Gore calls": "$25k IN."

d. Andy Morse

On December 11, 1995, the Vice President telephoned Andy Morse, Senior Vice President at Smith Barney Shearson, from his White House Office.[26] The DNC Finance call sheet prepared in anticipation of this call notes that Morse gave $25,000 in both 1993 and 1994. Beside the heading "Reason for the call," the Vice President is told to "[a]sk Andy to contribute an additional $25,000 to the DNC Media Fund."

According to the Vice President, the purpose of his call was to raise money for the DNC media fund in response to a media blitz by the Republican National Committee. The Vice President asked Morse to contribute to the fund. In response, Morse said he would consider the matter. According to Morse, the terms hard or soft money did not come up in the conversation.

Morse received a follow-up call from a DNC employee soon thereafter. On February 23, 1996, he wrote a check payable to the "Democratic Nati Committee," assuming that the contribution would be recorded as a soft money gift. Instead, the DNC deposited $20,000 into a federal account and $5,000 into a non-federal account. This allocation by the DNC put Morse over the

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[26] The Vice President's schedule for December 11, 1995 shows that he was scheduled to make phone calls from the "West Wing Office" from 9:00 to 9:45 a.m. The call sheet for Morse shows a notation made by the staff assistant placing the call from the West Wing Office that the call was "Done" on "12/11" at "9:40."

legal annual limit of $25,000 for federal contributions for 1996 by $450.[27]

e. Peter Angelos

Phone records show that a call lasting approximately four minutes was placed from the White House to the office of Peter Angelos at around 1:00 p.m. on April 26, 1996. The Vice President's schedule indicates that this call was made during a time set aside for fundraising calls. A DNC call sheet prepared for the Vice President also suggests that he ask Angelos to contribute $50,000 to the DNC. Approximately a month after this telephone call, Angelos wrote a check to the DNC in the amount of $100,000 which contained a notation in the memo line of "Pres. Campaign." DNC Finance deposited $20,000 of this gift into a federal account. A DNC check tracking form identifies Peter Knight and the Vice President as "solicitor" of the $100,000 gift from Angelos.

While he remembers receiving a call from Vice President Gore, Angelos does not remember the Vice President asking for money. Nor does Angelos link the Vice President's call to his decision to make the donation a month later. Rather, Angelos recalls going to the DNC and speaking with Peter Knight at length before making out his $100,000 check. No thank you letter memorializing a pledge to contribute has been produced by either the White House or the DNC in connection with the Angelos call.[28]

Because Angelos does not even recall this conversation as being a solicitation, and instead links his subsequent gift to conversations with Peter Knight, we do not believe that this call could be considered to be a basis for a potential 607 prosecution.

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[27] Morse did not learn that $20,000 of his gift had been allocated to the DNC's federal account until September of 1997 when he received a letter from Steve Grossman of the DNC, apologizing for what Grossman termed a "mistake." Morse's attorney replied by letter that since this allocation put Morse over the legal limit by $450, Morse would like the records changed to reflect a gift of federal money in the amount of $19,550.

[28] The Vice President does not remember the details of his conversation with Angelos.

raising $50,000 in 1995 and 1996 for the DNC. In making his pitch, the Vice President said something to the effect that, "the DNC was gearing up for the 1996 campaign." The Vice President did not mention a specific dollar figure that he was presently seeking, nor did he mention the terms "hard" or "soft" money. Instead, he observed: "If you would be helpful, sooner rather than later, it would be appreciated."

Dayton was a Managing Trustee of the DNC. As such, he had pledged either to contribute or raise $50,000 in 1995 and 1996 for the DNC. According to Dayton, prior to receiving the telephone call from the Vice President, he had already told David Mercer of the DNC that he wanted his $50,000 gift to be soft money.

Soon after the call, Dayton spoke with David Mercer of the DNC to find out how Dayton should satisfy his pledge to give $50,000. Mercer directed Dayton to write a $30,000 check to the DNC's non-federal account; $10,000 to the New York (state) Democratic Party; and $10,000 to the New Jersey (state) Democratic Party. Dayton made a notation on the lower left portion of each check denoting "Non-Federal account." He wrote the checks within three days of speaking with the Vice President. Per directions, the DNC deposited Dayton's check into a non-federal account. The gift was noted on the "Gore Calls" spreadsheet: "YES-$50k; $50k IN."

The evidence clearly suggests that this call was a followup to a previous commitment by Dayton, and is thus, we believe, properly categorized as a "thank you" rather than a solicitation. Dayton already had a specific intent to make a soft money contribution, and there is no suggestion that anything about his conversation with the Vice President led him to believe that he was being solicited for hard money. We conclude that the brief conversation about a Senate campaign and the fact that the DNC was "gearing up" for elections is insufficient to suggest that the Vice President was seeking a donation to an election campaign. Certainly Dayton did not so interpret the conversation, or he would either have changed his subsequent donation to a hard money contribution, or told the Vice President that he couldn't make a hard money contribution, but would be willing to contribute soft money.

2. Federal Money, But No Solicitation.

The Vice President called at least 18 people who, while active in DNC fundraising or giving, recall the conversation as a thank you, not a solicitation. Curiously, three of these individuals were recorded on the DNC spreadsheet entitled "Gore Calls" as having given in response to the Vice President's call. For example, an entry next to Eli Broad's name reads: "sent $50K; $50k in." Similarly, an entry opposite George Marcus indicates an amount of $50,000 and then "$50K IN" and an entry opposite Ira Leesfield indicates "YES-maybe $50k" and "$30k IN." In addition, these three donors each received a thank you letter from the Vice President following their telephone conversations with him. Although the thank you letters do not explicitly indicate that the donors have contributed or agreed to contribute to the DNC as a result of being asked by the Vice President to do so, such an inference possibly can be drawn from them. Each of the gifts recorded for these three donors had $20,000 allocated to a DNC federal account without their knowledge.

It may be that each of these individuals, as regular substantial contributors to the DNC, interpreted the Vice President's call as expressions of appreciation for previous contributions, and did not consciously link their later gift to the Vice President's call. Another possibility is that they may have previously promised to contribute, and interpreted the Vice President's call as a "thank you" for that promise, even though the contribution had not yet been delivered. In any event, it is our view that a section 607 prosecution cannot be based on a conversation in which the donor affirmatively believes there was no solicitation, notwithstanding ambiguous thank you letters which possibly call into question the accuracy of the donor's memory. However, even assuming for the sake of argument that the Vice President asked Broad, Leesfield, and Marcus to give to the DNC despite the fact that they do not remember this happening, we have no evidence that the Vice President asked any of them to make hard money contributions. Finally, as explained above, our investigation has established that the mere fact that their contributions were reallocated into hard money accounts is not sufficient to support an inference that they were solicited for hard money, because those reallocations were accomplished unbeknownst to them, without their knowledge or prior approval.

3. Telephone Solicitations That Led To Non-federal Donations, but in Which Federal Elections Were Mentioned -- Mark Dayton

On February 5, 1996, the Vice President telephoned Mark Dayton, head of Vermillion Investments Corporation, in his office in Minneapolis, Minnesota. The conversation started with "small talk," then shifted to Senator Paul Wellstone's Senate campaign. The Vice President next alluded to Dayton having committed to

4. Telephone Solicitations That Led To No Donations

a. Solicitations That May Have Been Ambiguous

i. Penny Pritzker

The Vice President telephoned Penny Sue Pritzker, President of Classic Residence by Hyatt, on February 5, 1996.[29] Pritzker recalls that the Vice President asked her to contribute money for a media campaign which aired television commercials, aimed at smaller city markets. Pritzker told the Vice President that her family had already given $100,000 to assist in obtaining the Democratic National Convention for Chicago. She declined the Vice President's request to give to the media campaign, stating that neither she nor her family would be contributing any more at that time.

Several weeks prior to the call, Pritzker had been invited to attend a private meeting with the Vice President with about a dozen wealthy Chicagoans in a hangar at Midway Airport. Pritzker recalls viewing three to six television commercials with negative messages linking Senator Robert Dole to the policies of Speaker Gingrich. The attendees were told that the commercials were going to be shown in smaller city markets throughout the United States because of their demonstrated success in promoting the presidential reelection effort. The Vice President told the group that attendees would be contacted in the future for financial help in running the media campaign. When he called a few weeks later, the Vice President made mention of the television ads that Pritzker had viewed at the airport event and asked that she contribute so the ads could continue running.

ii. Noah Liff

The Vice President telephoned Noah Liff, Chairman of the Board of Steiner Liff Iron and Metal Company of Nashville, Tennessee, on May 2, 1996.[30] Liff has known the Gore family for 30 to 40 years and recalls the conversation in May as a friendly discussion between two friends. The conversation began on a personal note with the two trading information on family and

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[29] Clinton/Gore calling card records indicate that this call, which lasted for four minutes and 42 seconds, was made from a White House telephone at 5:03 p.m. Scheduling records and witness accounts detailed above indicate that this call was made from the Vice President's West Wing Office.

[30] Clinton/Gore calling card records indicate that this call was made from a White House telephone at approximately Noon. Scheduling records and witness accounts indicate that this call was made from the Vice President's West Wing Office.

mutual friends. Liff and the Vice President then spoke about how Liff approved of many of the policies and stances taken by the Administration.[31] After a brief discussion, the Vice President thanked Liff and then made a request for Liff's help.

Liff's best recollection is that the Vice President said something to the effect that any help Liff could provide would be appreciated. He responded by saying he had already given his "legal limit" and was unable to give any more.[32] According to Liff, nothing more was said by either party on the topic of "help" and the conversation ended on a friendly note.

Significantly, Liff also stated that he may not have been aware, at the time of the telephone call, that he could have provided a soft money donation to the DNC. He explained that his political gifts had all been made directly to candidates during this period. He believes now that he may not have learned about the option of giving non-federal gifts until the publicity about the Vice President's fundraising phone calls surfaced in the media this year. Even if he was aware, he believes that he did not consider the option when the Vice President raised the topic of "help." He is quite sure, though, that the Vice President did not specifically mention the DNC, the Clinton/Gore campaign, or the topic of a soft money gift during their conversation.

b. Solicitations in Which the Vice President Asked for Soft Money

The following descriptions involve three solicitation phone calls which we believe clearly cannot form the basis of a 607 violation because there is documentary and/or credible testimonial evidence that the Vice President asked the donors in question for soft money. We include these facts here because they provide examples of cases in which it appears from the conversations either that the Vice President made the fact that he was requesting soft funds explicit, or that both the Vice President and the donor expressly were discussing a soft money contribution.

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[31] In his first interview, Liff referred to a discussion of his "support of the Administration." In his second interview, Liff explained that by this reference to "support" he did not mean financial support. By support, Liff explained, he meant approval of the way the Administration was governing.

[32] While Liff claimed, in his second interview, that he did not consider what the Vice President meant by help, his response seems to confirm what he said in the first interview: that the Vice President was referring to monetary help. Additionally, Liff recalls that he did not state how much he had given or to whom. He does recall using the phrase "legal limit."

i. Eric Becker

The Vice President spoke to Eric Becker, Chairman of Sterling Capital, in Baltimore, on February 9, 1996.[33] After a preliminary discussion about a children's museum that Becker was developing, the Vice President turned the topic toward political fundraising with the phrase: "let me ask you about a political matter." He went on to explain that the DNC media fund was concentrating on areas scientifically chosen to target swing voters. According to the Vice President, "the news media acts like they don't know about it." Notes of the telephone conversation indicate that the Vice President told Becker that "soft money is permitted." Becker replied that he had just sent $50,000 to DNC Finance official Ari Swiller the day before. FEC records indicate that Becker did not make a further contribution to the DNC during this time frame.

ii. Jack Bendheim

The Vice President also spoke to Jack Bendheim, President and owner of Philips Brothers Chemical, on February 9, 1996. Notes of the call taken contemporaneously by David Strauss, who was sitting in with the Vice President, indicate that the Vice President told Bendheim that "soft & corporate ok." The Vice President also pointed out that "early is much better than late." Apparently in reply, Bendheim told the Vice President that he had already given $50,000 to the DNC in 1996.

Bendheim confirmed in an interview that he was solicited by the Vice President and that he declined to give. While Bendheim does not recall the term "soft money" being used in the conversation, as suggested in Strauss's notes, it was Bendheim's understanding, however, that the Vice President was asking for non-federal money in his call.

iii. Johnny Johns

On December 1, 1995, Johnny Johns, President of Protective Life Insurance Corp., telephoned the Vice President at a number previously left for him by a member of the Vice President's

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[33] So far, Becker has refused to be interviewed by us in connection with this matter. However, the substance of the Vice President's solicitation was recorded by Deputy Chief of Staff David Strauss, who took copious notes of the Vice President's side of the conversation as he sat in the West Wing Office on this occasion. The details provided here of the Vice President's conversation with Becker come from Strauss' notes.

staff.[34] After waiting for several minutes, the Vice President came on the line and explained that since the Republican Party was engaging in an extensive media campaign, the Democratic Party needed to respond. The Vice President asked Johns for a $50,000 contribution. Because Johns interpreted the request by the Vice President as a request for a contribution from his corporation, not from himself personally, Johns responded that he did not have the authority to commit the corporation. He added that this type of contribution would need to be decided by a committee within the corporation. He promised that if the corporation decided to make such a contribution, he would get back in touch with the Vice President.[35] The entire context of the conversation with the Vice President focused on the need for action by the Democratic Party in response to the action being taken by the Republican Party.[36] No action was ever taken by the corporation.

5. Telephone Solicitations That Led to Nonfederal Donations But in Which No Federal Elections Were Mentioned

As above, we here describe two additional conversations as examples of cases in which it appears that the Vice President made the fact that he was requesting soft funds explicit, because each donor states that he filled out his subsequent contribution check according to the instructions of the Vice President, and the check expressly indicate that they are soft money contributions. The contributions were deposited into soft money accounts.

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[34] While Johns does not recall what day he received the call, he does remember returning to his office one day in December of 1995 and receiving a message that the Vice President had called him. Clinton/Gore phone records indicate that a one minute call was made to Johns' office on December 1, 1995. In addition, a thank you letter, signed by the Vice President and mailed to Johns, references December 1 as the date of the call.

After receiving the message, Johns personally dialed the number left for him. The call was answered by a male secretary who eventually put the Vice President on the line.

[35] Johns' version of the conversation is corroborated by documentary evidence. For example, Johns' call sheet has a notation written by the Vice President in quotation marks as if to indicate a quote from Johns: "Let me go back & talk to my people and ask." An entry on the DNC spreadsheet entitled "Gore calls" reads: "He will ask and call Gore or Knight."

[36] Johns does not believe the Vice President mentioned his own election or any other specific election.

a. James Hormel

On December 1, 1995, the Vice President telephoned James Hormel, Chairman of Equidex, Inc., in his office in San Francisco. The Vice President asked Hormel for $50,000 to support "an advertising campaign for the DNC."[37] The two had a conversation about the DNC media fund. Hormel said he would consider the Vice President's request.

Hormel made a note with instructions given during his conversation with the Vice President as to how a donation should be forwarded to the DNC: "Check request: $30,000.00. Payable to: DNC-NonFederal Acct per V.P. Gore's request Send to: Peter Knight 1615 L St. NW #650 W DC 20036 202659-3005." His December 11, 1995 check was made payable to the "Democratic National Committee NON-FEDERAL ACCOUNT" for $30,000. The DNC deposited this gift into a non-federal account. Hormel's gift was tallied on the spreadsheet: "YES-$50K-Pastrick will follow up; $30K IN."

Prior to the call, Hormel attended a session where the Vice President addressed a small group about the ads being run by the DNC. The meeting provided a forum for the Vice President to make a presentation on the media campaign to the private sector. Hormel recalls no connection being made between the DNC media fund and the Clinton/Gore reelection effort.

b. Merv Adelson

On December 18, 1995, the Vice President telephoned Merv Adelson, Chairman of East Capitol Associates, at his office in Los Angeles.[38] The Vice President asked Adelson for a contribution of $25,000.[39] Adelson readily agreed to contribute

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[37] Next to the contribution history on Hormel's call sheet, staff assistant to the Vice President Joel Velasco, at Peter Knight's direction, made a notation: "no federal $ '95." At the bottom of the sheet, the Vice President wrote "Non-federal $ "soft" and "will call back."

[38] According to Adelson, the call was first received at his office in Los Angeles and then patched through to his residence in Aspen, Colorado.

[39] Adelson recalled that the request for funds was for a specific purpose, although he could not recall for what purpose. Adelson could only recall that the reason given by the Vice President for the request of funds was reasonable. To the best of his recollection, the terms hard, soft, federal, and non-federal were not used in the phone conversation, but the way that he completed his check, which he says he did pursuant to the Vice President's direction, strongly suggests that he was told to

$25,000. The only question Adelson posed to the Vice President was to whom should he make the check payable. While he does not recall the response, Adelson said he would have followed instructions given by the Vice President.[40]

On January 24, 1996, Adelson's accountant wrote a check in the amount of $25,000 made payable to the "Democratic National Committee Non-Federal Account C/O Peter Knight". The DNC deposited this check into a non-federal account. Entries on the DNC spreadsheet entitled "Gore calls" were made opposite Adelson's name: "YES-25K; letter sent 12/18/95; 25k IN."

IV. ANALYSIS

Section 607 prohibits only solicitation or receipt in federal office space of "any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971." Section 301(8) defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office" -- i.e., hard money. 2 U.S.C. § 431(8)(A)(i).

Thus, a contribution made to a political campaign or a political party, specifically intended to support the election of the candidate, is a contribution within the meaning of section 607. On the other hand, a contribution to a political party -- as opposed to a campaign committee -- intended to support the party's general ability to "get out the word" about important issues is a soft money contribution, and not included within the scope of section 607.

Section 607 contains no explicit intent requirement. However, a 1908 district court opinion interpreted a predecessor version of section 607 as a general intent offense. United States v. Smith, 163 F. 926, 927 (M.D. Ala. 1908) ("The guilty intent to violate the law flows from the knowing and intentional doing of the acts which the statute forbids. Ignorance of the statute, or of the extent of its provisions, is no excuse."). Reading a general intent requirement into section 607 is consistent with the rebuttable presumption that Congress intends to incorporate some mens rea requirement in its definition of federal crimes. See United States v. Garrett, 984 F.2d 1402,

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complete his check to a non-federal account.

[40] While Adelson remembers taking instructions from the Vice President, he also provided us with a one-page fax cover sheet from Peter Knight's assistant to Adelson's secretary which states: "Mr. Adelson's check should be made out to Democratic National Committee -- Media Fund."

1410 (5th Cir. 1993) (noting that courts "will presume that Congress intended to require some degree of mens rea as part of a federal criminal offense absent evidence of a contrary congressional intent").

Thus, based on the Smith case and normal principles of construction of criminal statutes, we believe that, in prosecuting an alleged violation of section 607, the government must prove that the defendant knew that he or she was: (1) engaged in the act of soliciting or receiving; (2) in a federal office; and (3) was soliciting or receiving, in particular, a hard money contribution. However, we do not believe that the government would be required to prove that the defendant acted willfully, i.e., that he or she knew it was illegal to make such solicitations in federal office space.

Under the Independent Counsel Act, although intent is properly considered in the context of a preliminary investigation (as opposed to a 30-day initial inquiry), the Department is limited in the extent to which it can rely on evidence of lack of intent to justify declining to seek an independent counsel. Section 592(a)(2)(B)(ii) provides that the Attorney General cannot decline to seek the appointment of an independent counsel based on "a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind."

The facts developed during our investigation indicate that as many as five people solicited by the Vice President from his West Wing Office gave money that subsequently was deposited into a DNC federal account. As explained above, we have concluded that this was done without the donors' knowledge or prior consent, and thus does not provide any inferential support for the notion that they were solicited for hard money contributions. Furthermore, we have no direct evidence that the Vice President actually asked these or any other prospective donors to make federal contributions. Indeed, in each of the situations where the conversation was explicit, the evidence is to the contrary; the Vice President requested soft money contributions. To the extent the words used by the Vice President in any of his solicitations were ambiguous, the stronger inference to be drawn from the facts and the context is that the Vice President was asking for soft money. Moreover, even if the Vice President's words could have been understood by a reasonable person as seeking federal contributions, there is, we believe, clear and convincing evidence that the Vice President intended to solicit only soft money donations.

A. Evidence that the Vice President Asked Prospective Donors for Non-Federal "Soft Money" Contributions

We have discovered direct and circumstantial evidence that Vice President Gore explicitly or implicitly asked several prospective donors to make "soft money" contributions to the DNC during the telephone solicitations in question.

1. Notes on Call Sheets

Notes taken on several DNC call sheets during conversations between the Vice President and the listed donors provide evidence that the Vice President asked for soft money in those conversations. For example, call sheets for Eric Becker and Jack Bendheim contain handwritten notes by David Strauss, then the Vice President's Deputy Chief of Staff, which reference "soft money." According to Strauss, these notes which state, "soft money is permitted" and "soft and corporate OK," memorialize parts of the Vice President's side of the conversation. Another call sheet for James Hormel has the phrase "non-federal $ soft" noted in the Vice President's handwriting. During his interview, the Vice President explained that these three notes are indicative of the types of references he made during his telephone solicitations.[41]

In addition, a notation by the Vice President on Johnny Johns's call sheet in quotation marks as if to indicate a quote from Johns -- "Let me go back & talk to my people and ask." -- is consistent with a solicitation for a soft money corporate contribution, which is how Johns recalls the conversation

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[41] It could be argued that the Vice President's statement to Becker that soft money is "permitted" could have implied to Becker that the requested gift could also be made in the form of hard money. However, because the Vice President asked Becker for $50,000, it is clear that a knowledgeable donor would have understood the Vice President to be asking for at least $30,000 in soft money. That $30,000 could not only possibly be soft money; rather, it had to be soft money. There is no reason to believe that, in stating that soft money is "permitted" on February 9, 1996 -- two weeks before Marshall wrote his memorandum describing the DNC allocation practice, which, of course, the Vice President denies he even read at the time -- the Vice President was trying to tell Becker that the first $20,000 of his contribution could be given as hard money. If that had been the Vice President's intent, he presumably would have said so directly. In our view, the most reasonable inference to be drawn from the Vice President's statement to Becker that "soft money is permitted" is that the Vice President was trying to make sure that Becker knew he had the option to make the contribution through his corporation.

proceeding.[42] This inference is also supported by an entry on the DNC spreadsheet entitled "Gore calls" in connection with Johns's call which reads: "He will ask and call Gore or Knight."

2. Donors Who Understood the Vice President to Be Soliciting Soft Money

At least seven people called by the Vice President have indicated that they understood the Vice President to be explicitly or implicitly asking them for non-federal contributions.

William Dockser told us that the Vice President did not mention either "soft money" or "hard money" during their conversation, but instead referred to the need to fund the DNC's media campaign. Dockser was left with the impression that the Vice President was requesting soft money, given Dockser's belief that the DNC's issue-oriented ads were being funded by soft money gifts. Similarly, E. Blake Byrne, who also was familiar with the media fund from his involvement in the media business, indicated that he agreed during his conversation with the Vice President to make what he believed would be a "soft money" donation. Andy Morse told us that the Vice President did not mention either "hard" or "soft" money during their telephone conversation. However, when Morse wrote his contribution check, he assumed that the contribution would be recorded as a soft money gift.[43] Jack Bendheim also recalls no mention of hard or soft, federal or nonfederal money during his conversation. Nevertheless, Bendheim told us that because the media campaign was "issue-oriented," he understood the Vice President to be asking for soft money.

James Hormel's own contemporaneous notes as to how his donation should be forwarded to the DNC -- "Check request: $30,000.00. Payable to: DNC-NonFederal Acct per V.P. Gore's request Send to: Peter Knight 1615 L St. NW #650 W DC 20036

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[42] Corporations are prohibited under the Federal Election Campaign Act from giving hard money contributions. 2 U.S.C. § 441b. However, corporations may donate to a national party committee's nonfederal account. Thus, unless it is to be inferred that the Vice President was soliciting a plainly illegal contribution -- which in our view is clearly unwarranted -- the two were clearly discussing a soft money contribution.

[43] As noted above, the DNC deposited portions of the Dockser, Byrne, and Morse gifts into a hard money account without their knowledge.

202659-3005." -- suggest that the Vice President asked him for a soft money contribution.[44]

Similarly, Merv Adelson recalls asking the Vice President to whom should he make his $25,000 contribution payable. Although Adelson does not recall the Vice President's response, he says he would have followed instructions given by the Vice President. Adelson's accountant subsequently wrote a $25,000 check in the amount of $25,000 made payable to the "Democratic National Committee Non-Federal Account C/O Peter Knight." The evidence thus suggest that the Vice President asked Adelson for soft money.

As noted above, the Vice President made a notation on the Johnny Johns call sheet indicating that Johns perceived the Vice President as soliciting a corporate contribution. Johns himself has told us that he in fact thought the Vice President was asking him for a corporate contribution, which is why he told the Vice President that he did not have the authority to commit his corporation to the contribution the Vice President was requesting.

3. The Vice President's Interview

In his November 11, 1997 interview, the Vice President stated that he never asked a prospective donor for a federal contribution during his telephone solicitations, and that he in fact frequently made the "soft" nature of the funds he was soliciting an explicit part of his "pitch." According to the Vice President, he did this because he believed (incorrectly) that the DNC's media campaign was being funded only through soft money contributions, and because he thought it would sometimes be easier for an officer or high-level manager of a large corporation to make a substantial contribution through the corporation rather than with personal funds.

On the other hand, several memos addressed to the Vice President clearly state that the DNC media campaign had to be funded with a split of hard and soft money. At least one of these memos, entitled "DNC Budget Analysis -- 11/21 POTUS PRESENTATION," appears to suggest that the issue of hard money and the media fund was also discussed at a meeting attended by the Vice President. In addition, the February 21, 1996 Bradley Marshall memo, which was attached to the February 22, 1996 memo from Harold Ickes to the President and Vice President, appears to reflect the DNC's practice of splitting contributions.

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[44] However, Hormel recalls no reference to soft money during his conversation with the Vice President.

The Vice President told us that he does not recall the topic of a hard money component for the media fund having been raised at the November 21, 1995 meeting, or on any other occasion in his presence. Moreover, according to the Vice President, he did not read Ickes' DNC-related memos, including Ickes' February 22, 1996 memo which attached the February 21, 1996 Bradley Marshall memo.[45] At least two of the Vice President's assistants have confirmed that he did not read many of the memos that were placed in his in-box. Neither could say, however, whether the Ickes memos were among those ignored.

B. Solicitations That Were Arguably Ambiguous

We have no direct evidence that the Vice President explicitly asked any prospective donor to make a "hard money" contribution in the course of his telephone solicitations. However, several of the Vice President's solicitations, as described by the prospective donors, are arguably susceptible to more than one interpretation. In our view, the more reasonable interpretation of these solicitations is that the Vice President was asking for soft money.[46]

1. Solicitations in Which the Vice President Referred in Passing to His Reelection Campaign While Soliciting Contributions for the DNC's Media Fund

In the course of soliciting Robert Johnson for a contribution to the DNC media fund, the Vice President referred in passing to his reelection campaign. The Vice President told him that he was facing a tough election. However, he did not ask Johnson for a contribution to the Clinton/Gore '96 Committee, but instead asked Johnson to contribute $30,000 to the DNC in order to get the DNC's message out on issues such as health care.

In soliciting Penny Pritzker for a contribution to fund the media campaign, the Vice President reminded her that she had been present in Chicago when the Vice President had shown some sample ads to a group of Democratic party supporters. According to

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[45] The Vice President acknowledged that, had he read these memos, his belief that the media campaign was funded with soft money would have been challenged.

[46] We believe that this interpretation is bolstered by the evidence, summarized above, that in several instances the Vice President clearly asked for soft money in his telephone solicitations on behalf of the DNC. Given this fact, it seems reasonable to infer that, in other fundraising calls made around the same time and as part of the same fundraising effort, the Vice President also asked for soft rather than hard money contributions.

Pritzker, in the course of that presentation, which occurred several weeks prior to the Vice President's telephone solicitation, the Vice President had stated that the issue ads being run by the DNC had been successful in promoting the presidential reelection effort.

Critics of the DNC have complained that the DNC ran its issue ads for the very purpose of circumventing the limitations on contributions to and expenditures by the Clinton/Gore '96 Committee. However, federal election regulations permit national party committees to accept both federal and non-federal donations. See 11 C.F.R. § 102.5. Indeed, in light of the Supreme Court's holding in Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996), it may even be unconstitutional to restrict the DNC's ability to air commercials that do not expressly advocate the election or defeat of particular candidates, even if such commercials incidentally benefit or harm those candidates by shaping public opinion. In short, there is a legitimate distinction between hard and soft contributions rooted in federal election law which results in what has been termed a "soft money loophole."

As described by Johnson and Pritzker, the Vice President was expressly asking them to make contributions to the DNC so that the DNC could keep its issue ads on the air. Moreover, at least with respect to Johnson, the Vice President asked for a large enough donation that a knowledgeable donor must have understood the Vice President to be asking for at least some soft money.[47] The Vice President did not ask either Johnson or Pritzker to make contributions to the Clinton/Gore '96 Committee. To the extent that the Vice President acknowledged that his own campaign might benefit from the DNC's airing of issue ads, that did not, in our view, convert what the evidence suggests was intended and understood to be a soft money solicitation into a hard money solicitation. At most, it was an acknowledgement of the existence of a legal loophole.

2. Solicitations Which Did Not Leave the Prospective Donors With An Understanding of What the Vice President Was Asking For

In several instances, our interviews suggest that individuals who were solicited for money by the Vice President did not have an understanding following the call of whether the Vice President had asked them for federal or non-federal

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[47] As noted above, according to Johnson, he did not realize at the time that the DNC could accept any hard money. Apparently, nothing the Vice President said to Johnson changed Johnson's misunderstanding -- which is consistent with the Vice President's explanation that he was asking only for soft money.

contributions. However, all of the donations received from people in this category were deposited into non-federal accounts, and with respect to each of these calls, we have no evidence from which it could be inferred that the Vice President was soliciting hard money.

Of those who declined to make donations in response to the Vice President's request, the only solicitation which we feel was somewhat ambiguous was that which the Vice President made to Noah Liff. In his call to Liff, the Vice President first thanked him for his support of the Administration's policies and, according to Liff, then said something like: "any help you can give us here, we would appreciate." According to Liff, the Vice President did not mention the DNC or the media fund during the call. On the other hand, he also did not mention any federal campaign or reelection fund. The Vice President also did not state how much money, if any, he was seeking or how the money he might be seeking would be used. Liff recalls nothing more specific than a request to "help them out up there."

Liff, who is from Tennessee, has known the Vice President for several years and has supported him since he began running for public office. Interestingly, while the Vice President, during his interview, characterized Liff as a Republican, Liff considers himself a Democrat.[48] Regardless of his party affiliation, the two spent a considerable amount of time, during their conversation, talking about Liff's general support for the positions taken by the Administration.

Liff's response to the Vice President's request for "help" -- that he had already given the "legal limit" -- seems to indicate that Liff thought the Vice President was requesting support for Clinton/Gore '96. Moreover, the absence of a reference to the DNC during the call appears to set this call apart from most of the other solicitations.

On the other hand, the DNC did prepare a call sheet for the Vice President concerning Liff, and the Vice President called Liff on May 2, 1996, which was during the period that he was making calls for contributions to the DNC media fund. Furthermore, Liff has told us that he may not have understood at the time that he could make a soft money contribution to the DNC. In this context, Liff's reference to his previous contribution of the "legal limit" can most reasonably be interpreted as a nonsequitur born of Liff's misunderstanding of what the Vice President was asking for. Given the fact that we have found no other evidence of the Vice President asking any donors listed on

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[48] The Vice President recalls talking to Noah Liff, but he is not sure if the call was part of the DNC fundraising call program.

DNC call sheets for contributions to the Clinton/Gore '96 Committee, this latter interpretation of the Liff telephone call seems more plausible.

Taking all the evidence of this conversation into account, we conclude that the conversation was between two individuals who had known each other for years, and that after general conversational pleasantries, the Vice President tentatively broached the subject of a contribution to an individual he assumed to be a Republican, and therefore unlikely to contribute to the DNC. Liff in turn, familiar only with hard money contributions, immediately rebuffed the overture, saying he had given his "legal limit," at which point the Vice President dropped the topic. While it appears that Liff assumed that the Vice President was talking about a hard money contribution, based on his description of the conversation that assumption was not based on anything said by the Vice President.

C. The Vice President's Intent

The Vice President has stated that he intended to ask only for soft money, not hard money, contributions to the DNC in the course of his telephone solicitations from his West Wing Office. As noted above, the Vice President has stated that this must have been his intent because he believed (incorrectly) at the time that the DNC's media campaign was being funded only through soft money contributions. In addition, the Vice President told us that he incorrectly believed at the time that individuals were limited to giving only $2,000 in hard money to the DNC per election cycle. The Vice President claims that he was laboring under this misconception of federal election law because he assumed national party committees were subject to the same limitations of $2,000 in federal contributions per election cycle as were the committees he had formed when he had sought election to the House of Representatives and later to the Senate. Thus, according to the Vice President, when he saw suggested solicitation figures of over $20,000 on the DNC call sheets, he assumed that he had to be asking for soft money.

We have developed no evidence to show that the Vice President read Ickes' memos setting forth that the DNC had to raise both hard and soft money in order to keep its issue ads on the air, or that he read Marshall's memo which alluded to the DNC's annual individual hard money limit. Given the very large amounts that the Vice President was being asked to raise, it seems plausible that he would believe he was asking for soft money in his telephone solicitations. We have found no evidence to counter his claim to this effect.

V. CONCLUSION

To summarize, the preliminary investigation has established the following points:

1) There is no evidence that the Vice President knew of the DNC practice of reallocating a portion of large contributions to hard money accounts. Therefore, there is no factual basis on which one could conclude that further investigation is warranted of whether the Vice President may have violated section 607 by making vague or ambiguous solicitations, knowing that a portion of any ensuing contribution would be treated as hard money.

2) There is no evidence that the Vice President expressly asked any of the individuals he contacted directly for funds to support his reelection or the election of any other federal official.

3) There is affirmative evidence that the Vice President asked for support for the DNC media campaign in virtually every call. Such support could, under law, have been either hard or soft.

4) All donors who had an affirmative impression of what was being requested believed it was a solicitation for soft money. Noah Liff, who recalls a response to the Vice President that suggests he interpreted the request as a hard money request ("I've given my legal limit") states that he thinks he may not have been aware at the time that there was any other option available. Given that context, it is not warranted to interpret the general nature of the recalled request made by the Vice President ("Any help would be appreciated") as a request for hard money.

5) In numerous conversations with more sophisticated donors, the discussion explicitly focussed on the fact that the Vice President was soliciting soft money.

6) In the vast majority of the cases, donations resulting from the Vice President's solicitations were handled by the DNC as soft money. In the few cases where they were not, the evidence suggests that this was done without the donors or the Vice President's knowledge.

7) The amounts of the requests being made suggest prima facie that the requests were for soft money. Hard money donations in those amounts would have been unlawful. There is no evidence to suggest that there was ever any discussion or understanding by either the Vice President or any of the donors that a portion of a single donation might be treated as hard money.

Based on these factors, and our additional analysis above, we have concluded there is insufficient evidence that the Vice President may have violated section 607 to warrant further investigation, and we accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel. In order to justify the need for further investigation by an independent counsel here, one would be required to decide the following issues in the following ways:

a) 18 USC § 607 applies to telephone solicitations made from the Vice President's office in the White House to private citizens located outside the White House;

b) There is no Department of Justice policy that such solicitations will not be prosecuted;

c) At least one of the solicitations made here was a call for a contribution within the meaning of the FECA; and

d) That there is not clear and convincing evidence that the Vice President did not intend to solicit such contributions.

Although we would ordinarily attach to this memorandum the necessary paperwork to be filed with the Special Division of the Court of Appeals, we have not done so here so as not to delay, in light of the upcoming holiday, the review of our conclusions. We will immediately begin drafting this paperwork.

ADDENDUM

Persons Solicited by the Vice President -- Resulting
Contributions Partially Deposited into a DNC Federal Account

Angelos, Peter
Byrne, E. Blake
Dockser, William
Johnson, Robert
Morse, Andy

Persons Solicited by the Vice President -- Resulting
Contributions Deposited into a DNC Non-Federal Account

Adelson, Merv
Black, Scott
Cofrin, David
Dayton, Mark
Getty, Ann
Hormel, James
Jenrette, Richard
Landow, Nathan
May, Peter
Petrocelli, Anthony
Wang, C.J.

Persons Solicited by the Vice President --
No Contributions Given As a Result

Ellison, Lawrence
Johns, Johnny
Pritzker, Penny
Liff, Noah
Becker, Eric
Bendheim, Jack
Stephenson, Byron Rex
Utley, Robert

No Solicitation by the Vice President -- Thank You Call

* Broad, Eli
Casey, Thomas
Chaudary, Rashid
Coleman, Lynn Rogers
Donald, James
Dozeretz, Beth
Edwards, Jim
Gohd, Matthew
Green, Steven

* Leesfield, Ira
* Marcus, George
Manatt, Charles Taylor
O'Neill, Patrick
Pensky, Carol Ann
Rosen, Jacob
Rubin, Robert
Shorenstein, Walter
Shuman, Stanley
Stout, Thomas Philip

* Contributions to DNC partially deposited into federal account

No recall of telephone conversation with the Vice President re: contributions

Adler, Michael
Allaire, Paul
Allard, Nicholas
Allison, Gary
Alix, Jay
Arnold, Truman
Azima, Farhad
Bailey, Ken
Bakke, Dennis
Barrientos, Rene
Bass, Robert Muse
Belfer, Bob
Belz, Gary
Bildner, Allen
Boggs, Thomas
Branson, Frank L.
Bronfman, Edgar Sr.
Callaway, Eli
Casperson, Finn
Catsimatidis, John
Cauthen, Sonny
Cejas, Paul
Chao Chi-Chu, George
Chapman, Joe
Checchi, Alfred
Clayton, James
Cloobeck, Stephen
Clymer, Ray
Cofrin, Gladys
Cogan, Marshall
Connelly, John E.
Cooke, John Frederick
Cooper, Irby
Corzine, Jon S.

Daly, Thomas
Davis, Marvin
Dayton, Ken
Delk, Robert Mitchell
Dell, Michael
Demenil, Dominique
Drummond, Garry Neil
Dunavant, William B.
Dwoskin, Albert James
Eskind, Jane
Eychaner, Fred
Farouki, AbulHuda
Field, Fred
Fisher, Wayne
Flom, Joseph H.
Ford, Gerald J.
Free, James Carlton
Friedenrich, John
Friedkin, Monte Norman
Frost, Phillip
Gallagher, Mike
Garrett, Richard
Geffen, David
Geiger, Keith Brian
Gilman, Howard
Glatfelter, Athur
Greenwald, Stephen
Gupta, Rajendra
Hall, Craig
Haney, Franklin
Hardy, G.P.
Hay, Jess
Hayward, Richard
Hazeltine, William Alan
Hurwitz, Charles
Hyde, Joseph R.
Irani, Ray
Jacobsen, Ken
Jamail, Joseph
Jones, Clark
Jones, Paul Tudor
Jordan, Vernon
Joyce, John
Katz, Lewis
Kelly, Peter G.
Kenmore, Ayse
Krise, Ron L.
Krupnick, Jon E.
Lausell, Miguel Demetrio Marxuach
Lerman, Miles
Lesniak, Raymond
Levin, Susan Bass

Lindner, Carl
Manilow, Lewis
Manilow, Susan
Manning, John Patrick
Masri, Hani
Master, Bernie
Mathews, Harlan
McDonough, Robert
McEntee, Gerald W.
McMillian, John G.
McWherter, Ned Ray
McWhorter, Clayton
Messinger, Alida Rockefeller
Mills, Olan
Mithoff, Richard
Moldaw, Stuart
Mondale, Ted
Montrone, Paul M.
Morey, Maura
Morton, Peter
Neal, Roy
Norton, Peter
Nutt, David
O'Quinn, John
Pearl, Frank
Pincus, Lionel
Podesta, Anthony
Pollin, Abe
Potter, Jonathan
Ramero, Edward
Rapoport, Bernard
Rivera, Dennis Hickey
Robertson, Sanford
Rohatyn, Felix
Roitenberg, Harold
Rudin, Lewis
Rudman, M. B. (Duke)
Russell, Madeleine
Sachs, Marshall
Sauter, Gary
Schoenke, Ray
Scott, Dr. Steven Martin
Sharp, James
Shipley, George Corless
Simon, Bren
Simon, Diana Meyer
Slawson, Richard William
Smith, Raymond William
Sparks, Willard
Sparks, Rita
Stein, Jay
Studley, Julian

Sussman, Donald
Sweeney, Patrick A.
Tagg, George
Thompkins, Susie
Tisch, Jonathan
Tisch, Steven
Tobias, Robert
Torkelson, John
Trauger, Byron
Tully, Daniel
Umphrey, Walter
Vernon, Lillian
Weaver, Delores Barr
West, Jake
Williams, John Eddie
Yokich, Stephen

1994 Calls Made from DNC Offices

Borish, Peter
Bronfman, Edgar Jr.
Dattel, Samuel
Walton, Alice

Unavailable for Interview

Jimenez, Mark
Uribe, Charles
Diller, Barry
Velez, Ruben
Lerach, William
Zappa, Gail
Jenrette, Richard

Refused Interview

Becker, Eric
Coia, Arthur
Fishelson, Julie
Hess, Leon
Lewis, Peter
Rechelbacher, Horst
Robb, Gary
Townsley, William
Zimmerman, Raymond

Mr. WILSON. Now, 9 days later Mr. La Bella took a very different view from the one that you advanced in this memorandum. Exhibit 16, if you turn to that, is a memo from Mr. La Bella to the Attorney General. The memo provides a recommendation that the Attorney General appoint an independent counsel to investigate the Vice President. But of particular interest in this connection is the part where Mr. La Bella takes issue with the way you characterized the view of the prosecutors who were in the interview with the Vice President and this is what Mr. La Bella told the Attorney General. And it is page 4 of Mr. La Bella's memo to the Attorney General. He said, "Although the memorandum states that the four prosecutors," and he is referring to your memo, "Although the memorandum states that the four prosecutors who participated in the interview of the Vice President, each found him to be credible and forthcoming, this somewhat overstates my own impression of the interview. While the Vice President did present his case well and plausibly, there were certain answers which seemed somewhat less convincing than others." It appears there is a stark contrast on a factual representation on a memo that you wrote and then Mr. La Bella comes back after the fact and takes issue with the way you characterize this factual matter.

[Exhibit 16 follows:]

U. S. Department of Justice
Criminal Division

Washington, D.C. 20530

November 30, 1997

MEMORANDUM

TO: THE ATTORNEY GENERAL

THROUGH: Mark Richard
Acting Assistant Attorney General
Crimin. Division

FROM: Charles G. La Bella
Supervising Attorney
Campaign Financing Task Force

Re: Independent Counsel Matter
Vice President Albert Gore, Jr.

On November 21, I received the first draft of Public Integrity's memorandum on the VPOTUS calls. This is the first write up I have seen regarding facts developed from Integrity's inquiry. As structured, I have had no role in the preliminary investigation of the Vice President's calls from the White House except for my attendance at his interview on November 11, 1997. Nor have I been provided copies of the key documents referenced in Public Integrity's memorandum. As a result, I must rely upon the description of these key documents -- like the call sheets and the Ickes/Mitchell memoranda -- as they appear in the memorandum. I should also note that while I have been told that the FBI has submitted a separate memorandum on the subject of the Vice President's phone calls from the White House, I have never seen a copy of that memorandum and am unaware of its contents. Thus, my analysis -- such as it is -- and reaction to the Public Integrity memorandum is very limited. I must give deference to the instincts and judgments of the prosecutors and investigators who conducted and participated in the preliminary inquiry.

It is worth noting at the outset that this matter presents several troubling and difficult issues. First, reasonable minds can and do differ as to whether Section 607 applies to solicitation phone calls placed by the Vice President to non-federal employees at non-federal locations. Second, even assuming that Section 607 is applicable, do the facts presented by the calls and the subsequent



contributions and treatment of these contributions by the DNC, involve a potential violation of that statute by the Vice President?

Underlying these difficult issues is the fact that even assuming a technical violation of Section 607, the likelihood of a prosecution based upon such a violation would be -- at best -- remote in the judgment of any relatively experienced prosecutor. The temptation, of course, is to allow the relatively insignificant nature of a potential violation to color the analysis that is to be applied under the Independent Counsel Act. This is a temptation that everyone has acknowledged but stated that they would resist in an attempt to resolve the matter. With this in mind, I have attempted to review the matter and arrive at a recommendation.

In its memorandum, Public Integrity, assuming the application of Section 607, concludes that

> further investigation of the allegations is not warranted because an Independent Counsel would not be able to demonstrate that the Vice President knowingly solicited any hard money contributions from his White House office.

Memo, p.3. In addition, Public Integrity finds that even if there were a solicitation of hard money, there is "clear and convincing evidence that the Vice President subjectively intended to ask only for soft money." Memo, p.2. Accordingly, Public Integrity recommends against the appointment of an Independent Counsel.

After reviewing Public Integrity's memo, I remain convinced that the Attorney General should seek the appointment of an Independent Counsel in connection with this allegation. It is clear that the likelihood of a prosecution is remote based upon the facts as we now know them. Nonetheless, there exists, in my view, a potential (albeit technical) violation that can be articulated based upon the fair inferences to be drawn from the facts thus far developed. Moreover, the possibility that this may be part of a broader criminal activity cannot be discounted.[1]

My overall concern is that at every point where two inferences could be drawn from a set of facts, the inference consistent with a lack of criminal intent/conduct was always chosen. Although I might personally agree with the inference accepted by Public Integrity as the more compelling or likely inference to be drawn, the fact is that reasonable minds may well draw a contrary

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[1] In a separate memo, I have urged that although it is my belief that Section 607 does not apply to the facts presented by the Vice President's phone calls, the question is not without doubt and, in keeping with the spirit and intent of the Independent Counsel's Act, an Independent Counsel should make this decision.

inference. To give just a few examples:

1. The memorandum notes that Liff's reference on the call sheet to the "legal limit" of what he believed he could give seems to indicate that he thought the Vice President was requesting hard money. This would be especially plausible in light of the absence of a reference to the DNC during the call (Memo p.38). Nonetheless, the memorandum concludes that the "legal limit" comment was simply "a nonsequitor born of Liff's misunderstanding of what the Vice President was asking for" (Ibid.). While this may be true, it is by no means the only inference to be drawn. Indeed, an inference contrary to that urged by Public Integrity would go some distance in undercutting the "Vice President's subjective intent" upon which Integrity's memorandum bases, in part, its conclusion not to seek the appointment of an Independent Counsel.

2. The notation of "soft money" on a few DNC-generated call sheets suggests that the concept of "soft money" was discussed by the Vice-President during those conversations. This is seen as evidence that soft money was discussed in all solicitations (Memo p.36, n.46). However, it is equally plausible -- indeed, it could be argued to be even more plausible -- that the few notations mark the exception rather than the rule. One could argue that it is more common to note an aberration than a pattern. Moreover, the possibility that there were hard money calls gets some corroboration -- and perhaps not insubstantial corroboration -- from the fact that many of these calls were paid for with a Clinton/Gore (hard money) credit card, rather than a DNC (soft money) card. (Memo, p.21, n.25, p.26, n.29).[2] Indeed, the use of a Clinton/Gore credit card could arguably give weight to the Common Cause allegations discussed below. In any event, it would be interesting to know just how many of the Vice President's calls were funded with a Clinton/Gore credit card and the rationale for using it.

3. The call to Penny Pritzker (incidently paid for with a Clinton/Gore credit card) (Memo, p. 26, n.29) could be part of a plan to link the media campaign directly with the reelection effort. Support for such a view comes from the Vice President's appeal to give to the media fund because of its demonstrated effort in promoting the presidential reelection effort (Memo, p.26). If there was such a linkage, it could be argued that the entire episode of phone calls was part of an effort to influence the '96

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[2] The memorandum characterizes the persons to whom "soft money" comments were made as the "most sophisticated" donors (Memo, p.40). There is nothing that I am aware of in the memo to support this characterization. It therefore appears, probably unfairly, as an effort to "explain away" the Vice President's comments. It would seem that if there are facts known to us that would support this conclusion, they should be recited to bolster the proposition.

election (rather than to solicit funds for a media campaign allegedly not associated with the election). Indeed, this is precisely the charge that Common Cause has lodged with respect to the media campaign and solicitation of funds in connection therewith. To segregate the telephone calls from the Common Cause allegation -- never viewing these as a whole or in context -- is in my judgment a dangerous approach which will be viewed by many as an effort to avoid seeing the big picture. (See discussion re Ickes/Marhsall memos, infra.) We cannot simply ignore the Common Cause allegations in our analysis of the Vice President's calls because they were included in a separate submission to the Department. To the contrary, these are significant allegations available to us concerning the media campaign and the Vice President's calls from the White House. It is arguably unfair on the one hand to reach a conclusion as to the Vice President's "subjective intent" in making the solicitation calls from the White House, and on the other hand to ignore the Common Cause allegations which -- some would and have argued -- place these calls and the Vice President's intent in proper perspective.

4. Although the memorandum states that "the four prosecutors who participated in the interview of the Vice President each found him to be credible and forthcoming", this somewhat overstates my own impressions of the interview. While the Vice President did present his case well and plausibly, there were certain answers which seemed somewhat less convincing than others. In particular, the Vice President was quick to explain that he did not likely review the Ickes/Marshall memos (which reference the DNC's splitting of contributions into hard and soft accounts in connection with the media campaign) because these matters were the subject of meetings that he attended. Yet he could not recall the items being discussed at the meetings.

Similarly, the Vice President claimed that his concern -- borne from his Senate experience -- was simply who was paying for the calls, not where they were placed. Yet if this is so, reasonable minds could argue that he would have charged his Senate fundraising calls (as he did his Vice Presidential ones) rather than go to a different location to place them. Again, the memorandum accepts the favorable inference without addressing the alternative.

This is not to say that I found the Vice President to be untruthful. On the contrary, on the whole I too found him to be credible and forthcoming. However, his answers to one or two questions gave me sufficient pause so that I would not rely on his interview as a bulwark for a determination not to appoint an independent counsel. Although Public Integrity tries not to give "undue weight" to the Vice President's statement (Memo, p.5), it appears to be that it does factor in to a not insignificant degree. Finally, I would be interested in the view of the agents who conducted the interview. I have not discussed the topic with them and I did not see their impressions in the memorandum.

Perhaps there are facts known to the prosecutors and investigators that would eliminate my few concerns about the answers that trouble me. If so, they are absent from the memo and I would suggest inserting them in order to support the conclusions reached. Indeed, if it is true that everyone who attended these meetings with the President and Vice President has been interviewed and supports the finding that the DNC allocation of funds and the hard/soft component to the media funds were not discussed, this should be included in the memorandum. If this is not the case, my concerns remain.

5. The call sheet for Jim Hormel was shown to the Vice President at the interview. The call sheet contains a handwritten note "no federal $ '95." During his interview, the Vice President said that he did not recognize the handwriting and did not believe it was on the call sheet when he placed the call. Have we identified the handwriting and, if so, have we interviewed the author? If we have not, is there any evidence to support the conclusion that the handwriting was not on the call sheet when it was given to the Vice President? The Vice President, in response to this document, reaffirmed that he believed he was only asking for soft money in these phone calls and was unaware of any hard money component to the media fund. However, one could draw a contrary inference from this notation.

One of the principal concerns I have with the position of Public Integrity and its recommendation is the treatment of the Ickes/Marshall memos. There are several facts with respect to these memos that are not disputed:

(a) They make it clear that there was a hard and soft money component to the media fund.[3] The memos also could be read to suggest that the DNC was systematically splitting the large contributions solicited by the President and Vice President in their phone calls into hard and soft accounts in connection with the media fund.

(b) The memos were sent to the Vice President and the topics referred to in the memos were discussed at some of the regular meetings attended by the President and Vice President.[4]

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[3] Indeed, Ickes stated his belief that had the Vice President read and understood the memos, he would have known that the DNC needed to raise federal funds in order to keep the media fund afloat (Memo, p.15).

[4] That the media hard money/soft money topic was discussed is, I have been told, evident from notes of the meetings. Since I have not reviewed the documents I must rely on the characterizations in Public Integrity's memo and my recollection of the discussion of these memos during the Vice President's interview.

The Vice-President does not deny seeing the memos; he stated only that he did not recall seeing them. The same inability to recall permeated his response to questions about meetings at which the memos were discussed. The Vice President stated that the reason he did not review the Ickes memos was that he knew he would be in attendance at meetings during which the topic would be fully aired. Moreover, he would wait for these meetings to find out what he needed to know. And yet the Vice-President cannot recall any discussion at these meetings concerning the splitting of funds -- although funding of the media campaign was a major concern at the time.[5] The Vice President did assume, however, that the subject matter of the memoranda would have been discussed in his and the President's presence. See FBI 302 at p.9. In such circumstances, some would argue that the Vice-President's failure of recollection is, at least, curious.[6]

With respect to the memos, Public Integrity concludes that:

> Based on the results of our investigation, it appears very unlikely that the Vice President had any awareness of the DNC's practice. As set out above, he states that he was unaware of it, and that, in fact, he believed that hard money donations to the DNC were severely limited to relatively small sums. Only the Ickes/Marshall memoranda, described in detail below, provide any support even for an inference that he may have known of the allocation practice. Moreover, even if it could be demonstrated that the Vice President read the memoranda, which he denies, this fact, by itself, does not support an inference that the Vice President asked any donor to make a hard money contribution.

(Memo, pp. 10-11). While it is true that the memos by themselves do not lead to a conclusion that the Vice President solicited hard money, they certainly suggest that the Vice President may have been part of an effort to solicit soft money with the understanding that the DNC would split this money for use in the media campaign.[7]

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[5] In fact, this was the heart of the "bad blood" between Ickes and Morris about which the Vice-President was extremely chatty.

[6] The Vice-President denied that he had any understanding that there was a hard money component to the funds used for the media campaign. The President however -- who attended the same meetings -- did understand, as he admitted during his interview. The President said he was unaware that the DNC routinely and systematically split each large contribution. In fact Ickes, himself denies he knew that this was the practice.

[7] The suggestion on p.11, fn.10 that the Task Force is continuing to look at the DNC's allocation practice is somewhat inaccurate. The Task Force investigation was halted at the request

This is certainly the type of inference that a reasonable prosecutor might draw from these facts.

As noted above, I assume that all those at the DNC, the White House, and Clinton/Gore '96 who could shed light on the issues have been interviewed. For example, I must assume that Knight, Utrecht, Strauss, Morris, the Vice President's Chief of Staff (who the Vice President said would alert him to anything he needed to see in the memos) and others have been interviewed and their statements support the notion that the Vice President had no reason to know that (i) there was a hard money component to the media campaign; or (ii) that the DNC routinely split large donations between hard and soft money accounts. I think this should be made clear in the memorandum since it goes a long way to support the Vice President's statements and the other objective facts relied upon by Public Integrity to support its recommendation.

The type of analysis involved in determining whether the Vice President was part of a scheme to solicit soft money knowing that it would be turned to hard money for the media campaign is subjective and open to debate. By routinely embracing the most innocent inference at every turn, even if the inferences are factually defensible, the memorandum creates an appearance that the Department is straining to avoid the appointment of an Independent Counsel and foreclose what many would characterize as an impartial review of the allegations. When you look at the facts,[8] the memos, the meetings, and the DNC practice, it is hard to say, as the memorandum does, that there is only one conclusion to be reached. This is especially so when you factor in the Common Cause

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of Public Integrity because they feared that it might chill those who were talking voluntarily to the POTUS and VPOTUS investigators. The investigation was halted at the time the Task Force was attempting to interview high level DNC employees -- the very people who might have some light to shed on contact with the White House and the essence of the Common Cause allegations. This investigation remains on hold at the request of Public Integrity.

[8] Although every effort was made to gather all facts within the limited time frame, several donors or potential donors were unable to be interviewed (due to illness, travel, etc.) One of those, Mark Jimenez, I learned about only this week when we were told that he is the same person being targeted by the Task Force for conduit contributions. He is also being investigated by three United States Attorney's offices. It is curious to me that Mark Jimenez was able to avoid an interview and yet his attorney (Abbe Lowell) has submitted a 40-page memorandum to Public Integrity outlining why Mark Jimenez's use of conduit contributions in 1996 was not an "intentional" violation of the Election laws. The memo was subsequently sent to the Task Force since it is the Task Force that is conducting the Jimenez investigation.

allegations which have been debated within the Department for the better part of a year and the use of a Clinton/Gore credit card to support at least some of the Vice President's calls. For the reasons I have already set out in the Section 607 memorandum, and the concerns expressed herein, I believe that the wise course is to seek the appointment of an Independent Counsel.[9]

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[9] If the Attorney General chooses not to seek an Independent Counsel, it would, in my view, be better to do so on the ground that Section 607 is inapplicable. Although I recommended in an earlier memorandum that this question too be determined by an IC (because there are plausible arguments on both sides), my own opinion, as stated in that memorandum, is that the better argument is that the statute does not apply.

I have been told repeatedly, however, that it is the Attorney General's obligation to determine if the statute applies. Assuming that to be the case, a determination that the statute is inapplicable is, in my opinion, not only legally correct, but has the incidental benefit of obviating the need to scrutinize and second-guess every act and word of the Vice President. A decision based on the facts in this case is, in my opinion, much more subjective than one on the law. As such, it is better made by an Independent Counsel than the Attorney General.

Mr. RADEK. I think "stark contrast" grossly overstates it. My memo is based on remarks that Mr. La Bella made to me shortly after we interviewed the Vice President, in which case he gave me the impression that he clearly thought the Vice President was credible. The first I learned that he was having some problems with it was when I saw his memo disagreeing with it, and again I don't think that the contrast was so stark. He said that he had some problems with it. As a result of this disagreement there was an investigation conducted by another Deputy Assistant Attorney General with no conclusions drawn——

Mr. WILSON. It is certainly significant enough for him to come back and put on paper disagreement with the way that you characterize it. And he goes on page 4 to present the whole thing fully. He does say that "this is not to say that I found the Vice President to be untruthful. On the contrary, I found him to be credible and forthcoming. However, his answers to one or two questions gave me sufficient pause so I would not rely on his interview as a bulwark for a determination not to appoint an independent counsel," which again is a contrast to the way you characterized his state of mind.

Mr. RADEK. Contrast, but that was the first I heard of it and I can assure you that we didn't rely on his statement as a bulwark either.

Mr. WILSON. What were the other statements referred to by Mr. La Bella? Did the other agents agree with your characterization or did they agree with Mr. La Bella's characterization?

Mr. RADEK. There was some dispute as to what their characterization, which they believed and which they agreed with.

Mr. WILSON. You found out later that there was some dispute from other people as to what their state of mind was?

Mr. RADEK. I am not sure to what you are referring.

Mr. WILSON. You described there was some dispute in terms of the other prosecutors?

Mr. RADEK. I'm sorry, I thought you said agents. I'm sorry. I don't think there was any disagreement with respect to other prosecutors.

Mr. WILSON. Only Mr. La Bella took issue?

Mr. RADEK. That is my best recollection.

Mr. WILSON. Just one last question. Exhibit 35 is a memorandum, if you would just take a moment to refer to that.

[Exhibit 35 follows:]

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States

PURPOSE: To recommend that the Attorney General not trigger a preliminary investigation in this matter.

TIMETABLE: The Attorney General has until August 26, 1998, to decide whether a preliminary investigation is triggered.

SYNOPSIS: New information regarding Albert Gore, Jr., and 1996 fundraising violations is insufficient and no preliminary investigation should be triggered.

DISCUSSION: (see attached)

RECOMMENDATION: I recommend that you not trigger a preliminary investigation in this mattter for the reasons set out in the attached memorandum to me.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring Components:
None

Nonconcurring Components:
None

Attachment

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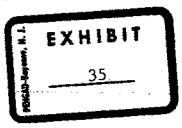

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

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Noncurring Components:
None

Attachment

DOJ-VP-00464

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U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

AUG 24 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States

The Public Integrity Section has conducted an initial inquiry into the question of whether there exists specific information from a credible source warranting further investigation into whether the Vice President of the United States, Albert Gore, Jr., a covered person under the Independent Counsel Act Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have provided one or more false statements, in potential violation of 18 U.S.C. § 1001, to attorneys and agents investigating his fundraising telephone calls last November. We have concluded that we have insufficient information upon which to base any further investigation, and therefore recommend that this matter be closed. We also have concluded that the new information we have received does not require the Attorney General's determination in the prior preliminary investigation to be reopened. This memorandum will summarize the information we received and the results of our review.

POTENTIAL SECTION 1001 VIOLATION

The Independent Counsel Act

When information is received suggesting that a person covered by the Independent Counsel Act may have committed a federal crime, the Department of Justice has 30 days to review the allegations. At the end of this period, a determination must

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be made as to whether the information we have is sufficiently specific and credible to warrant further investigation, and whether in fact the allegations constitute a violation of federal criminal law. At the end of the 30 days, the matter must either be closed, or a preliminary investigation must be triggered. The purpose of a preliminary investigation, which is limited to 90 days, is to determine whether further investigation is warranted; if so, the Attorney General must apply to the Special Division of the Court for the appointment of an independent counsel.

If the Attorney General disagrees with our conclusion in this case and concludes that a preliminary investigation should be conducted, that decision must be made by August 26, 1998, 30 days after receipt of the information. In that event, the Special Division of the Court must also be notified that a preliminary investigation pursuant to the Independent Counsel Act has commenced.

The Facts

In the Fall of 1997, the Public Integrity Section conducted a preliminary investigation into the question of whether the Vice President may have violated 18 U.S.C. § 607 when he made fundraising telephone calls from his White House office. The investigation resulted in the Attorney General's conclusion that there were no grounds to seek appointment of an independent counsel for two independent reasons: first, the overwhelming weight of the evidence supported the Vice President's statement that he was soliciting soft money contributions, outside the scope of section 607's ban on political fundraising from the federal workplace, when he made the telephone calls; and second, established Departmental policy precluded prosecutions under section 607 in the absence of aggravating circumstances, such as coercion, that were absent there. Given this, the Attorney General decided that she need not resolve the substantial legal question of whether section 607 even applies to telephone calls from a federal office to a private citizen outside the federal workplace.

Statements made during the previous investigation: As set out above, the Vice President's explanation was that when he made the fundraising calls, he was seeking large, so-called soft money contributions to the DNC. During the previous preliminary investigation, we therefore explored the question of whether there was any evidence that would tend to cast doubt on the veracity of that explanation. One central event that led up to the fundraising calls was a meeting held at the White House on November 21, 1995.

As part of our preliminary investigation, the Vice President was interviewed on November 11, 1997, and was questioned about several documents, including memoranda, charts, and analyses, that are described in a Harold Ickes memorandum dated December 18, 1995, as having been "reviewed at the DNC budget and

fundraising meeting on 21 November 1995 in the map room." As we set forth in our investigative findings near the end of the preliminary investigation, the documents deal generally with the DNC media fund and specifically with plans to raise several million dollars for paid television ads through the end of 1995. Within this context, one of the documents, dated November 20, 1995, suggests fundraising phone calls by the "POTUS" and "VPOTUS" as an additional way to raise the media budget shortfall. The remaining pages make up four documents dealing with DNC media budgets and fundraising projections for the remainder of the year. The December 18 Ickes memorandum indicates that the President, Vice President, and David Strauss were among the attendees of the November 21, 1995 meeting where these documents were "reviewed".

The Vice President, when questioned about this set of documents and the November 21, 1995 meeting, stated that he did not recall a discussion at this or any other meeting about the DNC's specific need for both hard and soft money in late 1995 to keep the ads on the air. The Vice President said that he believed that the fundraising phone calls probably were discussed during the meeting. He also recalled that the general topic of the media fund budget being increased was raised and discussed. However, the Vice President recalled that he believed, at the time he made the calls, that the ads were paid for with soft or non-federal money, claiming that he was not aware that there was a hard money component to the media fund.

The Vice President stated that based on this erroneous belief, together with his equally erroneous belief that hard money contributions were limited to $2000, when he made telephone calls requesting large contributions to the DNC media fund, he subjectively believed that he was soliciting a soft money contribution by the very nature of the request.[1] In fact, the ads were financed pursuant to a complex regulatory formula apportioning their cost between hard and soft money, and individual donors are permitted to contribute up to $20,000 to the DNC in hard money, so long as their total hard money

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[1] As set out in our recommendation at the conclusion of the preliminary investigation in that matter, we did not, of course, rely solely or even give substantial weight to the mere fact of the Vice President's explanation. There was also substantial independent evidence confirming the Vice President's statements that he was in fact soliciting soft money, primarily the repeated statement from many of the donors that it was their explicit understanding that they were being requested to make a soft money donation. In addition, in some conversations, it was specifically suggested by the Vice President that the contributions could come from corporate funds, which can only be soft money.

contributions to all donees do not exceed $25,000. When asked about portions of other Ickes memoranda, unrelated to the November meeting, that showed a hard money component to the media fund, the Vice President said that as a rule he did not read the Ickes memoranda on these topics.

Recently produced documents: On July 27, 1998, the Vice President's counsel, Jim Neal, contacted the Public Integrity Section to inform it that six pages had been recently discovered that appeared to relate to the November DNC budget meeting.[2] Specifically, the documents were copies of documents already in our possession, with the addition of handwritten notations made by David Strauss, the Vice President's former Deputy Chief of Staff. The documents are attached at Tab A.

One of the documents, entitled "DNC 1995 Budget Analysis", upon which Strauss took notes, sets forth the current DNC budget, financial status including available loan capacity, and two options for funding an additional $3 million in media above and beyond the $10 million that had been designated for media in the 1995 budget. The document indicates that the party had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the ads (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion. Consistent with this interpretation of pages one and two of the document -- that the hard portion of the media budget could be borrowed leaving the soft portion to be raised -- the "fundraising projections" set forth on page 3 show that all recent past and future fundraising events planned for the media fund were designed to raise soft, not hard, money.

While the document itself does not break down the media fund into hard and soft components, the placement of the Strauss notes on the document raises a suggestion that the hard money component to the media fund may, in fact, have been discussed at the

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[2] All such documents were requested by us during the course of the preliminary investigation, but these documents were not produced at the time. Neal stated that he did not know why these documents were "missed" during the search for documents conducted last fall. The Campaign Finance Task Force is conducting an inquiry to determine whether an investigation is warranted into the failure to produce these documents previously.

November 21, 1995 meeting attended by the Vice President.[3] Specifically, Strauss's writing -- which notes "65% soft/35% hard" opposite the term "media fund" -- appears to reflect a phrase that may have been used at the meeting to describe the approximate proportions of hard and soft money used by the DNC to purchase television ads during this period.

The Strauss notes also include what may be a statement of the hard money limit for gifts to the DNC. Specifically, the note just below the "65%/35%" includes what appears to be an attempt to define soft money from the DNC's perspective as "corporate or anything over $20 k from an individual." In addition, while not clearly written, a second notation that appears to say "hard limit $20k" appears on page 2 of the "DNC budget analysis" document opposite option 2 in the Analysis document.

These new documents, then, raised some new questions concerning the Vice President's statements about his understanding of the DNC's efforts to fund the media campaign. The Strauss notes suggest that during the November 1995 meeting, both the fact that the hard money limit on donations to the DNC was $20,000, and that the media campaign was funded by a mix of hard and soft money may have been mentioned. Because the Vice President was present for a portion, if not all, of that meeting, and may have heard, understood and remembered these points, these notes thus suggest the possibility that his subsequent statements that he believed at the time that hard money donations were limited to $2000 and that the media campaign was funded only by soft money may have been false.

For example, the "65% soft/35% hard" note, if it reflects something that was said at the meeting about the media fund, may suggest that the Vice President was told in the course of the meeting that this fund, for which he was helping to raise money in part through the fundraising calls, had a hard money component. Moreover, the entries that seem to relate to the individual hard money limit -- "corporate or anything over $20K from an individual" and "hard limit $20K" --may indicate that the Vice President was told that individuals could give up to

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[3] Before receiving the documents, we knew from previous Strauss interviews that he took notes during meetings and often used quotation marks to indicate verbatim statements. He also told us that after he took his notes it was his practice to write a file title on the top of the document and give it to his assistant to file in the appropriate drawer in the Old Executive Office Building. This background and the fact that several phrases appear in quotation marks immediately suggested to us that Strauss's notes may reflect things that were said during the November 21, 1995 meeting.

$20,000, not $2000, in hard money per election cycle to the DNC at that same meeting.

We should make it clear at the outset that we did not view this matter as being one in which we were examining an allegation and evidence of a potential crime to determine whether facially sufficient information could be disproven, thus eliminating the need for a preliminary investigation, as has been the case in numerous independent counsel matters. Standing alone, the Strauss notes are not, in our view, sufficient to support a conclusion that the Vice President may have been making a false statement, though it does open that possibility. Rather, based on concerns created by the notes, we determined to reexamine the circumstances of the November 1995 meeting in the course of a 30-day initial inquiry to explore whether there might be additional evidence supporting the chain of inferences necessary to reach a conclusion that the Vice President may have lied, sufficient to warrant further investigation.

We specifically sought any information suggesting that the Vice President may in fact have heard and comprehended the facts noted by Strauss; such an inference would be supported, for example, by information that these facts were discussed in sufficient detail and focus at the meeting that many other attendees specifically recall them, or that the Vice President made comments or asked questions in the course of the discussion that would seem to reflect an active understanding of the details, or that the participants recall any affirmative discussion of a need to raise hard money for the media fund. We found no such evidence. Indeed, the range of impressions and vague misunderstandings about these matters among all the meeting attendees is striking, and virtually eliminates any reasonable inference that mere attendance at the meeting necessarily would have served to communicate an accurate understanding of the facts as reflected in the Strauss notes.

Subsequent investigation: In an effort to determine whether the apparent disparity between what the Vice President told us he believed at the time he made the calls and what the Strauss notes indicate may have been said at the meeting warrants further investigation, we set out to interview the attendees of the meeting.[4] As a threshold matter, the evidence we gathered

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[4] Of the 12 participants that Ickes identified in his December 18, 1995 memorandum, nine have been interviewed. A tenth, George Stephanopolous, has testified in a Senate deposition that he did not recall this meeting and, if he did attend, he would have left after 5 minutes. Of the remaining two, Don Fowler is scheduled to be interviewed the afternoon of August 24th and we are working on a proffer from the President.

during these interviews indicates that the Vice President did attend a meeting on November 21, 1998 where the DNC media fund was at least discussed.

Only the author of the notes, David Strauss, could confirm that the notes in fact reflected things that were said during the meeting, and Strauss's confirmation is based on his note-taking practices rather than on any independent recollection of what was said at the meeting. Neither Strauss nor any other attendee could explain the meaning of the phrases or otherwise provide a recollection of the meeting that could tie specific entries to a given topic.

While some of the meeting attendees had a vague recollection of some of the topics of discussion, only one, Leon Panetta, suggested that the use of hard money was discussed in connection with the media fund. Significantly, with the exception of the DNC officials and those few White House officials who had a prior working knowledge of the media fund, none of the attendees walked away from the meeting with an understanding that the media fund required a mix of hard and soft money. Moreover, no participant recalls a mention of $20,000 as the hard money limit for donations to the DNC.[5]

When asked about circumstances that might establish whether or not the Vice President comprehended the topics discussed, no one recalled a specific question or comment made by the Vice President. No one recalled whether or not he was there for the entire meeting; nor did anyone recall whether anyone interrupted the meeting to confer with him or to have him take a telephone call. Some volunteered that it was not unusual for the President

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In addition, we received on August 18, 1998, a copy of the President's unredacted schedule for this November date that lists a few more potential attendees. One, Doug Sosnich, had little recollection of this meeting and no recollection of a hard/soft money discussion in connection with the media fund. The remaining two Brad Marshall and David Gillette, are scheduled to be interviewed during the afternoons of August 24 and August 25.

[5] This does not mean that we conclude that this fact was not mentioned; indeed, we consider the Strauss note to be reasonably persuasive evidence that it was. Rather, it leads us to the conclusion that whether or not it was mentioned, it was not an issue sufficiently central to the meeting or discussed in sufficient detail that it made an impression on any of the attendees. Thus, there are no grounds to conclude that it is reasonable to believe that merely because the fact may have been mentioned in a meeting attended by the Vice President, he was lying two years later when he stated that his understanding at the time was to the contrary.

and Vice President to be interrupted during such meetings. One witness, Brian Bailey, recalled that the two may have conferred with each other a couple of times during the meeting.

The results of our interviews are set forth below:

David Strauss, Deputy Chief of Staff for the Vice President during this period, had no specific recall of the meeting held on Tuesday, November 21, 1995, in the Map Room at the White House.[6] He did confirm that the handwriting on the documents recently turned over is his. He also noted that, based on his habit and practice, he could say that the pages were part of a packet handed out during the meeting and the words noted in his handwriting were things said during the meeting that he recorded as they were said. Strauss said that he took notes during this and other meetings to assist him in his own role as "booking agent" or scheduler for the Vice President. The notes were not taken for the benefit of others and he does not believe that anyone else relied upon the notes that he took during the November budget meeting.

Turning to the notes themselves, Strauss could not recall, who might have uttered the words "65% soft/35% hard"; "corporate or anything over $20k from an individual"; or "hard money limit $20k" during the meeting. He was unable to provide an explanation about what each of the phrases might have meant within the context of the meeting. He did not recall the issue of "hard" and "soft" money discussed by those attending but noted that these issues were often discussed at DNC budget meetings. Strauss was also unable to say whether the words were used with regard to the media fund, the DNC's operating budget or something else. Finally, he could not recall whether the Vice President participated in the discussion regarding these topics, whatever the context might have been.[7]

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[6] While the FBI's 302 at several points attributes information imparted by the witness to his recollection, Strauss repeatedly said during the interview that he had no recollection of the meeting. Thus, many of the statements set forth in the 302 that appear to provide information about this meeting in fact were the witness's inferences based in whole or in part on the documents, his notes on the documents, and his general knowledge of the way things worked both at the White House and DNC.

[7] Strauss concluded, based on his handwritten notes with quotation marks opposite "VP", that the Vice President participated in the portion of the meeting that dealt with fundraising issues. Like everything else about the meeting, though, Strauss could do no more than confirm that, based upon his notetaking practices, the statements written on the page were made.

With regard to his own understanding of the DNC's use of funds, Strauss confirmed that he was aware that the DNC used a mix of hard and soft money in its budget. However, he said he was not familiar with the DNC media fund. He also said he had no knowledge of the ratio between hard and soft money in the fund, or even if the fund had a hard money component. Strauss learned of the DNC's overall need for a mix of hard and soft money because, as the Vice President's political scheduler, he was often told that the fundraising events that needed to be scheduled were either hard money events like the Saxophone Club meetings, designed to raise lots of smaller donations, or "high roller" fundraising events, designed to raise soft money.[8]

Leon Panetta, the President's Chief of Staff, recalls attending this and one or two other DNC budget meetings in 1995 also attended by the President and Vice President. While the earlier meeting or meetings dealt with the overall DNC budget, he indicated that the Ickes memoranda lead him to believe that the one in November was focussed on the need to raise additional money for the media fund. Panetta admitted that these were not the types of meetings where he paid a lot of attention to details. However, he was able to confirm that the Ickes memoranda was the kind of material usually passed out and the subjects covered were the kind of topics upon which the discussion would be based.

Panetta recalls a discussion of what would have to be raised both in hard and in soft dollars during the meeting. He added that since the Ickes memoranda clearly indicates that the major issue during the meeting was the media fund, he is able to say that these topics would have been raised in connection with the fund.[9] He has no recollection of whether it was mostly soft or

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[8] Strauss noted that this DNC budget meeting was a "big one" since the President and Vice President were in attendance. He distinguished it from regular Wednesday "money meetings" in the Ward Room of the White House that were attended by Strauss and others but not the principals. Strauss also attended the Wednesday "money meetings" in the Ward Room of the White House. Several witnesses who attended these Wednesday meetings on a regular basis confirmed that the DNC's specific needs for hard and soft money were typically discussed in some detail in this forum.

[9] Panetta was interviewed twice by telephone. In the first interview, he began by saying he had no specific recollection of the November meeting. Midway through the first interview, though, he stated that he recalled a discussion of hard and soft money but believed it was within the context of the overall DNC budget, not the media fund. When questions arose after this interview about whether Panetta recalled a hard money component

mostly hard that was needed at the time.[10] And while he had a "sense" that everyone in the room at the time understood what was being discussed, Panetta could not recall any particular detail that led to this conclusion. Panetta added that he thinks there was always a reference to what kind of money -- hard or soft -- needed to be raised at the time in the course of the other budget meetings attended by the Vice President. He believed these discussions included references to the media fund and other segments of the DNC budget.[11]

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being discussed at this meeting or at other meetings and private talks with Ickes, a decision was made to ask the witness to clarify his recollection in a second interview.

By the second interview, Panetta firmly stated that the discussion of hard and soft money was within the context of what needed to be raised for the media fund. When pressed to separate his recollection from the content of the Ickes memoranda, he admitted that he believed the topic of hard and soft money was made in the context of raising money for the media fund because the Ickes memoranda clearly indicated that this was the "main driving force" and "main topic" of the meeting.

[10] Panetta initially said that he recalled a discussion of how much soft and how much hard money was needed and what kind of fundraising events could be done to reach these goals. When asked what he specifically recalled about the phone calls and other events set forth on the back page of the Strauss notes (November 20, 1995 memorandum), Panetta said he recalled that the phone calls were one way to raise soft money. When asked whether he specifically recalls this being said in the meeting, though, the witness said it was only a "general memory" and added that it "seems to make sense". He then backed away from the statement saying he believes that there was not a "specific breakout" in the meetings but, instead, a general discussion about the need for a lot more money to be raised which could only mean a large time commitment from the President and Vice President. It should be noted that in the first interview, he did not recall any discussion concerning hard and soft money relating to the telephone calls.

[11] There is some question as to the accuracy of Panetta's memory in this regard. In his first interview, Panetta only ventured it was possible that the topic was raised during other meetings. While we have found one DNC budget meeting scheduled in the Map Room on June 8, 1995, the Vice President's schedule indicates he was not in attendance. Moreover, it appears the Media Fund was not an item in the DNC budget during the Spring and Summer of 1995. Documentary evidence indicates that the $10 million Media Fund, increased to $13 million in November 1995, was not added to the DNC budget until October 1, 1995. This is

Panetta said that while he does not recall a specific conversation about the limit on hard money contributions to the DNC, it would not surprise him if it was discussed.[12] When asked for his own understanding of these limits, he said he believed an individual could donate one thousand dollars to candidates but he was not sure how it applied to political parties.

Panetta does not recall specific comments being made by the participants, including the Vice President, but volunteered that it was his "impression" that they were following the discussion and that questions would have been asked by the principals. He noted that the Vice President's role was to listen and not actively discuss the topics at issue. Panetta had no recollection of the specific statements being made as set forth in the Strauss notes. In particular, he did not recall any of the statements that Strauss put in quotation marks, nor did he recall a particular discussion of what events to hold.[13]

Marvin Rosen, DNC Finance Chairman from September 1995 through January 1997, recalls the November meeting, which was memorable because he had just started working at the DNC, as focussed primarily on the issue of the overall DNC debt, not a distinct meeting on the media fund. By way of explanation, Rosen

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corroborated by witnesses who have noted that while the media campaign began to be discussed earlier, discussions over funding and raising money for the campaign did not begin until the Fall of 1995. Thus it appears to be very unlikely that Panetta attended meetings with the Vice President in the Spring and Summer of 1995 during which the hard/soft money split was discussed in connection with the media campaign.

[12] Panetta may have contradicted himself on this point. Page 3 of the 302 on the first interview notes that "Panetta did recall a discussion regarding the hard money limits on contributions". On page 4, though, it is noted that he had no specific recollection of the topic. In any event, we know that as of the date of the interview he was unaware of the legal limit.

[13] Because Panetta is the only attendee who recalls a discussion of hard and soft money in connection with the media fund, the clarity and consistency of his statements is particularly important in judging the weight they should be given here. We attach the first Panetta 302 at Tab 8 to assist you in your review. We have not received the 302 of the second interview conducted on August 18, 1998, and therefore the facts set out herein are drawn from [redacted] notes and memory of the interview. When we receive this second 302 we will forward it. ATTN NAM

said he never understood the difference between the media fund and the money needed to run the DNC overall operating account since there was not separate bank account for the media campaign only a designation on how much needed to be spent on advertising. Instead, he remembers the participants discussing the fact that a fundraising strategy was badly needed given the increasing debt caused, in part, by media spending. He recalls a discussion about paying the DNC bills and raising more money or acquiring more debt to pay for the extra television ads the White House had already said they may want.

Rosen did not recall a discussion of hard money with respect to the media fund. Moreover, he volunteered that these issues were not likely to have been discussed at this meeting since soft money, not hard money, was needed at the end of 1995. He recalls that the DNC Finance Division that he chaired was told, toward the end of 1995, that soft money for the media fund, not hard money, needed to be raised. He added that hard money was not an issue at the end of 1995 because the direct mail solicitation campaign, one of the major sources for hard money, normally sent out solicitations at the end of December and hard money would be coming in at the beginning of the year. Accordingly, the focus of the fundraising proposals presented to the President and Vice President during the November meeting was on raising soft money from large donors through the end of the year.[14]

Ronald Klain, Chief of Staff for the Vice President, confirmed his presence at the meeting but did not recall any discussions about the DNC media fund. In fact, Klain, who was attending one of his first meetings after taking the job of Chief of Staff, claimed that he was not aware of the media fund even after the meeting. He states that he learned that the fund was a means by which the DNC could buy commercials in meetings held after November. Instead, Klain recalled that the meeting focussed on the status of DNC fundraising and the need to raise additional money. Consistent with this memory, Klain recalled that the meeting participants, especially those from the DNC, were seeking to ensure scheduling commitments from the President and Vice President, for events and telephone calls, to help meet fundraising goals. Klain added that his role at the meeting was to accompany the Vice President and learn how the White House worked while Strauss, as Deputy Chief of Staff, was responsible

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[14] Rosen said that he helped put together the November 20, 1995 memorandum (See last page of Attachment at Tab A) that mentions telephone calls and additional events which required participation from the President and Vice President. The memorandum was generated because the White House wanted a proposal on what the DNC needed, in terms of a commitment of the principals, to raise more money to fund additional media ads.

for scheduling fundraising events that were discussed at the meeting with the DNC.

While Klain entered the meeting with a general understanding of the distinctions between hard and soft money and the DNC's need to raise both, he did not recall any discussion of hard and soft money issues during this meeting. Klain volunteered that it was not until the Spring of 1996 that he learned that the media fund had a hard money component, when Harold Ickes tied the need for the Vice President to participate in hard money fundraising such as Saxophone Club events to the DNC media campaign. Klain did not share this knowledge of the media fund composition with the Vice President. He is unaware of whether the Vice President knew that the media fund had a hard money component.

Klain had no specific recollection of any of the phrases contained in the Strauss notes being uttered during the meeting. He did state, though, that the phrase "need for 8 million in next 5 weeks" was consistent with his memory that the primary topic of the meeting was a need to raise additional money for the DNC.

Brian Bailey, formerly an Assistant to Erskine Bowles, Deputy Chief of Staff to the President, recalls both attending the meeting and preparing a document that may have been discussed by meeting participants. Bailey explained that because of his educational background in business and accounting, in the Summer of 1995 Ickes began assigning him the task of analyzing DNC budgetary information. Through at least the end of November, Bailey served as Ickes's assistant "working the numbers" provided by the DNC. In connection with this task, Bailey prepared a memorandum titled "DNC 1995 Budget Analysis". While he is not sure, he believes that this document may have been included in a handout given to the meeting participants. It was his role as Ickes's DNC budget analyst, though, that led to his attendance at the November meeting, the only meeting he attended with the Vice President and President.

Bailey recalls the purpose of the meeting was to present to the President and Vice President information regarding the status of the DNC budget generally including debt, borrowing capacity, and future expenditures, especially those involving the media buys. In this connection, Bailey recalls a discussion about future fundraising events and projections on how much money could be raised by these events. An important topic was the Media Fund and options for meeting projected shortfalls. According to Bailey, DNC personnel, including Don Fowler and Marvin Rosen, may have led this portion of the presentation.

Bailey also recalls a discussion of hard and soft money during the meeting, stating that Strauss's note setting forth a 65/35 split sounded familiar. Significantly, in spite of his familiarity with the DNC budget, he could not say what these

references to hard and soft money or the proportions might have related to. In fact, Bailey conjectured one of three possibilities. First, that the reference was to the composition of the media fund. Second, that the reference was to the total amount of hard and soft money that the DNC had on hand. Finally, he noted that the reference to hard and soft and the 65/35 proportions may have related to the rate or proportions that the DNC was raising their funds. Bailey eliminated the second possibility only after he was shown that the documents that he prepared clearly showed that the DNC's current funds were not in fact split 65/35 at the end of 1995.

Bailey stated that he did not recall any discussion of hard and soft money as it applied to the media fund or the Vice President's plans to make fundraising telephone calls. Bailey recalls that the media fund was discussed but he also said he did not know whether the media fund had a hard money component. He had no specific recollection of any of the other phrases in the Strauss notes. Bailey, like the Vice President and Panetta, did not leave the meeting with an accurate understanding of the $20,000 hard money contribution limit to political parties; he believed the limit was $1000.

Scott Pasterick, DNC Treasurer from May, 1995 through January, 1997, recalls the purpose of the November meeting was to discuss the overall budget of the DNC. He did not recall any of the phrases on Strauss's notes being said at the meeting. While he did recall a discussion regarding the amount of hard and soft money the DNC had in their accounts, he remembers this as directly related to the overall DNC budget. He also recalls a discussion about how the DNC could only spend soft money if they had a particular balance of hard money. Pasterick did not recall a discussion at this or any other meeting attended by the Vice President relating to hard and soft money issues as they applied to the media fund.[15]

Pasterick confirms what others have said about the meeting providing an opportunity for the DNC to give a presentation to the President and the Vice President on the topic of their

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[15] Pasterick stated his belief that two concepts were widely understood or "common knowledge" among White House officials: that every DNC expenditure during a federal campaign was required to have a hard money component and that soft money was corporate and anything over $20,000 from an individual. However, Pasterick was unable to provide any information to indicate that the Vice President was aware of these facts. Moreover, our interviews with other White House officials, including former politicians such as Leon Panetta, show that these concepts are in fact more commonly not known.

budget. He describes the role played by the principals as one of listening while DNC officials did the presenting.

Harold Ickes, the President's Deputy Chief of Staff in charge of political matters, recalls that he requested the November 21, 1995, meeting in order to establish the DNC's fundraising accomplishments and to review "budgetary assumptions". Ickes has no specific recollection of two memoranda that he wrote just before November 21st suggesting a meeting to "develop a fundraising program to raise additional funds for media for 1995 and early 1996". He noted, though, that it was "fair to say" that these two documents referred to the meeting eventually attended by the President and Vice President in the Map Room. To set up the meeting, Ickes cleared a "manifest" and list of attendees with Leon Panetta, who in turn cleared both with the President, before the meeting was put down on the final schedule.

Ickes recalls that he chaired this and similar meetings on DNC budget topics. He started by laying out the agenda and purpose of the meeting and defining the issues that needed to be discussed. He then made his presentation briefing the President and Vice President on the current financial status of the DNC and projected financial needs. According to Ickes, future fundraising issues were also discussed with the principals since the two were an integral part of the DNC fundraising effort and future events affected their schedules. During Ickes's presentation portion, attendees from the DNC would be called upon to present specific information on various topics.

When asked about the Strauss notes, Ickes not only did not recall the handwritten phrases being uttered at the meeting but also expressed doubt that these topics would have been discussed in the level of detail reflected in the notes. Specifically, Ickes recalls giving the opening statement and presenting "aggregate" information regarding the overall DNC budget as a prelude to a discussion of fundraising events that required the commitment of the President and Vice President. As a possible explanation for the Strauss phrases, Ickes ventured that Strauss may have been making notes to himself in greater detail than the actual discussion at the meeting since Strauss was very sophisticated on matters of hard and soft money and political contributions.[16]

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[16] As evidence of Strauss's sophistication, Ickes noted that Strauss was a regular at the Wednesday money meetings where discussions of DNC finances including soft and hard money was often discussed in detail. While his active participation in the meetings was infrequent, according to Ickes, when Strauss did speak up, it was clear that he understood the topics being discussed.

Finally, while Ickes claims he had no specific recollection of a discussion, he was sure that references were made to hard and soft money during the meeting. By way of explanation, he pointed out several references to this topic in the memoranda reviewed at the meeting. He noted, though, that this presentation was meant to be an overview and not a detailed "line by line" discussion of the budget. Importantly, Ickes does not recall a detailed discussion of the media fund, or the issue of hard and soft money as it applied to the fund, being discussed during the meeting.

Robert Watson, DNC Chief of Staff during this period, is certain that he attended only one meeting on the DNC budget with upper level White House officials. He recalls the meeting was attended by the President but did not recall whether the Vice President attended. Watson remembers that the meeting occurred during the Summer of 1995. Also in attendance were the First Lady, and Bruce Lindsay. He provided a photograph of a meeting dated June 8, 1995.

Watson did not recall a November meeting and did not recognize the Ickes memoranda or the Strauss notes. Watson was unsure whether the DNC media fund consisted of hard and soft money but believed it might since DNC expenditures generally required a mix.[17]

The Vice President, when interviewed, again confirmed that he attended the November meeting stating, again, that the overall status of the DNC budget was discussed as well as sources of income including direct mail and fundraising events and expenses such as the media campaign. In summarizing the purpose of the meeting, the Vice President said that the presentation was aimed at showing that the DNC had predictable expenses such as payroll, travel, and overhead and, if they were also expected to pay for issue-related television commercials, they would need some fundraising help from the principals. He noted that he and the President did not often attend these types of meetings but they

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On the other hand, as noted above, Strauss in his interview claimed he knew very little about DNC budgetary matters, stating unequivocally that he took down what was said at this meeting without understanding many of the topics being discussed.

[17] After Watson's interview, we learned that his recollection is at odds with photographs and Secret Service records that establish his presence at the November meeting. His interview makes it clear that he has no memory of the November meeting, however, and it is possible that he was only present for a short time. As noted above, the Vice President's schedule indicates he was not at the June meeting.

were present at this meeting to participate in the discussions and to give guidance on the topics being discussed.

The Vice President was unable to refresh his memory by reviewing the Strauss notes and, consistent with his last interview, he again stated that he has no specific recollection of things that were said at the meeting.[18] Again, he did not recall a discussion of hard and soft money in connection with the media fund. While he was aware that other parts of the DNC's budget had hard and soft components, he heard nothing during this meeting, or in any other setting during this period that challenged his belief that the media campaign was being paid for by soft money. Instead, the Vice President remembers being told that the DNC needed soft money to keep the commercials on the air. He also recalls a general discussion relating to the need to raise more money for television and other DNC expenditure items to avoid going deeply into debt. He left the meeting with the goal and intention of raising this money for the DNC.[19]

In an attempt to explain why Strauss may have heard certain things during this meeting that he did not, the Vice President noted, consistent with the statements of other witnesses, that he was often interrupted during these meetings. He also noted that he would typically sit next to the President and often consulted with him on topics other than what was being discussed at the meeting in front of him, which corresponds with Bailey's memory of what happened during this meeting. He admitted that the DNC budget was not a topic that interested him noting that this could explain why he did not hear, or comprehend, some of the items discussed during the meeting. Finally, the Vice President said he knows Strauss to be a truthful and diligent person but, nevertheless, affirmed that he did not hear the things written in Strauss's notes during the November 21, 1995 meeting.

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[18] After reviewing the statements attributed to him and set apart by quotation marks, the Vice President could not recall saying these words but confirmed that at least two of the statements were the kind of thing he would have said since he believed his job was to ease the burden on the President by taking more of the fundraising responsibilities.

[19] When asked where his belief that the media fund was only composed of soft money originated, the Vice President recalls that the notion may have arisen from something he heard at the Wednesday night "residence" or strategy meetings. He speculated that it may likely have come from things said by Dick Morris, who was an advocate of the media campaign and actively pushed the television ad initiative by pointing out that soft money could be used to buy the air time.

Legal Analysis

The false statement statute provides, in pertinent part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be [guilty of a felony].

18 U.S.C. § 1001. To obtain a conviction under § 1001, the government must prove (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction. United States v. Herring, 916 F.2d 1543, 1546 (1990).

Turning to the facts developed in our 30 day inquiry, the "statement"; "materiality"; and "agency jurisdiction" elements for each of the statements at issue in the allegation are easily established. Clearly, the words uttered by the Vice President during the interview qualify as statements for purposes of section 1001. As noted above, the subject matter -- hard money component to the media fund and legal limits for hard money gifts to the DNC -- are relevant, and therefore material, since they describe the state of mind or intent of the Vice President at the time he made the fundraising telephone calls from his West Wing Office. Finally, because the agents and attorneys to whom the Vice President made his statement were investigating federal law violations, the "agency jurisdiction" element is met. The issue of specific intent cannot be considered during the initial inquiry.

The element of falsity should not be confused with the element of the state of mind required to commit the offense in this case. The question we have explored during the initial inquiry is whether there is sufficient information that the Vice President's statements -- (1) that he believed the media fund was financed with soft money and (2) that he believed the hard money donation limit was $2000 -- were false to warrant further investigation. The state of mind required to commit a violation of section 1001 is "knowingly and willfully," and whether the Vice President made an otherwise false statement knowingly and willfully is something we cannot explore in the course of the initial inquiry. In the words of the Act, we are not permitted to close a matter at the end of the initial inquiry period based on a determination that the subject "lacked the state of mind required for the violation of criminal law." 28 U.S.C. § 592(a)(2)[(B)(i). However, whether or not the Vice President believed at the time that the hard money limit was $2000 and that the media fund was financed through soft money goes to the element of falsity, and can thus be explored under the normal

standards of information sufficient to warrant further investigation.

We note that were explorations of the truth or falsity of statements about beliefs considered to be subject to the state of mind restrictions in the Act, the Act would require that every such statement trigger the Act, whether or not the underlying belief was true, since it is the truth or falsity of the statement of belief that is at issue, not the underlying fact. Furthermore, we could only close the investigation without appointment of an independent counsel if we could develop "clear and convincing evidence" that the subject in fact had such a belief -- a standard that would be virtually impossible to meet in most cases. If we were barred from exploring whether there was evidence that a statement concerning ones belief was false on the theory that it is a matter of state of mind, we would be in the bizarre situation in which we could assess the truth or falsity of a statement such as "my assistant called and cancelled the appointment," but not "I believed my assistant called and cancelled the appointment." We would have to trigger on the latter statement whether or not the assistant in fact called, and furthermore would not be able to close without appointment of an independent counsel without affirmative, clear and convincing evidence that in fact the witness believed his assistant made the call.

Thus, the question here relates to the statutory element of falsity -- whether the evidence uncovered during the investigation is sufficiently specific and credible to support a conclusion that further investigation is warranted into whether the Vice President's statements concerning his beliefs about the media fund's financing and limitations on hard money contributions were false. Specifically, because no one interviewed could remember, let alone explain, the use of Strauss's terms "hard limit $20k" and "corporate or anything over $20k from an individual" in the meeting attended by the Vice President, we are left with no evidence to support a conclusion that the Vice President's statement that he believed the legal limit for hard money gifts to the DNC was the same as the limit for individual candidates -- $2000 per election cycle -- is false.[20]

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[20] As noted above, Panetta, who claimed at times to have a recollection of the meeting, is unaware that individuals can give up to $20,000 in hard money to the party per election cycle. When interviewed, he admitted he was only knowledgeable about the limit of $1,000 imposed on gifts to individual candidates.

Furthermore, like Panetta, Gore's background is as a congressional candidate, and he explained that from that experience he gained his understanding of the hard money

On the second statement, the only evidence that the Vice President's statement regarding his belief that hard money was not used to purchase DNC media ads is false rests on Strauss's belief that the words "hard" and "soft" were uttered in a meeting attended by the Vice President, and Panetta's memory that the raising of hard money was discussed in what must have been the media fund context. We have uncovered no evidence that the Vice President heard or understood the reference.

Moreover, the documents reviewed at the meeting show that soft, not hard, money was needed at the time the phone calls were discussed, which would suggest that raising soft, not hard, money would have been the major focus of discussion at this meeting. Finally, these same documents provide a strong indication that the Vice President lacked any motive to lie in his interview. The DNC was poised to borrow virtually all the hard money necessary for the ads, leaving only soft money to raise in the phone calls and other events through the end of the year. Thus, even if the Vice President knew that both soft and hard money were used to pay for the media campaign, the fundraising telephone calls upon which he was about to embark were needed to raise soft money, and he would have had no need to misrepresent the facts in order to support his statement that the calls were soft money fundraising calls.

Thus, it is our conclusion that the initial inquiry did not develop sufficient evidence to warrant further investigation into the question of whether the Vice President's statements, in his interview, regarding his state of knowledge or belief at the time he made the fundraising calls were false. First, the evidence that statements were in fact made during the November meeting that contradict the Vice President's interview statements is weak. Taken alone, Strauss's notes are both cryptic and ambiguous, and not even clearly from the meeting. He has no independent memory of what was said or what his notes mean. While we believed, upon our first review of the notes, that they indicated that both the split of hard and soft funds used to finance the media campaign and the $20,000 hard money contribution limit to the DNC were discussed at the meeting, it is telling that the actual attendees at the meeting either do not recall such a discussion, believe that these comments were not made, or offer a different explanation for the notes.

Panetta's statement is also far from unambiguous. He changed his statement concerning the meeting three times in the course of two interviews. He began the interview with no specific recollection of the meeting. His first impression was that there would have been references to hard money during the meeting because, he said, the Ickes memoranda had references to

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limitations, an explanation we find plausible.

hard money. He went on to state that the references would have been to the overall DNC budget. Later, in his second interview, Panetta offered another explanation, claiming now that the references to hard money had to be in connection to the additional funds needed for the media fund. When asked about the change in his rendition of the meeting, he admitted that he was relying on what the Ickes memoranda told him the meeting was about rather than his recollection.

Weak as the evidence is, we do conclude, however, that the notes, together with Panetta's evolving memory, support a conclusion that some sort of statement may have been made by someone at the meeting to the effect that the media campaign was funded by a mix of hard and soft money and that individuals could give up to $20,000 in hard money to the DNC. Even assuming this, however, we have developed no evidence that the Vice President heard the statements, understood the statements, or retained the information imparted. No one recalls him participating when these topics may have been discussed. Moreover, no one recalls him saying or doing anything outside of this meeting that would indicate that indeed he knew, whether because he attended the November meeting or some other way, that the media fund was not all soft money or the hard money limit to the DNC was $20,000.

Conversely, our inquiry has uncovered a wealth of evidence that other meeting participants, most of whom had more involvement in DNC budget topics and fewer other issues to concern themselves with than the Vice President, also failed to hear, understand, or retain the meeting statements. No one but Panetta recalled a mention of hard money in connection with the media fund. The list of people who attended the meeting yet failed to comprehend this hard money component included Brian Bailey, who spent several months crunching the DNC budgetary numbers for Ickes, Robert Watson, Chief of Staff at the DNC, Ron Klain and David Strauss, both with extensive political backgrounds. It is worthy of note that if the existing information is sufficient to warrant investigation of the Vice President based on his statements concerning his understanding of the hard money component of the media fund and the hard money contribution limits, each of these other meeting attendees have provided statements concerning their own understanding which is also at odds with the Strauss notes, and thus would have to be investigated as well for making false statements.

At least two inferences may be drawn from the consistent inability of the meeting participants to recall a mention of hard money in connection with the media fund. First, contrary to Panetta's statement, there may not have been such a discussion. The notes may have been a general discussion of the hard versus soft components of the overall DNC budget. Alternatively, the discussion may have been so brief that all but one participant

failed to hear or retain the significance of the point being made.[21]

An analysis of the documents passed out at the meeting offers additional support for the second possibility. It suggests that the need for soft money, as opposed to hard money, was the primary focus of this meeting. As noted above, the "DNC 1995 Budget Analysis" indicates that the party had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the adds (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion.

In conclusion, it should be noted that the documents and Marvin Rosen's recollection that soft money needed to be raised for the media fund at the end of 1995 leaves little motive for the Vice President to provide a false statement about the media fund. Stated differently, the Vice President had little reason to lie about his mistaken belief since the documents apparently discussed during the November meeting appear to show that soft money was what he needed to raise in the events and calls being planned for him.

REOPENING OF PREVIOUS DETERMINATION

As a necessary corollary to the conclusion reached above, the notes do not provide any more evidence that the Vice President violated section 607 when he made the calls, and thus it is our view that there is no necessity to reexamine the conclusion reached by the Attorney General last year that no independent counsel need be appointed to determine whether the Vice President violated section 607 when he made fundraising telephone calls from his White House office. There is no information in these notes that would tend to suggest the Vice President was in fact soliciting hard money contributions when he made the calls. Moreover, the recently produced evidence has no effect on the determination, made last December, that pursuant to

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[21] A related possibility is that the connection between the "issue ads" and soft money was so pervasive by the late Fall of 1995 that those meeting participants not familiar with the details of the DNC budget failed to pick up on the fact that there was a hard money element. This strong association between the concept of soft money and this media campaign is evidenced by public references to the television spots as "soft money ads" by a variety of public figures, including Representative Dan Burton.

established Department of Justice policy the absence of an aggravating circumstance makes prosecution for a section 607 violation unwarranted.

New Evidence and Results of Section 607 Investigation

When on December 2, 1997, the Attorney General notified the court of her determination not to seek an independent counsel, she cited two reasons. First, she noted that evidence that the Vice President may have violated section 607 is insufficient to warrant further investigation. Second, she told the court that even if the evidence suggested a violation, established Department of Justice policy required that there be aggravating circumstances before a prosecution under this statute is warranted. No aggravating circumstance was uncovered during our investigation.

In summarizing the basis for her finding that the evidence was insufficient to warrant further investigation, the Attorney General, in her Notification to the court, cited a "wealth of affirmative evidence" that had nothing to do with the Vice President's understanding of the media fund but, nevertheless, demonstrated that the Vice President was not soliciting hard money in his telephone calls. Noted was the fact that no evidence was uncovered that indicated that the Vice President knew of the Democratic National Committee's (DNC) practice of reallocating a portion of large contributions to hard money accounts. Also cited was the absence of evidence showing that the Vice President asked for funds to support the election of any federal official, including himself. It was further noted that donors who understood the concepts of hard and soft money interpreted the Vice President's request to be for soft money and many of the these donors recall that the conversations focussed on soft money. In addition, the amounts requested by the Vice President suggested a soft money request and, in some cases, his requests focussed on corporate contributions which could only be soft money contributions. Finally, the Attorney General noted that the donations made in response to the Vice President's calls were, in the vast majority of cases, handled by the DNC as soft money.

It remains undisputed that a major share of the media campaign was, in fact, funded by soft money. Moreover, documentary evidence uncovered during our investigation clearly indicates that the need for soft money, not hard money, was most critical at the time that the Vice President volunteered to make the phone calls.[22]

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[22] Documents indicate that at the end of 1995, when the party was in need of at least $3 million dollars to stay "on the air", the DNC had the capability of borrowing hard money but not

Turning to the policy ground cited by the Attorney General in her notification, the recently produced evidence in no way affects the previous finding that no aggravating circumstances have been established in this matter. We do believe that evidence of a concerted coverup of a section 607 violation might provide the necessary aggravating circumstances to warrant bringing a prosecution under that section, but any such evidence should be substantial, enough to persuade us that we are in fact dealing with an effort to obstruct the investigation, not a mere hypothetical possibility with no concrete support.

Absent new evidence of an aggravating circumstance, then, the policy finding, as described in the Notification, remains an independent dispositive ground for declining to seek an independent counsel to pursue a section 607 violation.

CONCLUSION

It is our recommendation that the newly discovered documents provided to us by the Vice President's counsel do not provide sufficient information to warrant further investigation of whether the Vice President may have made a false statement in the course of our previous preliminary investigation, and thus no preliminary investigation should be triggered. Furthermore, we conclude that the previous preliminary investigation into whether the Vice President violated section 607 in the course of making campaign fundraising telephone calls from his White House office need not be reopened based on this new information.

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soft money. It was in this context--the need to make up a shortfall of mostly soft money through the end of the calendar year--that the phone call project was conceived. This factor was given very little emphasis during our preliminary investigation because the Vice President claimed both that he did not read the documents and that he erroneously believed that the media campaign was run entirely with soft money.

Mr. RADEK. Uh-huh.

Mr. WILSON. You had completed a memorandum on August 24, 1998 regarding the perjury investigations of the Vice President, and the following day a task force prosecutor took exception to a number of the factual points that you made in your memorandum. I wanted to go through and read a couple of the factual points and differences and ultimately get your comment on that.

This is the task force prosecutor responding to your memo and he says, in Radek's memo he indicated that only Leon Panetta recalled discussing soft and hard money splits in conjunction with the media fund. In fact, Panetta was not the only person with such a recollection. The task force attorney's memo states that we now have Panetta, Watson and the contemporaneous Strauss notes, with quotation marks, all indicating that this topic was raised. On the other side is a group of people who basically don't recall. This is a classic white collar scenario. Yet the memorandum, which is your memo, gives more credence to the don't recalls than to the explicit memories. Certainly a lineup like this warrants additional inquiry.

Now, the prosecutor goes on and he says, and here is another quote, the Radek memo says Panetta's impression was the Vice President was following the hard money discussion. The agents' notes reflect that the Vice President was listening attentively so he takes exception with your characterization of how the Vice President was—whether it was an impression or whether he was actually following something attentively. He goes on in the memo to say—to point out that you say in your memo that Panetta may have——

Mr. BURTON. Excuse me, counsel's time has expired, but I would yield to you 5 minutes to conclude that question.

Mr. WILSON. Just providing the quote, he indicates that your memo states that Panetta may have contradicted himself. However, the agents' notes do not support this. Panetta recalled the general topic, though not the specific details. Let me take one moment and reset this clock.

At another point the prosecutor says, "the agents disagree vehemently with the characterization of the Panetta interviews." Specifically they assert that he did not change his statement, although the Radek memo says he did so three times. Here the prosecutor is saying in your memo you are saying that Panetta changed his view three times and according to the prosecutor the agents are disagreeing vehemently with your characterization. The memo also goes on to criticize your memo for failing to mention that the Vice President said in a press conference that the phone calls were designed to solicit money for the campaign, according to the memo. Of course the press conference stood in stark contrast to his statements during later FBI interviews, so again he takes issue with another of your characterizations.

In another point he points out in your memorandum you suggest, "The media fund was not an item in the DNC budget during the spring and summer of 1995. However, Watson recalled the agenda of the June 8, 1995 meeting included the media fund." So he is saying there is a factual disagreement where you are saying that it

doesn't do one thing and he is saying that Bobby Watson gave different testimony. Just a couple of other points.

He notes that your memorandum suggests that Marvin Rosen recalled the focus of the fundraising proposals presented to the President and Vice President during the November meeting was on raising soft money and the agents' notes indicate that Rosen had no recall whether the events were intended to raise soft or hard money. So you have made one characterization about what Marvin Rosen thought and the prosecutors saying that the agents say that is not correct at all.

And there are a number of other statements along this line where he walks through the factual statements that you have made in your recommendation to your superior and he simply points out that your factual assessments are incorrect. I guess the simple question is how could you and the person who wrote this memo be so far apart on factual matters?

[Exhibit 36 follows:]

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: [redacted] Attny Name

Re: Independent Counsel Matter: Al Gore, Jr.

I have reviewed the Public Integrity memorandum we received today on the Independent Counsel matter concerning the Vice President. I have also spoken with Chuck La Bella and the agents who worked on the investigation. Although we have had limited time to consider the matter, we have the following immediate observations:

1. The Section 1001 question as set forth in the memorandum (p. 18) turns on whether the Vice President believed the media fund was financed with soft money and whether he believed the hard money donation limit was $2,000. The first question however is more properly whether he believed the media fund was financed exclusively with soft money. This is not simply a semantical difference since there is no doubt that the media fund was financed with soft money and that he knew it to be so. But whether there was a hard money component is the issue.

2. Brad Marshall of the DNC has been interviewed since the draft was written. His recollection is the same as Leon Panetta's i.e., that the 65/35 split was discussed at the November 21 meeting in the context of the media fund. In fact the statement was made by him. In response to a question, he said something to the effect that on the spending side of the media fund, we are averaging 65% soft and 35% hard.

Thus, we now have Panetta, Marshall and the contemporaneous Strauss notes (with quotation marks suggesting direct statements) all indicating that this topic was raised. On the other side is a group of people who basically "don't recall". This is a classic white collar scenario. Yet the memorandum gives more credence to the "don't recalls" than to the explicit memories. Certainly, a lineup like this (although at the time the memo was written Brad Marshall had not been interviewed) warrants additional inquiry. Some of those relied on e.g., Rosen, have their own credibility problems. (The La Bella Report makes reference to some behavior by Marvin Rosen that is, at the very least, quite questionable.) As for Strauss, the memorandum seems to rely more on his faulty recollection than on his contemporaneous notes.

3. The memorandum does not reference the Vice President's press conference wherein he made a statement to the effect that the phonecalls were designed to solicit money for the campaign. That statement stands in stark contrast to his later comments when interviewed for this investigation. And in placing all this in context, it has to be remembered that the phonecalls were made with a Clinton/Gore credit card. That suggests that it was indeed campaign related.

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4. The agents' notes and recollections of various interviews differs in some important respects from the memorandum. This is most pronounced as to Leon Panetta, who the agents view as a very credible witness, but who is pictured in the memorandum as having an "evolving memory" (p.21) and therefore lacking all credibility. To give just a few examples of the disparity between the agents and the memo:

a. The memo (p. 11) says Panetta's "impression" was that the Vice President was following the hard money discussion. The agents' notes reflect that Panetta said the Vice President was listening attentively.

b. Page 10, fn. 11 suggests that the Media Fund was not an item in the DNC budget during the Spring and Summer of 1995. However Watson recalled the agenda of the June 8, 1995 meeting included the Media Fund.

c. Page 11, fn. 12 says that Panetta may have contradicted himself. The agents notes do not support this. Panetta recalled the general topic discussed though not the specific details.

d. Page 12: The memo suggests that Rosen recalled the focus of the fundraising proposals presented to the President and Vice President during the November meeting was on raising soft money. The agents' notes indicate that Rosen had no recall whether the events were intended to raise soft or hard money.

e. Page 14, n. 15: The footnote concludes that Panetta, among others, did not understand the statement made by Pastrick at the top of the footnote. In fact, Panetta understood clearly the first part of the statement, i.e., that every DNC expenditure during a federal campaign is required to have a hard money component. The only thing Panetta did not know was the $20,000 limit.

f. Page 15, n. 16 The memo quotes Ickes' statement that Strauss was very sophisticated in matters of soft money/hard money, and therefore may have written notes of greater detail than actually discussed. However, the memo does not mention Strauss' own statement (reflected in agents' notes) that he was not familiar with these issues as they pertained to the White House and the DNC. Strauss was adamant that those notations reflected comments made at the meeting.

g. Page 16: The memo says that Gore stated he and the President did not often attend DNC budget meetings like that held on Nov. 21. In fact, the agents report that most witnesses indicated that the President and Vice President generally did attend the DNC budget meetings.

5. The memorandum at least twice refers to the fact that the Vice President might well have left the meeting at the point in which the hard money media fund discussion took place. Not

only is there no evidence that this occurred (i.e., no witness recalls his leaving) but the agents notes reflect that Ickes told them that when he conducted meetings (and he was conducting the meeting on November 21), he would halt the proceedings if the President or Vice President stepped out of the room; the meeting would resume when they returned. Therefore, rather than presume the Vice President was not present, the presumption must be that he was..

6. The memorandum notes (p. 15, n. 16) Ickes' speculation that Strauss may simply have been penning his own thoughts rather than recording statements made at the meeting. The memorandum does not mention that the Vice President conceded that if the statement were in the Strauss notes he presumes the statement was made; he simply has no recollection of it.

7. The agents disagree vehemently with the characterization of the Panetta interviews as set forth on pp. 20-21. Specifically, they assert that he did not change his statement, although the memo says he did so three times. He began his interview, as did all the witnesses, stating he had no specific recollection of the meeting. In both interviews he indicated that there was a discussion at the Nov. 21 meeting concerning the hard and soft components of the media fund. His recollection was not derived solely from the Ickes memorandum, although the Ickes memorandum supported his recollection.

On behalf of both Chuck and myself, we have some observations on the overall inquiry[1]:

As the memo recognizes, there are two separate questions to be resolved, one involving 607 and the other involving 1001. To some extent of course they are intertwined. As to the 607, given a policy of non-prosecution absent aggravating circumstances, the question is whether the information we now have presents any aggravating circumstance. Certainly a possible false statement on the issue could be seen as such.. Therefore, unless we can dismiss absolutely the claim that there was a false statement, the 607 issue at least must be considered.

In sum, we think given the new evidence i.e., Marshall, Panetta and the Strauss contemporaneous notes, along with some preexisting evidence, including the Vice President's press conference, his use of the Clinton/Gore credit card, and the incredibility of his claim not to recall memos sent to him and topics discussed in his presence, it is impossible to close out this case. Given the failing recollection of so many witnesses, at the very least one would want to put into the grand jury several of these witnesses before closing out an investigation. A grand jury appearance under oath may well jog one's vague recollections as recounted in a voluntary interview. Grand jury is not an option during this stage of the investigation, but would be if this were turned over to an independent counsel.

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[1] Both Jim De Sarno and Jeff Lampinski are out of town today and could not weigh on this. Therefore, the limitation of the concluding portion of the memo is not meant to indicate that the FBI would not be in agreement if Jim and/or Jeff were available. We simply do not know and therefore do not include them in this final portion.

There is a sense we all share that at the end of the day the facts involving the Vice President's calls and statements would not warrant prosecution. But that is not the question we face at this point. The question we now face is whether further inquiry is warranted on both 607 and 1001. The answer we believe is yes.

Mr. RADEK. Well, the fact is that we were not far apart on factual matters. The factual matters that you discuss are small and for the most part insignificant. For instance, the debate——

Mr. BURTON [presiding]. Let me interrupt for a second. Who is the person who wrote that memo?

Mr. RADEK. Mr. La Bella's deputy.

Mr. BURTON. What is his name? We had it awhile ago.

Mr. WILSON. It has been redacted.

Mr. BURTON. The fact of the matter is that if it is who I think it is, he felt so strongly about it he resigned.

Mr. RADEK. No, it is not Mr. Clark.

Mr. BURTON. Mr. Clark was not one of those.

Mr. RADEK. Mr. Clark was doing the analysis on the Common Cause allegation and left and you have his memorandum.

Mr. BURTON. Judy Feigin is the lady's name and she had substantial differences, as did Mr. Clark, in the way you were conducting the investigation?

Mr. RADEK. Yes, they did. They were both from San Diego and Mr. La Bella brought them with him.

Mr. BURTON. Oh, it was Mr. La Bella?

Mr. RADEK. I did not say that.

Mr. BURTON. Why would you say they were both from San Diego?

Mr. RADEK. I was describing who they were.

Mr. BURTON. The fact of the matter is Mr. La Bella didn't like the way it was being handled. She didn't like the way it was being handled. Mr. Clark didn't like the way it was being handled, and they quit. So there was a strong, strong difference in the way that you were conducting this and the way they thought it should be conducted?

Mr. RADEK. Mr. Clark quit. Mr. La Bella left to become the Acting U.S. Attorney in San Diego.

Mr. BURTON. He was in line to become the U.S. Attorney in San Diego, and he was passed over and a subordinate of his became the U.S. Attorney. And to everybody that followed this, it looked as though that Mr. La Bella was passed over because he was so vehement in his opposition and he felt there should be an independent counsel and you folks, top brass at Justice, didn't want it.

Mr. RADEK. Thanks for the compliment about top brass, Mr. Chairman, but with respect to Mr. La Bella's appointment, I can assure you I had nothing to do with it. You know better than I that the person who appoints and names the U.S. Attorney is a member of this branch of government and not the executive branch and Mr. La Bella's appointment, nomination was handled the same way they all are, and that is by a Senator in the U.S. Senate and then confirmed——

Mr. BURTON. The recommendation is made by the Attorney General and the final decision is made by——

Mr. RADEK. The recommendation is made by the U.S. Senator, whatever that party is.

Mr. BURTON. If that is the case, it is a sister-in-law of one of the members of the White House.

Mr. RADEK. But don't put that on the Department of Justice is all that I am saying.

Mr. BURTON. Mr. Lantos.

Mr. LANTOS. Thank you, Mr. Chairman.

Let me change the subject for a minute. Senator Orrin Hatch, chairman of the Senate Judiciary Committee, has stated he, "is not nearly as concerned with the allegations about some of the occurrences with the White House with regard to a phone call or phone calls that may have been made although they may unknowingly have violated the law." Nevertheless, the La Bella memorandum cites the Vice President's call solicitations from the White House as grounds for seeking an independent counsel.

Mr. Radek, in deciding whether to prosecute a case such as this one, is it appropriate to look at prior Justice Department precedent on prosecutions involving solicitations made from Federal property were initiated?

Mr. RADEK. When making a decision whether to prosecute or whether to have an independent counsel, yes, sir.

Mr. LANTOS. Do you agree with that, Mr. Esposito?

Mr. ESPOSITO. I have never seen the La Bella memo.

Mr. LANTOS. I am raising an issue irrespective of the principle. If certain violations are not prosecuted historically, is it fair not to have them prosecuted currently?

Mr. ESPOSITO. I think the Department of Justice looks at past precedent.

Mr. LANTOS. Do you think that is a proper procedure?

Mr. ESPOSITO. Yes.

Mr. LANTOS. How about you, Mr. Gallagher?

Mr. GALLAGHER. With all due respect I would have to defer to the FBI general counsel, which has reviewed this entire matter and would be more appropriate to comment to that question. I can't speak to it personally.

Mr. LANTOS. Was the Justice Department correct, Mr. Radek, to consider the precedent that in 1988 the Department learned that Senators Orrin Hatch and Gordon Humphrey had sent solicitation letters to Federal employees but the Department of Justice declined to prosecute?

Mr. RADEK. The outcome of that line of inquiry within the Department was that it was clear that the Department's prior practice was not to prosecute solicitations on Federal property, the 607 violation, without aggravating circumstances. To the extent those matters you cite stand for that principle, it would be proper to consider them, yes.

Mr. LANTOS. Was the Department of Justice correct, Mr. Radek, to consider the precedent that in 1976 the Department declined prosecution when Federal employees complained about receiving solicitation letters from then President Jerry Ford for Republican congressional candidates, letters that the Department found were, "patently coercive in content and tone?"

Mr. RADEK. Again to the extent that there were no aggravating circumstances, that is one that should be factored in to determine what the Department's prior practice had been and to the extent it had policy.

Mr. LANTOS. Let me go back to the Common Cause issue. During his opening statement the chairman repeatedly referred to the Justice Department's handling of the complaint filed by the campaign finance watchdog group Common Cause. He referred to several

quotes by Mr. La Bella expressing his frustration at the Department's handling of this complaint. It is important that we understand what actually occurred with regard to the Common Cause complaint because when we have all of the facts before us, the dispute between Mr. La Bella and others at the Justice Department is ultimately utterly insignificant.

First, I think some background may be useful. Following the 1996 campaign, Common Cause filed a complaint with the Justice Department alleging that issue ads run by both the Democratic National Committee and the Republican National Committee violated Federal campaign finance laws. Common Cause further alleged that the White House had violated campaign finance laws by DNC issue ads to evade campaign spending restrictions. After Mr. La Bella submitted the memo the chairman quoted, Attorney General Reno determined that the preliminary investigation of the Common Cause allegations should be triggered under the Independent Counsel Act; is that correct, Mr. Radek?

Mr. RADEK. It is accurate in terms of time but the triggering event for the Common Cause investigation was the audit report from the FEC auditors.

Mr. LANTOS. Can you tell us what that investigation entailed?

Mr. RADEK. The investigation was primarily an analysis of known facts, and the known facts were these. There were a whole bunch of issue ads and we knew what they were and what they said. They were ads that clearly promoted on the part of the Democrats a Democratic message and on the part of the Republicans a Republican message. Then there were a lot of rulings out of the Federal Election Commission that some good legal minds sweated and strained over for a long time trying to figure out what the state of the law was. There was not much in terms of factual development of issues because it was assumed that the President was involved in it. There was testimony that he was in on the planning of the issue ads, the Vice President the same.

And if we were to look at the Republicans under the independent counsel statute that would be as a conflict of interest, under the discretionary clause.

What was difficult was the law. We had to figure—under the independent counsel statute we had to determine whether there was a violation of the law. My position is and was that it is not a violation until the FEC says it is a violation. And particularly in a murky area like this where the FEC had hinted it was not a violation and in the end said it was not a violation, it seemed to me to be close to irresponsible to even conduct a criminal investigation of people who had or were taking advantage of this loophole.

Mr. LANTOS. Is it fair to say that there was considerable disagreement within the Department regarding the laws regulating issue advertising?

Mr. RADEK. There was considerable disagreement in the Department on almost every issue; but yes, Common Cause was one that people found very difficult conceptually and there was a certain sort of basic appeal to the simply stated issue stated by Common Cause until you examined the law and the fact that soft money could be used on the most blatant of Federal campaigns because it was usable for State and local candidates. And so the law was real-

ly difficult to get through; and yes, there was considerable disagreement throughout that process.

Mr. LANTOS. Is it fair to say that there was considerable disagreement among election law experts regarding the laws regulating issue advertising?

Mr. RADEK. Yes, that's correct.

Mr. LANTOS. Can you also explain the division of election law enforcement responsibilities between the FEC and the Department of Justice?

Mr. RADEK. The Federal Election Commission is the entity that has exclusive jurisdiction for interpreting the statute and administering it civilly. The Department of Justice enforces it criminally.

Mr. LANTOS. At the conclusion of the preliminary inquiry, the Attorney General determined that an independent counsel should not be appointed to investigate the Common Cause complaint. She had two reasons for her decision. The first reason is that it would be too difficult, if not impossible to bring successful prosecutions against those who had relied on advice of counsel from election law experts who had good faith interpretations of the laws.

The second reason is that it was the long-standing policy of the Department of Justice to defer to the FEC for interpretations of ambiguities in campaign finance laws. In fact, both parties and their campaign committees now recognize that issue ads are legal. Press accounts indicate that both parties are rushing to raise huge sums of soft money to run issue ads this fall; is that correct, Mr. Radek?

Mr. RADEK. Yes, sir. I believe that is based upon a decision by the Federal Election Commission on this issue, that is the board, not the auditors.

Let me say with respect to the independent counsel decision, there was extensive factual investigation conducted during the preliminary investigation, and that had to do with whether or not the President, the Vice President, or the heads of the parties, particularly the Democratic Party, had received advice of counsel consistent with what—what the state of the law and whether that advice of counsel would fit into defense and whether it was legitimate.

Mr. LANTOS. Much of this discussion today and much of the work of our committee for quite some time has really hinged on whether one gives singular malign interpretations to certain events or appearance of certain events, or whether one takes a somewhat more benign view.

I want to go back to the early discussion we had with respect to Mr. Esposito's recollection of your statement at the meeting you don't recall attending, that you were under a great deal of pressure. This is a statement that I suspect many people in public life can make, particularly during difficult and tension-filled periods, so I don't see anything remarkable. But I would like to deal with the issue of the alleged statement that the Attorney General's job hangs in the balance.

I recall that there was a great deal of criticism of the Attorney General at the time and her job was in fact hanging in the balance and I wonder if, Mr. Esposito, you could explain to me in plain English how you combine these two realities into a factual statement that on the face of it would be absurd.

Mr. Radek obviously is an extremely intelligent person, and I agree with him and his conclusion that he could never make such a statement because the statement would be so palpably absurd and idiotic and counterproductive and stupid, and I have difficulty seeing your rationale in taking statements from an individual and connecting them in a way which are so self condemnatory. So can you enlighten me on that subject.

Mr. ESPOSITO. Sure. I am not trying to make any conclusions.

Mr. LANTOS. Well, you have already. What I am trying to get at, please understand what I am saying.

I stated earlier there is little doubt in my mind that all three of you to the best of your recollections are telling the truth. There is not the slightest doubt in my mind that Mr. Radek is telling the truth. There is no doubt in my mind that the two of you to the best of your ability are telling the truth. But there is a fundamental flaw in your position, and that fundamental flaw in your position is that the statement you allege was made would be an unbelievably idiotic, damaging, destructive, horrendously inappropriate statement which an individual with Mr. Radek's extraordinary public service of 30 years and his legal background soberly would never make. How do you explain this?

Mr. ESPOSITO. I can't explain it.

Mr. LANTOS. Is it——

Mr. ESPOSITO. You have asked me a question. May I answer it. I can't explain it. All I can tell you is this was the statement that was made. Why he made it, you will have to ask him; but he can't recall. I am telling you that is the statement that was made. I didn't put two facts together. I haven't drawn any conclusions. I am just repeating the statement that I heard.

Mr. LANTOS. You remember it verbatim?

Mr. ESPOSITO. What I remember verbatim is that the Attorney General's job could hang in the balance.

Mr. LANTOS. It was hanging in the balance. There is no question about it. That is a statement of fact. But you connect these two items, the pressure that Mr. Radek is under and the Attorney General's job which was obviously up for grabs.

Mr. ESPOSITO. It was said in the same sentence. How can you not connect it?

Mr. LANTOS. Well, it is perfectly obvious that two statements can be made consecutively without a connection being made between the two of them as to causality. That should be obvious to you, Mr. Esposito. You created the causality, it seems to me, because I can't conceive Mr. Radek, whom I have not met until this afternoon, would be making such a statement, just as it would not be plausible for me to have you make idiotic statements or Mr. Gallagher make idiotic statements. If you make idiotic statements and you are sober, maybe you misunderstood the statement. Is that a conceivable option?

Is it conceivable to you that you misunderstood the statement, that you put two things together which really didn't belong together?

Mr. ESPOSITO. What I heard was he was talking about pressure, pressure on him, and as a matter of fact the Attorney General's job could hang in the balance. That came out—in the same 2 seconds.

Mr. LANTOS. Well, try to reconstruct verbatim what the statement was because you fly in the face of logic in connecting these two statements. Both of them could well have been made utterly innocently and innocuously.

Mr. GALLAGHER. Mr. Lantos, may I respond?

Mr. ESPOSITO. I think it is a totally inappropriate statement, and that is why I remember it and that is why I reported it 30 minutes later to the Director of the FBI.

Mr. LANTOS. If it was such a totally inappropriate statement in your judgment, why didn't you probe at that point?

Mr. ESPOSITO. My comment to—nobody has asked me yet at this hearing, but it was at the end of the meeting. I was standing and I believe Lee was rising out of his chair when he made his statement. I think my response was something to the effect I am sure that you will do the right thing, Lee. Then he and Joe left my office.

Mr. LANTOS. Does it make sense to you if in fact what you say hypothetically is true, that Mr. Radek would confide in you that the Attorney General is worried about her job?

Mr. ESPOSITO. He didn't say that the Attorney General is worried about her job.

Mr. LANTOS. Well, if your job is hanging in the balance, you presumably would be worried about retaining your job?

Mr. ESPOSITO. I am not going to presume anything.

Mr. LANTOS. You connected two conceivably plausible statements in a causal sequence which according to your own admission makes no sense.

Mr. ESPOSITO. No, I was agreeing with you that you're right. I never said that it didn't make sense. I said it was inappropriate.

Mr. LANTOS. Inappropriate. Have you heard him make many other such weighty, inappropriate statements?

Mr. ESPOSITO. No.

Mr. LANTOS. Was this out of character?

Mr. ESPOSITO. Yes.

Mr. LANTOS. Doesn't that give you pause that perhaps you misunderstood?

Mr. ESPOSITO. No. I think this was a time at the beginning of a very important investigation and there was a lot of stress and pressure on the Public Integrity Section, as there was on the Bureau to move forward in this investigation.

Mr. LANTOS. Mr. Gallagher.

Mr. GALLAGHER. There are two points, one whether or not the meeting occurred. I had not seen the calendar or wasn't aware of a calendar entry by Mr. Esposito when I testified last week. I spoke from my recollection and I was in the adjoining office. Mr. Esposito asked me to join him in the meeting, and that is what I testified to.

With respect to——

Mr. LANTOS. May I stop you there for a second. I will give you plenty of time to answer.

Mr. GALLAGHER. Thank you, sir.

Mr. LANTOS. There is no doubt in my mind that the two of you recall a meeting that took place. There is no doubt in my mind that Mr. Radek doesn't recall that meeting.

I have scores of meetings with colleagues and constituents, not all of which I recall. And I have absolutely no difficulty accepting the fact that Mr. Gallagher and Mr. Esposito, you are accurately reflecting the fact that there was a meeting; and Mr. Radek accurately reflects his memory that he doesn't recall that meeting. I have no trouble with that.

Where I have trouble, having listened to him now for a couple of hours, is accepting your characterization of his alleged statements which would be disloyal to the Attorney General, to whom he is very loyal, and it would be just on the face of it so blatantly stupid that I am convinced that he would never make it. And you just stated, Mr. Esposito, that it was very out of character, that it didn't make sense. It didn't reflect the pattern of thoughtful, proper, intelligent, logical dialog you had with this gentleman.

Now, if I would be in your boots, I would say one of the possibilities is that I misconstrued the remarks.

Mr. GALLAGHER. Mr. Lantos, if I could add on that point.

Mr. LANTOS. Please.

Mr. GALLAGHER. After the meeting I concluded—Mr. Esposito and I did not speak particularly about this statement. What we talked about was the strategy that the FBI would begin to put together to create the task force. I was unaware of the fact that he was going to go down the hall and talk to the Director.

Mr. LANTOS. Yes.

Mr. GALLAGHER. I was unaware of the fact that the Director was going to make a decision to talk to the Attorney General about it and document his observations and the fact that he talked to the Attorney General in a memorandum.

It was not until some days after this memorandum was prepared that I had an opportunity to see it.

The memorandum as to the statement attributed to Lee Radek is accurate. He did make the statement. I cannot interpret why he made the statement. I respect Lee Radek. He is a friend. I respect him as an attorney. We have had a lot of professional contacts. I walked away from that statement with the appreciation that what he was saying was that this was going to be a very tough, critical investigation and it was a statement of fact that the Attorney General's job may be on the line. May hang in the balance was what was said. When I saw it, I had no difficulty with the accuracy of the statement and didn't know that it was being documented.

Mr. LANTOS. Of course, you see the Attorney General's job being on the line was obvious to anyone who listened and watched the Sunday morning television programs. There was Republican Senator after Republican Senator calling for her resignation. There was unbelievable pressure in this body to get rid of her. This was a statement of fact.

Mr. GALLAGHER. Correct. But——

Mr. LANTOS. What is so sinister about it if you don't connect the two?

Mr. GALLAGHER. The difficulty I have is that you are asking me to analyze a statement that I did not make nor did Bill Esposito make. It was made by Lee Radek in our presence. We only reported what he said and I can't get into what is behind it and unfortunately he doesn't recall either the meeting or the statement. So the

difficulty is to analyze a statement that we don't have the person who made it recalling it.

Mr. LANTOS. But we can still analyze the statement, Mr. Gallagher, whether he recalls it or not. I have no difficulty analyzing it in a benign fashion. I think both statements are accurate. He was under great pressure, period. The Attorney General's job was in the balance. Well, it was.

Mr. GALLAGHER. Unfortunately, as I said, there wasn't a period in between them. They were connected.

Mr. LANTOS. How in an oral conversation do you know where the periods and the semi-colons are. Explain that to me.

Mr. GALLAGHER. It was one simple statement. It was not separated by any pause. It was not separated by other statements. It was connected.

Mr. LANTOS. How was it connected?

Mr. GALLAGHER. It was one statement.

Mr. LANTOS. Say the sentence.

Mr. GALLAGHER. It lasted a number of seconds. It was not—I did not take it to be a dramatic statement. I share your opinion that there was a lot of publicity to the fact that the Attorney General's job may hang in the balance. There was a lot of discussion of that.

I recall the statement by Mr. Radek about the pressure, and the way that he said it, that there was pressure on him because the attorney's job may hang in the balance, was said. That is not a direct quote but is very close to that. But I took away from that what he was attempting to convey—or the implications that I took and they may differ from what the Director of the FBI, how he reacted to it, but the implication that I took was that Lee Radek was making a statement of how sensitive and tough this investigation was going to be that we were about ready to enter. The whole purpose of this meeting, and it was an extraordinary meeting because it is the only meeting that I recall in Bill Esposito's office with Lee Radek and myself talking about campaign financing and the structure of the investigation that was to begin. That is why I recall the meeting and that is why I recall the statement.

Mr. LANTOS. Well, let me ask you whether my benign interpretation of the two sentences, which for the sake of argument I accept, what is wrong with my benign interpretation? Obviously there was a great deal of pressure because they were beginning a major investigation and obviously the Attorney General's job was in the balance. Everybody knew that. The New York Times, the Washington Post, had headlines and editorials on a weekly basis on this subject.

Mr. GALLAGHER. The difficulty I have is to separate them when I as one of the two people who heard it said did not hear or understand any separation from the two points. They were connected as I heard them.

Mr. LANTOS. Well—and if you connect it, what does it mean to you?

Mr. GALLAGHER. What it means to me and what I took from that statement as I heard it, that Lee Radek, and I didn't take it so much out of character with him because Lee Radek was emphasizing that this was going to be a very difficult, sensitive investigation. That is the impression I took from it.

Mr. LANTOS. That is obvious.

Mr. GALLAGHER. So I did not overreact to it. I did not put any great significance on it. I did not know once Bill Esposito would discuss it with the Director it would become an issue that would be raised with the Attorney General. Maybe that is my naiveness, naivete.

Mr. LANTOS. No, it is not your naivete because your interpretation is exactly my interpretation. You have just substantiated the case that I am making. You heard these two statements. You didn't think they were so extraordinary. You didn't run and write a memo about it. You didn't go to the head of the FBI to report it. You just thought yeah, that is right. It is a very sensitive investigation, great pressure. The Attorney General's job is in the balance. All of those statements are true.

Mr. GALLAGHER. But the issue is that the Director of the FBI did read a higher degree of sensitivity into it and——

Mr. LANTOS. That is what the FBI does. We want you guys to sniff for something in every conceivable context. I don't blame Louis Freeh and I don't blame Mr. Esposito. I am merely putting a more rational interpretation on some obvious statements. Mr. Radek, as the Justice Department, was under a great deal of pressure; and the Attorney General's job was in fact in the balance.

Mr. GALLAGHER. But they were connected.

Mr. LANTOS. Of course they were connected. If she was in the flower growing business, then the pressure would be less severe. We all understand that.

Mr. GALLAGHER. The difficulty you and I would have is attempting to interpret a statement made by someone else.

Mr. LANTOS. That was my point to Mr. Esposito. You know, I would like to sort of go back to an early dialog we had. Let's put this statement or statements aside for a moment, although I would like to state for the record that not only do I think that a benign interpretation can be made of the alleged statements, but the only rational interpretation of the alleged statements is a benign interpretation.

Do either of you believe that the Attorney General in fact based her decisions on political considerations or because she was concerned about retaining her job, Mr. Esposito?

Mr. ESPOSITO. Not for a minute do I believe she would make a decision just to keep her job.

Mr. LANTOS. How can you immediately go, consider this statement so evil so as to run to the FBI Director to report it?

Mr. ESPOSITO. I never said it was evil.

Mr. LANTOS. It would have been evil. If she would make her decision for the purpose of keeping her job, that is unacceptable, isn't it?

Mr. ESPOSITO. First of all, I did not run down to the Director's office. Immediately after the meeting, after Mr. Gallagher and I had a few minutes of discussions, I reported the results of the meeting. The main focus of the meeting was two points which I previously testified to. Also in the context of the discussion, this came up. That was my job, to brief the Director on the results of the meeting because the Director and I had discussed having a meeting to begin with.

Now, you asked me a question about the Attorney General. I answered the question on the Attorney General. I have a great deal of respect for the Attorney General and her integrity. I always think she would do the right thing, and if it would cost her her job, I believe she would still do it.

Mr. LANTOS. Mr. Gallagher, what is your answer to that same question?

Mr. GALLAGHER. I have the highest respect for the Attorney General. I have dealt with her on many issues, and I have no reason to question her at all.

Mr. LANTOS. Well, let me say I share the highest respect you have for the Attorney General, and I have very high respect for all three of you. I only wish I were as sure of everything that you are apparently sure of everything, Mr. Esposito, because I am never sure that I hear you right or I hear my wife right or my friend right. Different people may have different interpretations of the same sentences and it is appropriate to give a professional colleague the benefit of the doubt.

I yield back the balance of my time, Mr. Chairman.

Mr. BURTON. We were going to give you the remainder of your 5 minutes. So you have another 2½, 3 minutes if you would like.

The gentleman yields back the balance of his time.

Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman.

I feel like I am walking in a cesspool and somebody is saying drink the water, it's clean. That is the way that I have felt for a number of years. I can't reconcile a lot of things. I can't reconcile the public confidence in the Attorney General and the private memos that say something very different. There are a lot of things that strike me as silly. There are a lot of things that strike me as absurd and there are a lot of things that strike me as down right dangerous. I can't reconcile, Mr. Radek, your telling me that you didn't get involved with the President or Vice President after September 1997 when you wrote a memo in November 1998 talking about the independent counsel and why the President shouldn't be—and the Vice President—excuse me, why the Vice President shouldn't have an independent counsel, as if somehow you weren't involved. I can't reconcile that.

I can't reconcile a memo that is clear as clear can be, and I am going to read part of it. It is the memo that came out by Mr. Freeh to you, Mr. Esposito. I mean, I knew about the Freeh memo to Reno in November 1997 and the La Bella memo in 1998, in July 1998, both recommending independent counsels, so we may love the Attorney General but it was very clear there was no doubt in either person's mind that an Attorney General should appoint an independent counsel based on just the law requiring it and based on even if the law didn't require it, just her discretion. I can't reconcile that she didn't, but you know, that is her opinion and she took her position. But I didn't know about the Freeh memo to you, Mr. Esposito. I didn't know that there was a memo that said, "As I related to you this morning, I met with the Attorney General on Friday, December 6, 1996, to discuss the above-captioned matter, and it is entitled Democratic National Campaign Matter. I stated that the DOJ had not yet referred the matter to the FBI to conduct

a full criminal investigation. It was my recommendation that this referral take place as soon as possible." It blows my mind that the FBI wasn't given this referral.

Then he continues to say to you, Mr. Esposito, "I also told the Attorney General that since she had declined to refer the matter to the independent counsel, it was my recommendation that she select a first rate DOJ legal team from outside Main Justice to conduct the inquiry. In fact I said that these prosecutors should be junkyard dogs and that in my view the PIS was not capable of conducting the thorough kind of investigation that was required."

Not a very good recommendation of you, Mr. Radek. "I also advised the Attorney General of Lee Radek's comments to you that there was a lot of pressure on him and PIS regarding this case because the Attorney General's job might hang in the balance or words to that effect. I stated that those comments would be enough for me to take him and the Criminal Division off the case completely. I also stated that it didn't make much sense for PIS to call the FBI the lead agency in this matter while operating a task force with the Department of Commerce IG's who were conducting interviews of key witnesses without the knowledge and participation of the FBI. I strongly recommended that the FBI handpick DOJ attorneys from outside Main Justice to run this case as we would in any matters of such importance and complexity." It goes on. "I intend to repeat my recommendation from Friday's meeting." He goes on.

I want to know, Mr. Radek, if you were told the moment after he met, Mr. Freeh met with the Attorney General that you had, according to Mr. Freeh, made comments that questioned your ability to do your job?

Mr. RADEK. I'm sorry, what is the question? Did I know that?

Mr. SHAYS. Did the Attorney General who you all seem to be in awe of come to you and tell you that this comment had been made?

Mr. RADEK. No. I was unaware the comment was made until I saw this memo.

Mr. SHAYS. So the Attorney General after she was confronted by the Director of the FBI that your integrity was in question, and would you agree that this raises questions about your integrity? Whether or not you think that you made that statement, don't you think that this raises questions about your integrity?

Mr. RADEK. It seems to me that the Director is drawing an inference that questions my integrity, yes, sir.

Mr. SHAYS. Mr. Esposito, I am happy that you spoke to the FBI Director. You did what you should do. And you are not happy that you are here today. And you are all people that work with each other and I know that, but you heard it. You were obligated to step forward and you spoke to your Director. He was obligated to speak to the Attorney General. Would someone tell me why the Attorney General didn't tell you, Mr. Radek, about this memo? Obviously you can't, can you?

Mr. RADEK. No, I can't.

Mr. SHAYS. Can you tell me, Mr. Esposito?

Mr. ESPOSITO. No.

Mr. SHAYS. Mr. Gallagher.

Mr. GALLAGHER. I can't.

Mr. SHAYS. How can you tell me that you have confidence in their investigation? It doesn't make sense to me. It is not logical to me. It is not—how can you praise her when you have—she has been confronted with a question of integrity and she doesn't even go to the individual who was in fact accused of making the statement?

Let me ask you a question, Mr. Esposito. If your integrity was questioned, and you are the Deputy Director of the FBI, correct?

Mr. ESPOSITO. Correct.

Mr. SHAYS. If your integrity was questioned and someone went to your Director, Mr. Freeh, and you were accused of making statements that made it seem like you could not carry out your job, would you expect Mr. Freeh to come to you and confront you?

Mr. ESPOSITO. Yes, I would.

Mr. SHAYS. Well, I'll just say for the record my time has run out. It doesn't make sense to me, why the Attorney General who you all praise with her integrity and that she's doing a great job didn't do a great job in this instance. And it raises gigantic questions to this Member of Congress about what the hell is going on at DOJ.

Mr. BURTON. Gentleman yields back his time because his time has expired.

Mr. Barr.

Mr. BARR. Thank you. Mr. Chairman, sometimes at these hearings when I listen to Mr. Waxman or, in this case, Mr. Lantos, questioning administration witnesses, they are operating in a different dimension. Sometimes, I don't know whether you remember, Mr. Chairman, the bizarro world, the bizarro world of Superman which was another dimension into which he would occasionally traverse, everything was the opposite. Up was down, left was right, clean was dirty, dirty was clean. Everything was all jumbled together. And Mr. Lantos's statements, apparently to which Mr. Radek subscribes also, they're perfectly normal and acceptable and understandable for statements to be made, that an Attorney General's job is in the balance, if he or she follows the law and recommends the appointment of an independent counsel, may be entirely acceptable in the Clinton bizarro world, but it is not acceptable in the world of prior administration's Republican and Democrat. And it is not acceptable, Mr. Chairman, in the world of the majority on this committee.

That is why you have convened these hearings when the other side would never dream of convening these hearings, because in their world, for an Attorney General to be confronted with statements by a head of the Public Integrity Section that raised the question about her integrity and her job being in the balance, simply if she happens to follow the law or recommend—and recommend the appointment of an independent counsel, would, in fact, be subject to great questioning, because that would not be acceptable in any way, shape, or form. It's just absolutely mind-boggling that that witness and Mr. Lantos could be sitting here bantering back and forth, that this is perfectly understandable. It is perfectly understandable only in the context of the administration in which the evidence is offered.

In contrast, Mr. Chairman, the lethargy with which the Public Integrity Section approached the campaign financing matters here

with the way they've tried to come after the head of the FBI on March 5, 1997, just short—relatively shortly after the director's memo of December 1996, apparently the director made a mistake in testimony before the Congress on a completely unrelated matter. And immediately, the Department of Justice, the Clinton Department of Justice launched into action and immediately felt the need to trigger a preliminary investigation, even though it was an inadvertent mischaracterization in the director of the FBI's testimony, which he immediately, when he realized it was inaccurate, corrected the record, yet the Department of Justice immediately launches a preliminary investigation into that matter.

Now, they concluded relatively quickly that there were no grounds to continue with the appointment of an independent counsel, but in that case, they certainly had no hesitancy at all that the minimum threshold necessary to begin a preliminary inquiry was met. Whether or not that was an effort, another effort to get back at the head of the FBI for standing for the rule of law and demanding that the law be upheld, I don't know.

We will probably never know, but the fact of the matter is, Mr. Chairman, that even though, as we saw earlier in Mr. Lantos' continuous efforts to, you know, make sure there's plenty of sunshine out there and everybody is lovey dovey with everybody else, he played a testimony from Director Freeh of about 3 years or so ago. At that time, we did not have, Mr. Chairman, the memos that we now have before us as you indicated at the beginning of these hearings. It's taken about 2½ years to get these memos, even though they've been under subpoena for quite some time.

At the time that Mr. Freeh testified back then, had we heard the brief snippet of today, we did not have those. At that hearing, the chairman will recall, and I presume these witnesses will recall, that Mr. Freeh had to be very circumspect about how he discussed these matters and how he answered questions regarding them because the memos had not been made public and we did not have them.

However, at the time, in response to questioning by myself, he said that his recommendation was based on more than one aspect of the statute regarding appointment of independent counsel. I asked him at that time if he was aware of the fact, of course, that there were only two bases on which an independent counsel could be triggered, one was conflict of interest and the other was credible evidence that covered persons, including the President and Vice President, might have violated Federal laws.

In response, then, he answered yes. We know now, based on the memos that are before this panel today and before these witnesses today, that the director went into quite some detail criticizing the manner in which Mr. Radek's office presupposed that the covered persons were telling the truth. They gave them every inference of every—they had the benefit of every inference of what they were saying, and their self-serving statements were true and correct, and therefore contrary. And the director says this, contrary to the way a normal investigation progresses in which, right off the bat, you don't give the potential defendants or those that are the subject of an investigation, the benefit of every doubt. You, in fact, ask relatively probing questions. You remain somewhat skeptical. That

in the case at hand, quite the opposite was done, and therein lies the essence of the director's disagreements with the way the Public Integrity Section was handling this investigation.

You have not gone into this, Mr. Chairman, but I think it's also relevant to have a little bit of history in this area with regard to why Mr. Radek may have been doing so much to ensure that the FBI was cut out of this. The fact of the matter is that with regard to a previous matter of the appointment of an independent counsel regarding Henry Cisneros, the FBI there also had recommended that, based on credible evidence, an independent counsel needed to be applied for. The Department of Justice resisted that effort. It was only when the director of the FBI insisted over the objections of the Public Integrity Section that the Attorney General move forward with the seeking of the appointment of an independent counsel.

And I think that was perhaps, more than anything else, something that gave rise to the bad blood here and why the Office of the Public Integrity Section resisted so substantially the efforts by the head of the FBI to see that the independent counsel law was enforced, as well as the efforts by Mr. La Bella.

So, at least on this side of the aisle, Mr. Chairman, I don't want there to be any presumption that we agree that it is perfectly normal and healthy for some statement to be made that the Attorney General was under a lot of pressure, and her job might hang in the balance if, in fact, an independent counsel is appointed. That is entirely unacceptable. That has never happened as far as we know in any prior administration Republican or Democrat, faced with similar allegations.

Even those in the Carter administration, before the independent counsel statute, per se, came into existence. And that's why, Mr. Chairman, I appreciate very much your holding these hearings, so that we can at least set the record straight today, which we were not able to do because we didn't have these documents available at the last time the director of the FBI testified on these matters.

Mr. BURTON. Thank you, Mr. Barr. I guess we're about to conclude the hearing.

You have some more questions.

Well, let me get back to you in just a second, then. On November the 1st, 1996, Mr. Radek, you wrote a letter to Mr. Steven Zipperstein, chief assistant, U.S. attorney in California for the central district. And you said, this is to confirm the substance of the conversation on October 31, 1996, among Assistant U.S. Attorney Steve Mansfield, you and myself concerning two matters potentially venued within your district. It involved the Hsi Lai Temple and it involved another issue. And you directed them not to continue their investigation, even though they were sending out subpoenas and ready to go after, maybe possibly impaneling a grand jury.

You said that the reason was the Public Integrity Section, which was responsible for all potential independent counsel matters, has been assigned to examine all of the allegations to determine whether further investigation is warranted and whether appointment of an independent counsel might be appropriate.

As would be necessary in any matter with potential independent counsel ramifications, your office should take no steps to investigate these matters at this time. So you stopped him from conducting the investigation. And you said, in addition, we would appreciate it if you would immediately provide us with any background or other information you may have gathered to date concerning either of these matters.

Well, the end result was you didn't appoint an independent counsel. I'm not sure you probably ever had any—had any desire or inclination to do that. But for some reason, you did want to take it out of the hands of the U.S. Attorney out there who was really hell bent for leather to pursue that. And as a result, I don't know that anything was ever done with that.

So that along with everything else we've been reading in these memos would lead one to believe that there is an attempt by the Justice Department and the Public Integrity Section not to go after people who are connected with this White House. And that's what Mr. La Bella's memo said, in effect. I don't know, I hope everybody reads the La Bella memo. All this stuff today, if you watched this whole hearing, I'm sure people are going to say, my gosh, it looks like somebody making sausage. How do you understand all the ramifications of this? But the fact of the matter is there has been no thorough investigation of Mr. Ickes, the President, the Vice President. They weren't even asked questions about illegal campaign activities. They weren't even asked questions about people they were connected with. And it was apparent, apparently intentional.

Now, you know, that bothers us a great deal and that's why we have been so aggressive in investigating this and why we've been diligent. And the Justice Department, for 2½ to 3 years, has kept us from getting documents which we finally got, because I was going to bring the chief lieutenant for Eric Holder before the committee with the documents, and if he didn't bring them, I was going to hold him in contempt of Congress, I was going to take him to the floor.

I think they knew that so they finally coughed up the documents after 2½ years. You know, and then you look at these memos here. This is the memorandum to Mr. Esposito from Mr. Freeh. It was unfortunate that DOJ declined to allow the FBI to play any role in the independent counsel referral deliberations. I agree with you, that based on the DOJ's experience with the Cisneros matter, which was only referred to the independent counsel because the FBI and I intervened directly with the Attorney General, it was decided to exclude us from this decisionmaking process. Keep them out of there.

I admire your loyalty, I really do, saying that you believe that the Attorney General and the people over at Justice would not do this. And I think publicly that's probably as it should be. Louis Freeh and you fellows are loyal. But won't you read the memos. You see either gross, incompetent over there or deliberately blocking a thorough investigation of the White House and all these other things that have been going on over there.

While I admire your loyalty and your public position, when you read these private memos, it sure paints a different story. Now, I'm going to sum up, then I'm going to let Mr. Shays go next.

Freeh, La Bella and DeSarno sat right where you folks are sitting, and they said there should be an independent counsel. The memos, I believe, speak for themselves. I think when you read the memo from Louis Freeh, and I spent hours reading it and I spent hours reading Mr. La Bella's memo, I think they speak for themselves. The problem is making sure the American people understand how strongly both Louis Freeh and the FBI and Mr. La Bella felt about this. One of his subordinates felt so strongly, he resigned, Mr. La Bella's subordinate resigned, because he said it was such a biased mess.

Mr. Radek, my three, four former counsels to the President who sat there, right there on the e-mail thing, just a few weeks ago, and several other people going all the way back to the FBI scandal, when they were taking FBI reports, Mr. Livingstone and Mr. Marcesa and even the travel office investigation, the memory loss, the inability of anybody to remember anything, just makes me want to vomit. You can't be indicted for perjury if you don't remember.

So what happens when we have who was the chief counsel that was here, Chuck Ruff said when he was investigating the Whitewater investigation, he said, if I'm ever in this position, I'm paraphrasing, he said the best thing to do is to say you don't remember.

And Mr. Ruff didn't remember. Neither did his subordinate. Neither did the new counsel, Ms. Nolan. None of them remembered anything. And now today, Mr. Radek doesn't remember. He just doesn't remember a meeting that is that significant when they're talking about one of the most important cases in the history of the United States. He doesn't remember the pressure statement, he doesn't remember saying, you know, that the Attorney General's job hangs in the balance. That's pretty strong stuff. I don't know how you forget that. They didn't forget it. Louis Freeh didn't forget it. He went to the Attorney General and talked to her about it, but she didn't remember either.

The epidemic from the White House has spread to the Attorney General and now to you, Mr. Radek. It's just amazing. And the thing that bothers me the most is that if the Attorney General and I say if, if the Attorney General's job and her position was so important, that she did not appoint an independent counsel in accordance with the law that was passed by Congress, if she deliberately did not appoint an independent counsel, because she wanted to keep her job or she wanted to protect the President and not have a thorough investigation, that is obstruction of justice. That is a felony. That's obstruction of justice if that's what she did.

I'm not sure we're ever going to find out, but, by golly, after reading all this stuff and going through this for 2½, 3 years, I'm convinced that's what they did. And you too, Mr. Radek.

And finally, Louis Freeh, as I said, as well as you gentlemen, publicly support the Attorney General. But all of the evidence and the information we have here shows just the opposite. And I think it's a tragic shame and it's a black stain and a blot on the justice of the United States of America and the Justice Department.

Mr. Shays.

Mr. SHAYS. I'm not going to keep you here much longer. I just want to resolve in my mind, Mr. Riady—excuse me, Mr. Radek. Is it Radek or Radek?

Mr. RADEK. It's Radek, Mr. Shays. Thank you.

Mr. SHAYS. I heard Mr. Lantos say "Radek," and he's usually right on the mark, so it made me wonder.

Mr. Radek, I'm interested to know under what basis you make the statement that the temple, Buddhist Temple fundraiser was not meant to be a fundraiser but an outreach. You made reference to that.

Mr. RADEK. I don't know that I ever adopted that position. If there is a document where I did, I would be glad to examine it.

Mr. SHAYS. I thought you made reference to the fact that——

Mr. RADEK. No, I think that was the Vice President's interview; he probably said something to that effect.

Mr. SHAYS. I heard "the temple," and I didn't think it was Mr. Esposito.

Mr. RADEK. I said that the Hsi Lai Temple was one part of the campaign financing investigation.

Mr. SHAYS. Right. And you did not feel—what interests me is that Mr. Trie suggested it, Mr. Huang arranged for it, and Mr. Hsia—excuse me, Maria Hsia carried it out. Tell me what was illegal about that event.

Mr. RADEK. Well, there were several offenses committed, but the focus of the investigation was, as you suggest, whether there was a conspiracy among what the FBI liked to call the opportunists, the people who were the fundraisers who were going out and raising money and presumably trying to get favors in return for that. To raise foreign contributions, to raise contributions that were what we call strawman contributions, that is, contributions made in the name of another.

Mr. SHAYS. That's laundered money.

Mr. RADEK. Well, it is. I'm not sure it technically fits the money laundering statute, but I would rather reserve a legal opinion on that since we may be trying to use that. It may well be money laundering. And there's a lot of crimes that flow from that, like false statements to the FEC, interference with the FEC or some other Federal function. And that was the type of charges that were brought against from Maria Hsia for which she was convicted.

Mr. SHAYS. So it's—it was illegal though, clearly illegal.

Mr. RADEK. There was illegal activity involved in that fundraiser in terms of foreign and strawman contributions.

Mr. SHAYS. Which I call laundered money and you don't. It was money supposedly given by individuals, and it wasn't their money. It was laundering money to cover up who actually was giving the money.

Mr. RADEK. Yes. There's a specific FEC crime, FECA crime. It is contributing in the name of another. That violated it. It may or may not violate the money laundering statute.

Mr. SHAYS. But it was under FEC and you seem to carry a lot of weight with what the FEC says.

Mr. RADEK. The act, FECA, the Federal Election Campaign Act.

Mr. SHAYS. But it was illegal.

Mr. RADEK. Yes.
Mr. SHAYS. And the President was involved in it.
Mr. RADEK. I don't know that the——
Mr. SHAYS. The Vice President was involved.
Mr. RADEK. The Vice President appeared there, yes.
Mr. SHAYS. He was the attraction.
Mr. RADEK. Yes.
Mr. SHAYS. That was why people came.
Mr. RADEK. Yes.
Mr. SHAYS. OK.
Mr. RADEK. Where are we going with this?
Mr. SHAYS. Where we are going with it is I'm just trying to understand your logic. Because you recommended in 1998 not to move forward, and yet you're telling me that you didn't get involved in this investigation after 1997 when asked specifically about whether the Vice President was questioned, and you kind of waved it off like I wasn't involved, "you" meaning——
Mr. RADEK. The 1997 interview of the Vice President I took part in. I know what was asked at that interview. So I could answer your question. The subsequent interviews I was not involved in, but when they involved the independent counsel issues, obviously I became aware of the contents of the interview. That doesn't mean to say that I know whether or not, in the course of that interview, someone may have asked a question about the Hsi Lai Temple. That's all I'm saying. I wasn't involved in the interviews.
Mr. SHAYS. But what bothers me is you wouldn't know, because you wrote a memo, memo 35 in our exhibit, and the title is to recommend that the Attorney General not trigger a preliminary investigation in this matter.
Mr. RADEK. This has nothing to do with the Hsi Lai Temple, I believe.
Mr. SHAYS. It has with the phone calls.
Mr. RADEK. Yes. Which had nothing to do with the Hsi Lai Temple.
Mr. SHAYS. Right.
Mr. RADEK. The Hsi Lai Temple was a separate particular part of the campaign finance investigation.
Mr. SHAYS. What I want to know is why you didn't speak to that issue.
Mr. RADEK. The issue of whether the Vice President spoke at a fundraiser where illegal contributions were committed? It wasn't a terribly relevant issue. The issue you'll find addressed in the Attorney General's letter in late 1996, I think it was, to the Congress——
Mr. SHAYS. Let me understand. Maybe you're dead right, and I'm just foolish to wonder, but if I'm involved in a fundraising event that is raising illegal money, somehow I don't have to—you kind of dismiss it like, you know, you foolish person. Of course, we wouldn't look at that.
Mr. RADEK. No, sir. We looked at it thoroughly, and eventually Maria Hsia was indicted for that. Of course, we looked at anybody who was involved. We never came across any specific and credible evidence that the Vice President was involved in illegality.

Mr. SHAYS. And I wanted to know if you asked him the questions.

Mr. RADEK. I did not ask him the questions when we interviewed him in 1967.

Mr. SHAYS. Why didn't you see if he was asked in 1997 and 1998 if you're in charge of Public Integrity?

Mr. RADEK. I was no longer involved in that, but the processes were there that if the allegation arose——

Mr. SHAYS. I obviously don't understand what you just said to me. You were not involved in what?

Mr. RADEK. I was not involved in the task force's work to the extent that they were still investigating the Hsi Lai Temple.

Mr. BARR [presiding]. The gentleman from Connecticut will have 5 additional minutes without objection.

Mr. SHAYS. I just want to understand, if you're in charge of Public Integrity, it's my sense we either have an independent counsel who looks at the integrity of our public officials or you do.

Mr. RADEK. Now, in this instance, there is a lot of other people who look at them. As the acting chairman can tell you, most of the corruption work is done by U.S. Attorneys. In this case, the task force after Mr. La Bella's arrival stopped being part of the Public Integrity Section, it became a separate entity. To the extent that the investigation continued, I stayed on for a while in an advisory capacity. And as independent counsel matters would come up, I would be called in to do a preliminary investigation and to give an opinion, along with everybody else. I was no longer in charge of directing where the task force went or what it investigated.

Mr. SHAYS. So Mr. La Bella does his investigation and he recommends that an independent counsel be appointed with no reservation whatsoever.

Mr. RADEK. At the end of his tenure, he wrote that report which you're releasing today which summarized—was intended to summarize all of his investigations, and he recommends an independent counsel for various particular matters and sort of for the whole thing.

Mr. SHAYS. I'm sure you read them, his memo.

Mr. RADEK. I did. And I responded to it and I presume you're releasing my memo as well.

Mr. SHAYS. And the Director of the FBI recommended an independent counsel. And you, at every instance, recommended that there not be one. Is——

Mr. RADEK. Not exactly true, sir. There was somewhere I recommended an independent counsel.

Mr. SHAYS. What were the instances where you recommended an independent counsel?

Mr. RADEK. There were some that were appointed and there was one where she disagreed with me.

Mr. SHAYS. I want you to be specific. What particular areas did you recommend an independent counsel?

Mr. RADEK. On Alexis Herman.

Mr. SHAYS. Related to the President or Vice President, and as it related to campaign abuse?

Mr. RADEK. Alexis Herman, Harold Ickes. That's all.

Mr. SHAYS. OK. But not the Vice President?

Mr. RADEK. No, sir.
Mr. SHAYS. Not the President?
Mr. RADEK. That's correct.
Mr. SHAYS. Did you write——
Mr. RADEK. Although I was deeply involved in the Monica Lewinsky matter, but not related to campaign finance.
Mr. SHAYS. Did you write memos arguing that the President and the Vice President should not have a special counsel?
Mr. RADEK. I did.
Mr. SHAYS. Do we have all of those?
Mr. RADEK. I believe so. I'm not in charge of document production, but I'm reasonably sure you do.
Mr. SHAYS. So you took an active interest in recommending that the President and the Vice President not have independent counsel look at campaign abuses, but you tell me that there are areas where you did not question or areas where you were not involved. So I—just reconcile that.
Mr. RADEK. But that's not to say that someone wasn't doing it. When I stopped being involved, the task force continued its work. And I'm quite confident that the work was done well, and I think the results will speak for it. They've had numerous convictions. The investigation continues. And it's a logical, well-structured investigation that I think—that I'm sure is ongoing now. What I'm saying is my personal involvement only involved the independent counsel decisions after some point when Mr. La Bella was there because that's my job.
Mr. SHAYS. If soft money was used by the President or his media people and directed to certain States and the President was, in some way, involved in writing those acts, do you consider that an illegal act?
Mr. RADEK. I do not.
Mr. SHAYS. Why?
Mr. RADEK. Because the FEC hasn't said it's illegal, and now the FEC has now said it's not illegal. Coordination, no matter how closely the President participated, doesn't seem to be an issue at all, and the FEC has ruled that instead, the only thing that matters is the content of the ads. If the ads contain an electioneering message, then they need to be paid for with hard money. Otherwise, it's soft money.
Mr. SHAYS. So we know it's soft money.
Mr. RADEK. I'm talking about what's permissible. The FEC has said it's OK for soft money to be used.
Mr. SHAYS. And directed by an individual like the candidate and his media people?
Mr. RADEK. Yes. No matter how closely he coordinated it, it's irrelevant.
Mr. SHAYS. And the basis for that is what, decision of the FEC?
Mr. RADEK. The FEC decision, I believe, on the Common Cause case, but there's a number of opinions that lead up to it that told us that's where they were going.
Mr. SHAYS. Well, I'll just conclude by saying the public statements are very laudable about people like the Attorney General. The memos that we have are just replete with statements questioning the veracity of the investigation by the FBI, by people who

were in DOJ, and I don't know how to reconcile that. And I don't know how to reconcile the fact Mr. Radek, in particular—Radek, excuse me I don't know how to reconcile the fact that there was a meeting that you don't remember, that two people here remember.

I don't know how to reconcile the fact that they felt so concerned that they spoke to the director of the FBI, and the director of the FBI felt so concerned that he spoke to the Attorney General and then, as she says, I take full responsibility. But I don't know what taking full responsibility means anymore with this Attorney General, because she obviously didn't speak to you according to your statements, and you certainly would have remembered that. So she just let it hang. And the statement you're accused of making is basically saying, in so many words, that you were concerned about what you did as it related to an independent counsel of the President or Vice President because she may, in effect, not get reappointed. That was the gist of it. And I would think that if she was confronted with that, she would call you and say what the heck are you making statements like that for? And then you could have said I wasn't making a statement. And then you could have gone back and set the record straight. But instead, she allows this to be a public record with no answer.

Mr. RADEK. I can't reconcile that either, Congressman. I can tell you that Bill Esposito and I were friends for a long time. In fact, we had some very frank discussions at times about what was wrong with the Department of Justice and/or the FBI. And the fact that he did not, that he was disturbed by this remark and did not ask me about is something I won't understand, and I haven't discussed it with him prior to this testimony. I hope to discuss it with him sometime.

Mr. SHAYS. But you questioned him?

Mr. RADEK. But beyond that, let me say this: There's a couple of things in your question that sort of aren't supported by the evidence. One is the decision on an independent counsel. I think if you look at the memorandum and listen to these two gentlemen's testimony, what they say I said, of "the investigation." Now, whether or not that related to an independent counsel, I don't read from this being a part of the argument.

And I agree that there is a sinister interpretation to be taken from this memorandum. Mr. Gallagher, I believe, didn't walk away from that meeting with a sinister interpretation, and it sounds to me like Mr. Esposito was puzzled, as I would have been if I heard somebody like me make this remark, which, to me, again, disappoints me that he didn't ask me about it at that time.

Mr. SHAYS. And yet, there you go again. You don't have any interest in voicing the same concern about the Attorney General?

Mr. RADEK. Well, sir, I can say that the Attorney General wasn't bashful about asking me about things that happened, and I have no explanation as to why she didn't ask this. But you know, I would have to speculate that somehow it got communicated to her in a manner less effectively than is stated here.

Mr. SHAYS. But that's the gentle way. The stronger way is to say that your integrity was questioned by the director of the FBI because of a statement you are believed to have made, and you were confronted with that. That's the way I look at it. And it raises a

gigantic question of what other things she didn't act on when she should have. I mean, the fact is we do know, we do know that Mr. Esposito felt the statement was made. We do know that Mr. Gallagher felt the statement was made.

Mr. Gallagher, would you say that you didn't think it was sinister, you just passed it off? I heard you respond to Mr. Lantos, but I mean, did you come to the same conclusion Mr. Esposito did?

Mr. GALLAGHER. I came to the conclusion that, first of all, the statement was made and in a connected fashion, but the impression I took at the time in the context of the discussion was that what Lee Radek was conveying to us of the sensitivity of this investigation. That's what I took away from it.

Mr. SHAYS. Did you think that—so you don't come to the same conclusion that Mr. Esposito came, that he was concerned that potentially how he made a decision on independent counsel might affect whether or not the Attorney General was going to have her job?

Mr. GALLAGHER. At the time, I did not come away with that reaction. And perhaps it's because what I was focused on was moving forward with the investigation. The purpose of this meeting that day was to get from Lee Radek an appreciation of what the Public Integrity Section had been doing up to this point so the FBI could get some control of the investigation. We were seeing in the paper a lot of reports about events that would become the campaign financing, and we weren't asked to do anything yet.

So the purpose of the meeting was to ask Lee Radek to come over, discuss the investigation so we could get a plan together and move forward.

Mr. SHAYS. So based on your answer, and truth requires me to ask this question, your conclusion basically was not the same as Mr. Esposito's?

Mr. GALLAGHER. I don't know that it's in conflict with Mr.——

Mr. SHAYS. You can't have it both ways.

Mr. GALLAGHER [continuing]. Would not be as strong.

Mr. SHAYS. You can't have it both ways. You either have to decide in your own mind if you thought Mr. Radek was, in fact, suggesting that his job was on the line or her job was on the line based on this, his decision about an independent counsel, which is what Mr. Esposito felt and told the director of the FBI or he didn't. And you can't say you agree with Mr. Esposito or not. You basically are suggesting otherwise.

Mr. GALLAGHER. I am suggesting that—well, I'm not suggesting, I'm stating that what I heard Lee Radek say was that there was a lot of pressure on him because the Attorney General's job might hang in the balance. I can't interpret what he meant by that statement.

Mr. SHAYS. But you did interpret it. You did not interpret it as being, in fact, a suggestion that the Attorney General might lose her job if he didn't make the right suggestion.

Mr. GALLAGHER. Your statement went a little further than that. Your statement, as I heard you just stated, was that you tied it to her decision on the independent counsel. I don't recall Lee Radek making a statement that day in the context of the statement that

tied the pressure of the Attorney General's job and independent counsel.

Mr. SHAYS. So what's on the table, bottom line, is that Mr. Esposito, you heard it a certain way and you reported it. And no action was taken afterwards by the Attorney General as far as confronting Mr. Radek with this and as far as resolving this.

And Mr. Esposito, let me ask you this question, do you regret not asking Mr. Radek to go in more detail about what he meant?

Mr. ESPOSITO. Looking back on it, yes.

Mr. SHAYS. Fair enough. Thank you. I yield back.

Mr. BARR. I'd like to ask unanimous consent that the GAO briefing report to the chairman, Committee on the Judiciary House of Representatives, dated May 2000 entitled Campaign Finance Task Force Problems and Disagreements Initially Hamper Justice Investigation, be made a part of the records. Without objection, so ordered.

[The information referred to follows:]

United States General Accounting Office

GAO

Briefing Report to the Chairman
Committee on the Judiciary
House of Representatives

May 2000

CAMPAIGN FINANCE TASK FORCE

Problems and Disagreements Initially Hampered Justice's Investigation





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May 31, 2000

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

As you requested, this report discusses the management and oversight, operations, and results of the Department of Justice's (DOJ) Campaign Finance Task Force (CFTF). Created by Attorney General Reno in December 1996 within the Criminal Division's Public Integrity Section (PI), CFTF was established to investigate allegations of illegal fundraising during the 1996 presidential election. Subsequently, investigating illegal fundraising allegations concerning the 1994 congressional election was added to CFTF's mission. The Task Force comprised primarily DOJ attorneys; Federal Bureau of Investigation (FBI) investigators; and support staff, such as financial analysts and intelligence research specialists. Since its creation, CFTF has undergone several management changes and has been the target of accusations of mismanagement.

On February 17, 2000, we provided your office a preliminary briefing on the results of our review. This report summarizes and updates the information presented at that briefing. More specifically it addresses (1) strained working relationships and trust concerns; (2) disagreement over investigative approach; (3) management and analysis of evidence problems; (4) management changes, staffing fluctuations, and oversight; (5) CFTF prosecutive results and costs; and (6) limitations in the Federal Election Campaign Act that may inhibit prosecutions. The briefing slides, which have been updated to include additional information obtained subsequent to our briefing, are contained in appendix I.

Results in Brief

Following its creation, CFTF faced several management challenges and operational problems. Notably, the working relationships between DOJ and the FBI were strained and hampered by mutual concerns of trust, with DOJ attorneys and FBI investigators disagreeing over which investigative approach to take. Furthermore, efforts to manage and analyze documentation and evidence were hampered by the lack of (1) an electronic data management system that could effectively process and manage the overwhelming amount of documents and other evidence collected and (2) sufficient staff to input and analyze them.

To get the investigation on track, in the fall of 1997, DOJ and the FBI changed the Task Force's leadership, streamlined CFTF's oversight structure, and committed additional staff and information management resources. The Task Force was removed from PI's leadership and placed directly under a Deputy Assistant Attorney General in DOJ's Criminal Division. PI, however, maintained its oversight of CFTF-related matters that had Independent Counsel statute implications. Up until its expiration in 1999, the statute and its applicability to CFTF's investigation had been a source of tension and disagreement between DOJ and the FBI and within DOJ.

As of December 31, 1999, CFTF had launched 121 investigations. As of March 31, 2000, it had initiated 24 prosecutions and 15 individuals and 1 corporation had been convicted. From its inception through fiscal year 1999, DOJ and the FBI estimated that they had spent $31.2 million on Task Force activities.

DOJ and FBI officials reviewed a draft of this report and generally concurred with its substance.

Background

As it relates to campaign financing, the Federal Election Campaign Act (FECA) of 1971, as amended, (2 U.S.C. 431-455) generally applies only to financial transactions that are intended to influence federal elections, i.e., campaigns for the office of U.S. Representative, U.S. Senator, President, or Vice President. FECA contains its own criminal provision, which generally provides that knowing and willful violations involving at least $2,000 may be prosecuted as misdemeanors.

According to DOJ, those FECA violations most likely to warrant criminal prosecution involve schemes to influence a federal candidate's election by making contributions that are patently illegal, through means calculated to conceal the scheme. Furthermore, to warrant criminal prosecution, in general, a FECA fraud must have subverted one of FECA's "core" provisions. These provisions place limits on the amount that can be contributed and disallow contributions from foreign nationals, disguised contributions, and attempts to circumvent FECA's disclosure requirements.

The Independent Counsel statute, 28 U.S.C. 591-599, which expired June 30, 1999, required the Attorney General to decide whether a criminal allegation involving a top official of the executive branch of the federal government, such as the President, Vice President, Cabinet officers, or the chairman or treasurer of the national campaign committee seeking the

reelection of the President, was to be investigated by someone outside of DOJ. The purpose of this legislation was to ensure both the appearance and the reality of impartial prosecutive decisions concerning the President and certain high-level government and campaign officials.

Scope and Methodology

At your request, we examined the management and oversight, operations, and results of CFTF from its inception through December 31, 1999. To accomplish this objective, we interviewed current and former DOJ and FBI officials responsible for managing and overseeing CFTF. We obtained information on CFTF's management structure, oversight, cost, and staffing from DOJ and the FBI. We reviewed CFTF indictments and obtained information concerning the results of its prosecutions. We have updated CFTF's prosecutive results through March 31, 2000.

In addition, we reviewed selected prosecution and declination documents[1] from five closed cases and five closed matters[2] to gain a sense of whether those documents showed evidence of supervisory review and management oversight. Of the five cases we selected, three cases were selected because they had been high-profile cases; one case was selected because the defendant was found not guilty; and one case was randomly selected.

Because information on the number and chronology of matters that had been declined was not readily available, we selected, with CFTF's assistance, five matters to review. We recognize that this small sample is insufficient to be representative of all matters declined; however, we sought to obtain some limited insight into the supervisory oversight and approval process for declinations. Thus, we selected two matters closed during fiscal year 1998 and three matters closed during fiscal year 1999. No matters were declined during fiscal year 1997.

We did not assess the appropriateness of CFTF's prosecutive decisions or its rationale for those decisions. Because CFTF's work is ongoing, active investigation and prosecution files were not available to us. We did our work from July 1999 to March 2000 in accordance with generally accepted government auditing standards.

[1] Declination memoranda are internal documents, which set forth the facts of a matter and explain the government's reasons for not prosecuting individuals or organizations accused of violations.

[2] For purposes of this report, we define a matter as an allegation of a violation that has been considered for possible further investigation and prosecution. If Justice decides to prosecute a matter and files it with the court, either by indictment or information, it then becomes a case.

Strained Working Relationships and Trust Concerns

Describing their working relationship following CFTF's creation, the PI attorney in charge and the FBI's lead investigator, respectively, characterized their relationship as not very effective and strained. According to PI's chief, tensions between investigators and attorneys existed over the extent of attorney involvement in investigations. According to two FBI officials, investigators believed that the Task Force attorneys' involvement in traditional investigative functions, especially interviews, was excessive. For example, the lead investigator said that some agents believed that during investigative interviews they were being used mainly as note takers.

In addition, disagreements developed over the need for an Independent Counsel. Both DOJ and FBI officials frequently cited their disagreement over the need for an Independent Counsel as a major source of tension and conflict. One FBI official characterized DOJ's criteria for triggering the seeking of an Independent Counsel as too stringent. According to PI's Chief, the disagreement over the need for an Independent Counsel also created mutual trust concerns. Eventually, both the FBI Director and a Supervising Attorney leading the Task Force recommended that the Attorney General appoint an Independent Counsel. (See appendix I, slides 17 - 18.)

Disagreement Over Investigative Approach

Initially, attorneys and investigators differed over the Task Force's investigative approach. The attorneys' approach was to build cases from the ground up and investigate wherever the evidence led. One of DOJ's concerns was to avoid prematurely tipping off potential witnesses or targeting individuals before sufficient predication was established. The lead investigator, on the other hand, wanted to pursue several investigative tracks simultaneously. For example, a senior FBI official said that on the basis of news reports of White House coffees for campaign contributors, one of the tracks the FBI wanted to investigate was whether the White House had violated campaign finance laws. However, according to the Chief of PI, there was no specific predication to justify all the investigative tracks that the FBI wanted to pursue.

Moreover, the FBI official said that the investigative effort was always under a microscope and subject to enormous scrutiny and second-guessing. The Chief of PI agreed that the investigation was under considerable scrutiny, but he also said that this scrutiny was occasioned by PI's belief that the press created expectations for a major scandal. DOJ officials said it was important to have sufficient predication to justify an investigative direction, and it was particularly important for the

investigation to be thorough and not perceived as being political. (See app. I, slides 19 - 21.)

Management and Analysis of Evidence Problems

Exacerbating the strained situation were document management problems, which impeded the investigation's progress. According to the lead investigator, CFTF was overwhelmed with documents and other evidence and lacked sufficient staff and electronic system resources to input and organize the information being gathered. The lead investigator noted that after several months, the large volume of documents obtained overwhelmed CFTF's electronic data management system and a new system had to be purchased. He added that due, in part, to delays in hiring support staff, it took months to input backlogged documents into the new system. According to the lead investigator and CFTF's attorney-in-charge, the document management problems hindered efforts to assess the documents' importance to the investigation and their relationship to other evidence. The problems continued into late 1997. (See app. I, slides 22 – 24.)

Management Changes, Staffing Fluctuations, and Oversight

In the fall of 1997, displeased with the investigation's slow pace, disclosures in the press about critical leads not being pursued, and internal frictions, the Attorney General and the FBI Director changed the Task Force's leadership. Subsequently, the Task Force's oversight structure was streamlined by the removal of PI from its leadership role and the commitment of additional staff and information management resources to get the investigation on track.

Since its inception, CFTF's staffing levels have fluctuated as investigations were initiated, documents and evidence were obtained and analyzed, and cases were completed. CFTF staffing peaked in late 1997 at 126 (24 attorneys, 67 agents, and 35 support staff). However, it has declined since then; and as of December 31, 1999, it totaled 48 (13 attorneys, 12 agents, and 23 support staff).

Since the fall of 1997, a number of personnel changes have taken place within CFTF and among the DOJ officials responsible for its oversight. However, the level and type of CFTF's management and oversight have remained fairly consistent. According to officials, (1) briefings for the Attorney General and top DOJ management officials have taken place weekly; (2) the FBI Director has had periodic discussions about CFTF with his executive staff; and (3) within CFTF, weekly meetings have been held among managers, case attorneys, and investigators to discuss case strategy, progress, and problems.

Regarding case management, all prosecution proposals were to be reviewed by senior Task Force managers and attorneys and forwarded through DOJ management to the Attorney General. Procedurally, both DOJ and the FBI were to concur on whether to decline prosecution of an investigation. Our review of documents in five selected prosecution case files showed evidence of high-level DOJ reviews in three of the five cases. However, the absence of documentary evidence in the two cases does not necessarily mean that supervisory reviews did not occur. Our review of documents in five selected declination matters showed evidence of DOJ and FBI concurrence in all instances. (See app. I, slides 27 - 41.)

CFTF Prosecutive Results and Costs

As of December 31, 1999, CFTF had completed 70 of the 121 investigations it had initiated and was focusing on completing its work on the 51 investigations ongoing. As of March 31, 2000, CFTF had initiated prosecution of 24 cases. It had convicted 15 individuals and 1 corporation, and 6 trials were pending. A jury acquitted one individual, and one prosecution resulted in a hung jury. Through fiscal year 1999, DOJ estimated that it had spent $5.2 million, and the FBI estimated that it had spent about $26 million funding CFTF. (See app. I, slides 42 - 43.)

Federal Election Campaign Act Limitations May Inhibit Prosecutions

According to a DOJ official, limitations in FECA penalties and its statute of limitations have inhibited more effective investigation of campaign finance violations. Specifically, he said that the criminal misdemeanor penalties provided in FECA are not severe enough to encourage violators to cooperate with the government to reveal the other participants and the extent of campaign financing schemes in exchange for lesser charges or for favorable consideration at sentencing. (See app. I, slides 44 - 46.)

Agency Comments

We provided the Attorney General with a draft of this report for comment. Representatives of the Criminal Division and the FBI reviewed the draft. On May 8, 2000, the Director of the Department of Justice's Audit Liaison Office responded that the Department generally concurred with the report's substance. The Department provided some technical comments, which have been incorporated where appropriate.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies of this report to Representative John Conyers, Ranking Minority Member of your Committee; Senator Orrin G. Hatch, Chairman of the Senate Judiciary Committee; Senator Patrick J. Leahy, Ranking Minority Member of the Senate Judiciary Committee; Senator Fred Thompson, Chairman of the Senate Governmental Affairs Committee; Senator Joseph Lieberman,

Ranking Minority Member of the Senate Governmental Affairs Committee; Representative Dan Burton, Chairman of the House Government Reform Committee; Representative Henry Waxman, Ranking Minority Member of the House Government Reform Committee; the Honorable Janet Reno, Attorney General; the Honorable Louis J. Freeh, Director of the Federal Bureau of Investigation; the Honorable Jacob J. Lew, Director of OMB; and other interested parties. Copies will also be made available to others upon request.

If you have any questions, please contact me or Daniel C. Harris, Assistant Director, at (202) 512-8777 or by e-mail at ekstrandl.ggd@gao.gov or harrisd.ggd@gao.gov. Major contributors to this work were Robert P. Glick and Charles Michael Johnson.

Sincerely yours,

Laurie E. Ekstrand

Laurie Ekstrand
Director, Administration
of Justice Issues

GAO General Government Division

Briefing to the Staff of the House Judiciary Committee on the Department of Justice's Campaign Finance Task Force

February 17, 2000

1

Note: Information on Task Force prosecutions and staffing was updated subsequent to the briefing.

GAO CONTENTS

- Objectives, Scope, and Methodology
- Background
- Results
- Summary of Prosecutions

2

GAO Objectives, Scope, and Methodology

- The Chairman asked us to review the management and oversight, operations, and results of the Department of Justice's (DOJ) Campaign Finance Task Force (CFTF).
- To accomplish these objectives, we:
  - interviewed current and former DOJ and Federal Bureau of Investigation (FBI) officials responsible for managing and overseeing the Task Force;
  - obtained information on the management structure, oversight, cost, and staffing of CFTF from its creation in December 1996 to December 31, 1999;
  - reviewed CFTF indictments and obtained information concerning their prosecutive results through March 31, 2000.

3

GAO Objective, Scope, and Methodology (cont)

- Obtained access to CFTF documents related to five closed prosecutions and five declinations to gain a sense for whether these documents evidenced supervisory review and management oversight. We recognize that this small sample is insufficient to be representative of the universe of closed cases and matters. The reviewed documents included prosecution and declination memoranda, plea bargain agreements, and correspondence related to those documents. Moreover, we did not assess the appropriateness of CFTF's decisions or its rationale for those decisions in the cases and matters we reviewed.
- Obtained staffing and cost data estimates from DOJ and the FBI.

- Because CFTF's work is ongoing, active investigation and prosecution files were not available to us.

4

GAO Background

- In November 1996, DOJ's Public Integrity Section (PI) initiated an effort to collect, collate, and evaluate various press allegations concerning violations of campaign finance laws in the 1996 presidential election.
- This effort led to Attorney General Reno creating CFTF in December 1996 to investigate alleged violations of campaign finance laws (discussed below) and to prosecute those cases where violations were believed to have occurred. Allegations concerning the 1994 congressional election were subsequently included in the Task Force's scope.

5

GAO Background

- The Federal Election Campaign Act
- As it relates to campaign financing, the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431-455 (FECA), generally applies only to financial transactions that are intended to influence federal elections, i.e., campaigns for election to the office of U.S. Representative, U.S. Senator, President, or Vice President.
- FECA contains its own criminal provision, which generally provides that FECA violations that are knowing and willful and involve at least $2,000 may be prosecuted as misdemeanors. According to DOJ, those FECA violations most likely to warrant criminal prosecution involve schemes to influence a federal candidate's election by making contributions that are patently illegal, through means calculated to conceal the scheme.

6

GAO Background

- According to DOJ, in general, to warrant criminal prosecution, a FECA fraud must have subverted one of FECA's "core" provisions, which include, for example, the following:
  - Limits on contributions from persons. Contributions from "persons" may not exceed $1,000 to a federal candidate per election; $20,000 to a national party committee per year; or $5,000 to any other political committee per year. 2 U.S.C. 441a(a).
  - No contribution from foreign nationals. Section 441e prohibits any foreign national from making, directly or through any other person, any contribution in connection with any federal, state, or local election. It also prohibits any person from knowingly soliciting or accepting such a contribution.

7

GAO Background

- No disguised contributions. Section 441f makes it unlawful for any person to make a contribution in the name of another, or for any person to permit his or her name to be used to make a contribution. A violation occurs if a person gives funds to a straw donor, or conduit, for the purpose of having the conduit pass the funds on to a federal candidate.
- No avoidance of FECA's disclosure requirements. Section 434 requires timely and accurate reporting of, among other things, all contributions over $200 to federal candidates and committees seeking to elect federal candidates and all expenditures over $200 on behalf of federal candidates.

8

GAO Background

- According to DOJ, reporting violations are normally involved in any aggravated scheme to subvert one of the other "core" campaign financing provisions.
  - For example, the use of conduits to disguise illegal contributions to federal candidates is evidence of an intent to interfere with the accurate reporting of campaign contributions and to deliberately cause false information to be conveyed to the Federal Election Commission, the federal agency charged with overseeing FECA.

9

GAO Background

- Independent Counsel Statute
- The Independent Counsel Statute, 28 U.S.C. 591-599, which expired June 30, 1999, required the Attorney General to decide whether a criminal allegation involving a top official of the executive branch of the federal government, such as the President, Vice President, Cabinet officers, or the chairman or treasurer of the national campaign committee seeking the reelection of the President, was to be investigated by someone outside of DOJ.
- The purpose of this legislation was to ensure both the appearance and the reality of impartial prosecutive decisions concerning the President and certain high-level government and campaign officials.

10

GAO Background

- In general, under the Independent Counsel Statute, the Attorney General had 30 days from the date of receipt of an allegation that a covered official had committed a crime to determine if there existed grounds to commence a preliminary 90-day investigation. During this initial 30-day inquiry, the Attorney General was to consider only the specificity of the information received and the credibility of its source.

- Under the statute, once a preliminary investigation commenced, the Attorney General generally had 90 days to determine if there were reasonable grounds to believe further investigation was warranted. If the Attorney General found that it was warranted, she made an application to a special panel of federal judges for the appointment of an Independent Counsel.

11

GAO Background

- In order to avoid potential conflicts, the act limited the Attorney General's authority and power during the initial inquiry and the preliminary investigation phases to prevent her from extensively participating in substantive decisionmaking.
  - As a result, during these phases, some of the Attorney General's normal investigative tools were prohibited. The Attorney General was not allowed to convene a grand jury, plea bargain, issue subpoenas, and grant immunity.

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GAO Results - Initial Organization and Staffing

- In December 1996:
  - Laura Ingersoll, a PI trial attorney, was placed in charge of CFTF, which was a subunit of PI. She reported to PI's chief.
  - Jeff Lampinski, a Section Chief in the FBI's Information Resources Division, was named lead investigator on the Task Force, reporting to a Deputy Assistant Director in the FBI's Criminal Investigative Division.
- Lee Radek, PI's Chief, said that no formal mission statement was prepared for the Task Force because he expected its investigation to be handled in the same way as other high-priority cases within the section. He anticipated that as additional targets or cases were developed, they would be spun off to other PI trial attorneys. PI was to apply its normal case review and oversight procedures to CFTF.

13

GAO Results - Initial Organization and Staffing (cont'd)

- When CFTF was first created, John Keeney, then Acting Assistant Attorney General, Criminal Division, recused himself of all CFTF matters because his son, a private attorney, represented John Huang, one of the investigation's targets.
- Mark Richard, a Criminal Division Deputy Assistant Attorney General, was designated to oversee CFTF.
  - Due to Mr. Keeney's recusal, Mr. Richard reported directly to the Deputy Attorney General and the Attorney General and, thus, for Task Force purposes, fulfilled the role of Assistant Attorney General.
- Neil Gallagher, then an FBI Deputy Assistant Director, was designated to oversee Mr. Lampinski and the FBI's investigative efforts.

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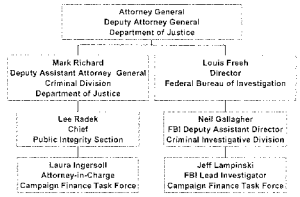
GAO Results - Initial Organization and Staffing (cont'd)

Department of Justice Management and Oversight Structure for the Campaign Finance Task Force - January 1997



15

GAO Results - Initial Organization and Staffing (cont'd)

- Initially, 20 FBI agents, 2 Department of Commerce Office of Inspector General agents, 3 FBI financial analysts, 2 FBI intelligence research specialists, 1 FBI secretary, 4 PI attorneys, and a PI paralegal constituted the Task Force.
  - In January 1997, CFTF's investigative and prosecutive resources were co-located in the same offices.
- Subsequently, according to DOJ and FBI officials, between February and September 1997, 24 FBI agents, 9 intelligence research specialists, 3 attorneys, and 5 administrative support personnel were added to CFTF headquarters. One other attorney worked part-time coordinating intelligence issues. In August 1997, two Internal Revenue Service agents were brought in to review all cases for tax issues.

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GAO Results - Initial Problems and Obstacles

- Strained Working Relationships Ms. Ingersoll and Mr. Lampinski, respectively, characterized their working relationship as not very effective and strained. In addition, according to two FBI Task Force officials, agents complained about PI attorneys' excessive participation in traditional investigative functions, especially interviews of witnesses where agents felt they were being used mainly as note takers.
  - Mr. Radek confirmed that tensions existed between attorneys and agents over the extent of attorney involvement in investigations. He added that disagreements over the threshold of information required to trigger a recommendation for an Independent Counsel also adversely affected their relationship. Mr. Radek said that as a result, issues of trust arose and the FBI resisted the team concept.
  - Moreover, Mr. Radek believed the press created expectations for a major scandal, rather than allowing the investigative process to make that determination. As a result, he said it was particularly important for the investigation to be thorough and not perceived as political.

17

GAO Results - Initial Problems and Obstacles (cont'd)

- According to Mr. Gallagher, contentious divisions arose between the FBI and DOJ over several issues, including the applicability of the Independent Counsel statute. Mr. Gallagher believed that Mr. Radek's criteria for what information was needed to trigger the seeking of an Independent Counsel were too stringent. Moreover, concerns over leaks to the media about Task Force progress and problems added to mutual trust concerns.

- Although both the attorneys and investigators held strong views on these issues, they believed the process for arguing their positions was fair. Mr. Lampinski said that disagreements between Ms. Ingersoll and him were elevated to their supervisors and in some cases to Mr. Richard. He described Mr. Richard as a fair mediator and said that no one ever told the investigators to back away from an investigation. He said the Attorney General and Director Freeh got involved only when Independent Counsel statute issues arose.

18

GAO Results - Initial Problems and Obstacles (cont'd)

- Disagreement over Investigative Approach: The attorneys' investigative approach was to build cases from the ground up and investigate wherever the evidence led. The lead investigator, on the other hand, wanted to pursue several investigative tracks simultaneously.
  - DOJ officials believed protecting the investigative process was important, and this meant having sufficient predication to justify an investigative direction.
  - One of DOJ's concerns was to avoid prematurely tipping off potential witnesses and/or investigative targets or targeting individuals before sufficient predication was established. Mr. Radek did not believe specific predication existed at that time to justify all the investigative tracks proposed by the investigators.

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GAO Results - Initial problems and obstacles (cont'd)

- Mr. Gallagher said he and Mr. Radek disagreed on the investigative strategy. Mr. Gallagher said that on the basis of news reports concerning White House coffees for campaign contributors, one of the tracks the FBI wanted to investigate was whether the White House had violated campaign finance laws. Mr. Gallagher said that the FBI believed that its investigative efforts were always under a microscope and subject to enormous scrutiny and second-guessing.
  - Because of PI's oversight of matters relating to the Independent Counsel statute, the overall approach taken by the Task Force was very conservative; that is, building cases from the ground up.
- Mr. Radek said that he believed that the FBI was too anxious to recommend the need for an Independent Counsel and that in his opinion the information gathered did not justify seeking the appointment of an Independent Counsel. He added that their disagreement over this issue had a devastating impact on the relationship between the FBI and PI.

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GAO Results - Initial Problems and Obstacles (cont'd)

- The need to appoint an Independent Counsel continued to be an area of disagreement.
  - In November 1997, FBI Director Freeh recommended to the Attorney General that she appoint an Independent Counsel.
  - Then, in July 1998, the then Supervising Attorney of the Task Force also recommended that the Attorney General appoint an Independent Counsel.
  - In both instances, the Attorney General decided not to appoint an Independent Counsel.

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GAO Results - Initial Problems and Obstacles (cont'd)

- Management and Analysis of Evidence: CFTF was overwhelmed with documents and other evidence and lacked sufficient resources to address this problem. Mr. Lampinski said that CFTF was receiving about 60 boxes of documents a day and had acquired over 2 million pages of documents. The FBI had to copy, index, and enter all documents into an electronic data management system that would support search and full retrieval capabilities. After several months, the system became overwhelmed and a new system had to be purchased.
  - According to Ms. Ingersoll and Mr. Lampinski, it took months to input backlogged documents into the new system, which significantly hindered efforts to assess the documents' importance to the investigation and their relationship to other evidence.
  - Mr. Lampinski said that by mid-February 1997, he had recognized the problem and subsequently sought to get resources to input the documents but had difficulty obtaining the FBI staffing he needed.

22

GAO Results - Initial Problems and Obstacles (cont'd)

- Mr. Lampinski said that efforts to obtain additional staff resources were delayed due to the process used to fill positions. At that time, the Criminal Justice Information Systems Division was moving its operations to West Virginia. The FBI was trying to help employees who did not want to move to West Virginia find other jobs at headquarters and decided that these employees should have the first opportunity at CFTF positions. However, according to Mr. Lampinski, the process of selecting individuals for these positions took 5 or 6 months to complete as positions had to be advertised, applications reviewed, career boards established, and applicants interviewed and selected.
- Mr. Gallagher said that in late spring 1997, the document management problems became evident.

23

GAO Results - Initial Problems and Obstacles (cont'd)

- In June 1997, on the basis of the FBI's proposed multiple-track investigative strategy, Director Freeh directed CFTF investigators to interview over 100 individuals. Many of those interviewed were not as yet the focus of CFTF efforts, including a number of White House and Democratic National Committee employees.
  - According to Mr. Radek, using CFTF investigators to interview additional individuals at this point diverted them from assessing the significance of documents already obtained. Moreover, Mr. Radek said he did not believe there was sufficient predication at the time to justify conducting all the interviews.
  - Ms. Ingersoll said that as a result of the interviews, about 90 percent of the Task Force's investigative resources were unavailable for about 2 to 3 weeks.
- The document management problems continued into late 1997.

24

GAO Results - Initial Problems and Obstacles (cont'd)

- Congressional/media impacts: According to CFTF officials, parallel congressional investigations and media reports during this period led to internal DOJ pressures and decisions that required CFTF to divert its efforts to address these external events.
  - For example, CFTF officials had to work with the congressional committees to coordinate CFTF and congressional documentation requests. CFTF also had to divert investigators to interview individuals identified as possible witnesses at congressional hearings although they had not as yet been earmarked for interview. The normal approach would be to first analyze information collected and use those analyses as a basis for the interviews.
  - Mr. Lampinski said that the need to divert resources to interview possible congressional witnesses had a negative impact on the Task Force's progress.

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GAO

Results - Initial Problems and Obstacles (cont'd)

- Mr. Radek said that CFTF efforts became unfocused as it attempted to ensure that if the Attorney General inquired about a news report, CFTF would already have information on it and not be caught by surprise disclosures.

- Lack of Foreign Country Cooperation: CFTF had difficulty obtaining evidence and interviewing subjects in certain foreign countries. According to DOJ, in many of these countries, legal assistance treaties do not exist. Although they may cooperate on crimes viewed as serious, some countries considered campaign finance violations to be internal U.S. political problems and were not as willing to cooperate. As a result, investigations of certain individuals were hampered and allegations of a foreign conspiracy to influence the presidential election could not be fully investigated, according to DOJ.

26

GAO Results - Management and Organizational Changes (Sept. 1997)

- In the fall of 1997, displeased with the investigation's slow pace, disclosures in the press that critical leads were not being pursued, and internal frictions plaguing CFTF, the Attorney General and FBI Director Freeh decided to replace CFTF's leadership.
- Charles LaBella, 1st Assistant U.S. Attorney in San Diego and James DeSarno, a former Special Agent-in-Charge of the FBI's New Orleans Field Office, were selected to lead the Task Force.
  - Mr. LaBella was told that the Task Force needed more focus, direction, and aggressive leadership.
  - Mr. DeSarno was told that the investigation was moving too slowly and that there were evidential and staffing issues that needed to be addressed.

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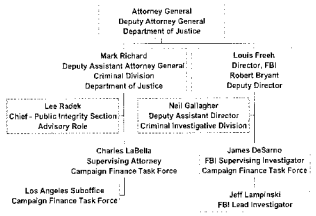
GAO Results - Management and Organizational Changes (Sept. 1997)(cont'd)

- Mr. DeSarno said that one of the reasons he was selected was because he was high enough in the FBI organization to coordinate across FBI divisional lines and obtain cooperation and support in addressing issues and problems he identified.
- Ms. Ingersoll stayed with the Task Force for a short period after Mr. LaBella took over.
- Mr. Lampinski remained with the Task Force and maintained much the same role he had before: managing agents and cases and overseeing case assignments and investigative strategies.

28

GAO Results - Management and Organizational Changes (Sept. 1997)(cont'd)

Department of Justice Management and Oversight Structure
for the Campaign Finance Task Force Subsequent to September 1997



29

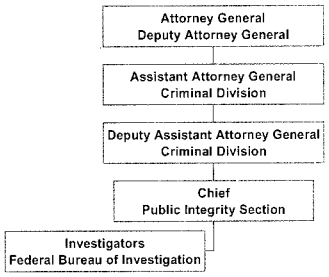
GAO Results - Management and Organizational Changes (Sept. 1997)(cont'd)

- Both Messrs. LaBella and DeSarno recognized the need to streamline CFTF's oversight structure.
  - Mr. LaBella insisted on a more direct chain of command. Subsequently, he reported directly to Mr. Richard, and Mr. Radek assumed an advisory role. However, Mr. Radek continued a direct role whenever Independent Counsel statute issues arose, as PI maintained primary responsibility for initial inquiries and preliminary investigations related to the statute.
  - Mr. DeSarno said that he reported directly to FBI Deputy Director Robert Bryant and Director Freeh. Upon Mr. DeSarno's arrival, Mr. Gallagher no longer had to take on as formal a role in the Task Force. However, he still attended weekly meetings and was involved in briefing the Director.

30

GAO Results - Management and Organizational Changes (Sept. 1997)(cont'd)

Organization Chart Showing Public Integrity Section Responsibility for Independent Counsel Matters



31

GAO Results - Management and Organizational Changes (Sept. 1997)(cont'd)

- Mr. DeSarno believed CFTF should be structured more like a field office, with investigators separated from attorneys. With Mr. LaBella's concurrence, investigators were moved to another floor in the building, which allowed the FBI to maintain greater investigative control of the cases.

- Mr. LaBella said that he quickly realized that CFTF's biggest problem was understaffing -- too few agents and attorneys for the number of cases that it had. As a result, documents went unreviewed and investigative leads were not followed. Mr. LaBella also noted that the experience level of the Task Force attorneys was not sufficient to address pending investigations. As a result, he brought three experienced Assistant U.S. Attorneys with him from San Diego.

- Since then, according to several CFTF managers, the Task Force has not had a problem getting resources. Both the Attorney General and Director Freeh have been very helpful in getting needed resources.

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GAO Results - Management and Organizational Changes (Sept. 1997)(cont'd)

- Ms. Ingersoll said that she had been requesting more resources for some time and had formally submitted a written request for additional resources just prior to Mr. LaBella's appointment to replace her.
- About the time of Messrs. LaBella's and DeSarno's arrival, CFTF received a significant increase in investigative and prosecutive resources.
- Mr. DeSarno said that soon after taking over the Task Force, he was able to get 90 FBI support personnel detailed short-term to address the backlog of documents to be indexed and entered into the new electronic database.

33

GAO Results - Management and Organizational Changes (1998 - 1999)

- In June 1998, James Robinson was confirmed as Assistant Attorney General for the Criminal Division and acquired responsibility for CFTF. Mr. Richard then reported through Mr. Robinson.
- July - August 1998:
  - David Vicinanzo, former Chief of the Criminal Division in the New Hampshire U.S. Attorneys Office, replaced Mr. LaBella as Supervising Task Force Attorney. Mr. LaBella returned to San Diego to become Acting U.S. Attorney for the Southern District of California.
  - Mr. Lampinski replaced Mr. DeSarno, who was designated to head the FBI's Criminal Justice Information Systems Division.

34

GAO Results - Management and Organizational Changes (1998 - 1999)(cont'd)

- In March 1999, Michael Horowitz, a Deputy Assistant Attorney General in the Criminal Division, replaced Mr. Richard in overseeing the Task Force.
- In June 1999, FBI Supervisory Special Agent David Reign, who was already a member of the Task Force, replaced Mr Lampinski, who was designated Special Agent-in-Charge of the FBI's Louisville, KY, Field Office.
- In September 1999, Mr. Vicinanzo returned to the New Hampshire U.S. Attorneys Office but continued to consult with CFTF. He was subsequently replaced in December 1999 by Assistant U.S. Attorney Robert Conrad, Chief of the Criminal Section in the Western District of North Carolina.

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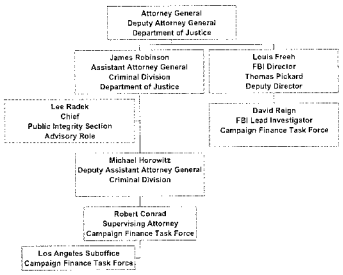
Note: Additional management changes have taken place since December 31, 1999

GAO Results - CFTF Organization Chart, as of December 31, 1999

Department of Justice Management and Oversight Structure
for the Campaign Finance Task Force - December 31, 1999



36

GAO Results - Management and Oversight

- According to CFTF managers interviewed, Task Force oversight has been accomplished in several ways:
  - Since Mr. LaBella arrived, weekly Attorney General briefings have been held to keep her informed of CFTF progress, problems, and needs. Participants have included, among others, the Deputy Attorney General; the Attorney General's Counsel; Mr. Robinson; Mr. Radek; Mr. Horowitz; Mr. Richard; the FBI's General Counsel; and CFTF's Lead Investigator and Supervising Attorney.
  - Director Freeh had periodic CFTF discussions with his executive staff.
  - Task Force managers met weekly with staff attorneys and investigators to discuss case strategy, progress, and problems on each ongoing investigation and prosecution.
  - Managers have been apprised daily, as needed, of important developments that may affect cases.

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GAO Results - Management and Oversight (cont'd)

- Case management - prosecutions:
- CFTF prosecutors said that when prosecutions were believed to be justified, senior Task Force managers and attorneys met with case attorneys and investigators to review and comment on prosecution memoranda. Prosecution memos were to be forwarded up the chain-of-command for information purposes, and the Attorney General and the Director were to be briefed.
  - We found evidence of high-level DOJ reviews, including the Attorney General and/or the Deputy Attorney General, in three of the five cases we reviewed (Johnny Chung, John Huang, and Yah Lin "Charlie" Trie). In two cases (Franklin Haney and Howard Glicken), we did not see evidence of high-level reviews of the prosecution memo nor, in Glicken's case, the plea agreement. (We should note, however, that the absence of documentary evidence on these case documents does not necessarily mean that supervisory reviews did not occur.)

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GAO Results - Management and Oversight (cont'd)

- Case management - declinations:
- Procedurally, both DOJ and FBI concurrence was required to decline prosecution on an investigation. The FBI indicated that CFTF's lead investigator was authorized to sign off on declinations although in one instance Director Freeh signed off.
  - Our review of five matters declined for prosecution showed FBI and DOJ concurrence. In those five matters, we were told that evidence was not sufficient to prove that a crime had been committed.
- Since Mr. LaBella's tenure, PI has served in an exclusively advisory capacity, except for matters or issues that related to the Independent Counsel Statute.

39

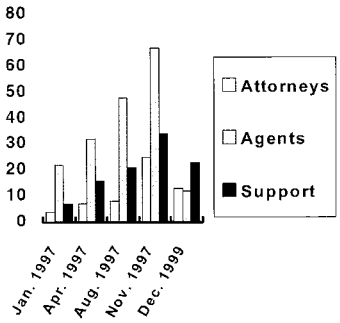
GAO Results - Staffing Trends

- CFTF staffing has fluctuated depending on its operational phase.
  - When CFTF was established, the investigation was only beginning and its scope was still unknown. As more information was developed, staffing grew.
  - In the summer and fall of 1997, CFTF staffing began to increase rapidly, reaching its peak in late 1997.
  - As of December 31, 1999, CFTF had completed 70 of the 121 investigations it had initiated and was focusing on completing its work on the 51 ongoing. As a result, staffing has decreased significantly.

40

GAO Results - Staffing Trends (cont'd)

- In January 1997, there were 4 attorneys, 22 agents, and 7 support staff.
- In April 1997, CFTF had grown to 7 attorneys, 32 agents, and 16 support staff.
- By the end of August 1997, CFTF staff numbered 77, which included 8 attorneys; 48 agents; and 21 support staff
- At its peak, in November 1997, staff numbered 126, including 24 attorneys, 67 agents, and 35 support staff.
- As of December 31, 1999, staff numbered 48, including 13 attorneys, 12 agents, and 23 support staff.



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Note: Support staff included computer support, paralegal, intelligence research staff, financial analysts, and clerical.

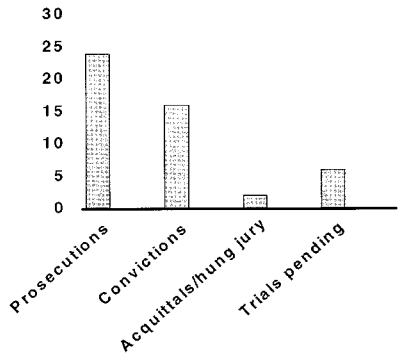
GAO Results - Estimated CFTF Costs

- Justice Department Costs:
  - Fiscal Year 1997 - $1.0 million
  - Fiscal Year 1998 - $2.1 million
  - Fiscal Year 1999 - $2.1 million
- FBI Costs:
  - Fiscal Year 1996 - $10,000 (equipment purchased in FY 1996 but transferred to CFTF in FY 1997)
  - Fiscal Year 1997 - $5.2 million
  - Fiscal Year 1998 - $16.1 million
  - Fiscal Year 1999 - $4.7 million

42

GAO Results - Prosecution Efforts, as of March 31, 2000

- Prosecutions - 24
- Convictions - 16 (15 plea bargains)
- Acquittals/hung juries- 2
- Trials pending - 6



43

Note: See summary of prosecutions, slides 47 – 52.

GAO Results - FECA Limitations May Inhibit Prosecution Efforts

- Limitations in FECA penalties and statute of limitations:
- According to DOJ and FBI officials, the penalties for violating FECA campaign finance provisions need strengthening.
- Mr. Horowitz stated that FECA's prescribed penalties have adversely affected CFTF's investigative efforts in that they are not severe enough to encourage cooperation by those being investigated to reveal the participants and the extent of the campaign finance scheme. Noting FECA's weak penalties, Mr. DeSarno stated that he was unaware of any area where Justice and the FBI put in so much effort for such a small return.
  - According to Mr. Horowitz, FECA violations are penalized as misdemeanors no matter the extent or amount of the violation. Moreover, the criminal penalties do not differentiate between donors or conduits.

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GAO Results - FECA Limitations May Inhibit Prosecution Efforts (cont'd)

- Commenting on how FECA violations were being treated by the courts, Mr. Horowitz stated that there is no current sentencing guideline for FECA violations. Therefore, judges usually use the closest, most analogous guidelines, which deal with fraud.
  - Using analogous fraud guidelines and considering the (a) first-time offense of those convicted and (b) lack of material loss involved, judges have sentenced most campaign finance violators to supervised probation and community service.
  - Generally, jail time or witness cooperation was obtained only in those cases where offenders were found to have committed other more serious violations, such as mail or wire fraud or income tax violations.

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GAO Results - FECA Limitations May Inhibit Prosecution Efforts (cont'd)

- According to Mr. Horowitz, another problem with FECA is its 3-year statute of limitations. The statute of limitations for most crimes is 5 years and for some crimes even longer.
  - This shortened statute of limitations is even more problematic in that the clock for the limitation generally starts when the check is written, not when the contribution report is filed. Thus, several months can pass before enforcement officials learn of a possible violation, further shortening the time prosecutors and investigators have to establish and file a case.
- As of December 31, 1999, legislation was pending in both the House and Senate to strengthen the criminal penalties for FECA violations.

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GAO Summary of Prosecutions (As of March 31, 2000)

Defendant and court district	Summary of charges	Disposition of case	Sentencing
U.S. v. David Chang District of New Jersey, January 7, 2000 and March 31, 2000	4 counts of violating Title 18 (Conspiracy, Obstruction of Justice, Witness Tampering)	Trial scheduled for June 6, 2000	Trial pending
U.S. v. Audrey Yu, District of New Jersey, January 7, 2000 and March 31, 2000	11 counts of violating Title 18 (Perjury Before the Grand Jury, Conspiracy, Obstruction of Justice, and Witness Tampering)	Trial scheduled for June 6, 2000	Trial pending
U.S. v. Pompimol "Pauline" Kanchanalak & Duangnet "Georgie" Kronenberg District of Columbia, November 13, 1998	15 counts of violating Title 18 (Conspiracy, Causing False Statements) and 1 count of violating Title 2 (Causing Contribution by Foreign National)	Trial scheduled for November 13, 2000	Trial pending
U.S. v. Mark B. Jimenez, Southern District of Florida, April 15, 1999	43 counts of violating Title 18 (Conspiracy, False Statements, and Aiding and Abetting), violating Title 2 (Causing Conduit Contributions, Aiding and Abetting), and 4 counts of violating Title 26 (Tax Evasion and Fraud)	DOJ pursuing Jimenez' extradition from the Philippines	Trial pending

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GAO Summary of Prosecutions (As of March 31, 2000)

Defendant and court district	Summary of charges	Disposition of case	Sentencing
U.S. v. Mark B. Jimenez, District of Columbia, September 30, 1998	17 counts of violating Title 18 (Conspiracy, False Statements, and Aiding and Abetting) and Title 2 (Causing, Aiding and Abetting)	DOJ pursuing extradition from the Philippines	Trial pending
U.S. v. Yuan "Antonio" Pan, District of Columbia, January 29, 1998	4 counts of violating Title 18 (Conspiracy to Defraud, Impair and Impede the FEC, Wire Fraud, Aiding and Abetting)	Yuan Pan is currently a fugitive	Trial pending
U.S. v. Carmine Alampi, District of New Jersey, December 1, 1999	1 count violation of Title 18 (Funneling Illegal Contributions to a 1996 Senate Campaign) and Title 2 (Illegal Conduit Contribution)	Pled guilty to 1 Count Illegal Campaign Contributions December 1, 1999	Sentencing date pending
U.S. v. Lawrence Penna Southern District, New York, September 15, 1999	1 count violation of Title 18 (Conspiracy to Impede the Reporting Functions of the FEC)	Pled guilty to 1 count Conspiracy to Impede Reporting Functions of the FEC September 15, 1999	Delayed pending Penna's cooperation
U.S. v. Berek Don District of New Jersey, March 5, 1999	1 count violation of Title 18 (Conspiracy to Funnel Illegal Contributions to a 1996 Senate Campaign)	Pled guilty to Making Illegal Contributions to 1996 Senate campaign May 27, 1999	Sentencing date pending

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GAO Summary of Prosecutions (As of March 31, 2000)

Defendant and court district	Summary of charges	Disposition of case	Sentencing
U.S. v. Maria Hsia (Hsia Ling) District of Columbia, February 18, 1999	6 counts of violating Title 18 (Conspiracy, False Statements, and Willfully Causing the Commission of an Offense)	Found guilty on 5 counts of Causing False Statements to be made to the FEC March 2, 2000	Sentencing date August 18, 2000
U.S. v. Yogesh Gandhi Northern District of California, August 5, 1998 and March 9, 1999	1 count of violating Title 18 (Mail Fraud) and violation of Title 26 (Tax Evasion, and Violating Federal Election Laws)	Pled guilty to Mail Fraud, Tax Evasion, and Violating Federal Election Laws June 25, 1999	December 5, 1999 1 year imprisonment, 2 years supervised release, and $237,299 restitution
U.S. v. Yah Lin "Charlie" Trie, District of Columbia, January 29, 1998 and Eastern District of Arkansas, November 9, 1998	Violations of Title 18 (Conspiracy to Defraud, Impair and Impede the FEC, Mail and Wire Fraud, Aiding and Abetting, False Statements, Witness Tampering, Conspiracy to Obstruct Justice and Congressional Investigation) and 1 count violation of Title 18 (Causing False Statements to FEC) and 1 count violation of Title 2 (Making Political Contributions in the Name of Another)	Pled guilty to 2 counts of campaign financing violations (Causing a False Statement to be Made to FEC and Causing Conduit Contributions to be made to the DNC) May 21, 1999	November 1, 1999 3 years probation (including 4 months of home detention), 200 hours of community service, and $5,000 fine

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GAO Summary of Prosecutions (As of March 31, 2000)

Defendant and court district	Summary of charges	Disposition of case	Sentencing
U.S. v. Jian-Nan "John" Huang Central District of Columbia, May 25, 1999	1 felony count violation of Campaign Finance Laws	Pled guilty to a felony conspiracy charge August 2, 1999	August 12, 1999 1 year probation, 500 hours community service, and $10,000 fine
U.S. v. Robert Lee Central District of California, April 6, 1999	Violations of Title 18 (Aiding and Abetting Illegal Foreign Campaign Contributions)	Pled guilty to Aiding and Abetting Illegal Foreign Campaign Contributions April 26, 1999	August 16, 1999 3 years probation, 250 hours of community service
U.S. v. Juan C. Ortiz District of Columbia, December 17, 1998	Violation of Title 2 (Conduit Contributions) and Title 18 (Aiding and Abetting)	Pled guilty to Acting as Conduit Contributor and Aiding and Abetting Illegal Campaign Contributions March 23, 1999	March 23, 1999 2 years probation, $20,000 in fines, and 200 hours of community service
U.S. v. Future Tech International Inc. District of Columbia, December 17, 1998	Violations of Title 26 (Tax Evasion)	Pled guilty to 2 counts of Tax Evasion October 5, 1998	February 5, 1999 $1 million in fines and payment of all back taxes and penalties
U.S. v. Johnny Chung Central District of California, March 5, 1998	Violations relating to Title 26 (Tax Evasion) and Title 18 (Bank Fraud and Conspiracy to Violate the Federal Election Campaign Act)	Pled guilty to Bank Fraud, Tax Evasion, and 2 misdemeanor violations of Conspiracy To Violate Federal Election Laws March 5, 1998	December 14, 1998 Probation and 3,000 hours of community service

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GAO Summary of Prosecutions (As of March 31, 2000)

Defendant and court district	Summary of charges	Disposition of case	Sentencing
U.S. v. Howard Glicken District of Columbia, July 9, 1998	Violating Title 2 (Criminal Violation of Federal Election Campaign Act) and 1 count of Violating Title 18 (Causing, Aiding and Abetting)	Pled guilty to Causing a Political Contributions to be Made by a Foreign National and Procuring a Conduit Contribution July 20, 1998	November 24, 1998 18 months probation, $80,000 fine, and 500 hours of community service
U.S. v. Michael Brown District of Columbia, August 28, 1997	Violations of Title 2 (Exceeding Dollar Limits on Contributions and Violating Federal Election Campaign Act)	Pled guilty to violating Title 2 (Exceeding Contribution Limit) August 28, 1997	November 21, 1997 3 years supervised probation, $5,000 fine, and $7,800 in restitutions
U.S. v. Gene Lum District of Columbia, May 21, 1997	Violating Title 18 (Conspiracy to Defraud the United States and Cause False Statements to be Made to the FEC)	Pled guilty to Conspiracy August 5, 1997 and Filing False Tax Returns August 13, 1998	June 3, 1999 2 years in prison, 5 months in half-way house, 5 months in home detention, and $30,000 fine
U.S. v. Nora Lum District of Columbia, May 21, 1997	Violating Title 18 (Conspiracy to Defraud the United States and Cause False Statements to be Made to the FEC)	Pled guilty to Conspiracy June 5, 1997	September 9, 1997 5 months in half-way house, 5 months in home detention, and $30,000 fine

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GAO Summary of Prosecutions (As of March 31, 2000)

Defendant and court district	Summary of charges	Disposition of case	Sentencing
U.S. v. Trisha Lum District of Columbia, May 12, 1997	Violations of Title 2 (Making Contribution in the Name of Another and Penalty for Violation of Federal Election Campaign Act)	Pled guilty to violating Title 2 (Making Conduit Contribution) June 5, 1997	August 27, 1997 3 years of supervised probation, 150 hours of community service, $5,000 fine, and $7,800 in restitutions
U.S. v. Franklin Haney District of Columbia, November 4, 1998	42 counts of violating Title 18 (Conspiracy, False Statements, and Causing an Illegal Act to be Done) and Title 2 (Criminal Violations of the Federal Election Campaign Act and Making Contributions in Another's Name)	Acquitted June 30, 1999	N/A
U.S. v. Maria Hsia (Hsia Ling) Central District of California, July 7, 1998	Violations of Title 18 (Conspiracy, False Statements, and Willfully Causing the Commission of an Offense)	Jury hung (7-5) June 7, 1999 Case was not retried by Justice and a motion to dismiss was filed June 21, 1999	N/A

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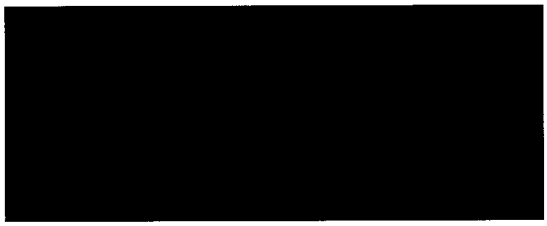

(182086)

Mr. BARR. Mr. Radek, I think that exhibit 35, there is a fairly lengthy memo dated August 24, 1998 that you wrote to Mr. Robinson, the Assistant Attorney General Criminal Division. Do you recall that memo?

Mr. RADEK. I do.

Mr. BARR. Apparently a task force prosecutor the very next day, after reviewing your memo, took exception to a number of the factual points that you made in there. Are you aware of that?

Mr. RADEK. I am.

Mr. BARR. Were those disagreements followed up on, in other words, where this prosecutor indicated that the agents disagreed with the characterization of their positions, was that followed up on?

Mr. RADEK. I'm sure it was. I can recall that some were specifically, but I'm sure that they all were.

Mr. BARR. But did you followup on it?

Mr. RADEK. There were followups on the Vice President's credibility, on the Panetta statements and things like that. So yes, we did.

Mr. BARR. Well, your memo, I believe, says that it was Panetta's impression that the Vice President was following the hard money discussions, and the agents' notes reflect that Panetta said the Vice President was listening attentively. Would that be important evidence showing intent?

Mr. RADEK. Yes. I don't see much difference between what he said and what his impression was.

Mr. BARR. So your view is, as a prosecutor, that if you have additional witnesses that make statements indicating, and these are trained agents, credible witnesses, I presume you would agree and they make statements to the effect that a key witness said that the Vice President was listening attentively with regard to questions over whether or not he was following discussions of hard money and soft money, that that would not be relevant?

Mr. RADEK. Oh, no, quite relevant, sir. I'm saying there was not much difference in that and his saying the Vice President was paying attention.

Mr. BARR. But neither one swayed you.

Mr. RADEK. Neither one swayed me. They were certainly evidence that I considered in making my recommendation.

Mr. BARR. You considered it and did not follow it?

Mr. RADEK. I didn't consider it to be determinative. I certainly considered it.

Mr. BARR. That's certainly obvious.

Also, in the memo, you say that Gore stated that he and the President did not often attend DNC budget meetings like that held on November 21st. In fact, the agents, I believe, reported that most witnesses indicated that the President and Vice President did, in fact, attend the DNC budget meetings. Was that discrepancy between your memo and witnesses stating that the President and Vice President, as a matter of course, attending the DNC meetings, going, of course, to the issue they were aware of, the hard-money/soft-money activities, was that followed up on the difference between your memo and what the agents said most witnesses reported?

Mr. RADEK. I don't specifically recall. Although, I still believe that at the end of this, that I was, and still am under the impression that they did not attend those meetings.

Mr. BARR. Despite—did you attend the meetings?

Mr. RADEK. No, sir.

Mr. BARR. The witnesses did and said that the President and Vice President did attend them, but that was not persuasive to you either.

Mr. RADEK. There were witnesses and there were calendars, and there was a lot of evidence as to which meetings they attended and which they didn't. My impression now, as my best recollection, is it was my conclusion that they did not attend many of them.

Mr. BARR. On a whole range of issues as we've gone over today through questions with the majority counsel, there is a great deal of evidence indicating that an independent counsel should have been triggered. You know, these witnesses' and the agents' testimony. What can you tell us, as of today, what is the status of the Common Cause investigation?

Mr. RADEK. I'm quite sure it's dead. The FEC's ruling that this is not an offense I think controls and stated what I thought was obvious from the beginning, that that was not a violation. It was a loophole.

Mr. BARR. The FEC is the controlling authority?

Mr. RADEK. Yes, sir.

Mr. BARR. Really?

Mr. RADEK. Yes.

Mr. BARR. Not the Department of Justice?

Mr. RADEK. No. I mean, we could prosecute it. But if the FEC said it wasn't a violation, after we got a conviction, I think we'd have to, in good conscience, dismiss it.

Mr. BARR. Are you aware of how few attorneys and investigators the FEC has?

Mr. RADEK. Oh, yes, sir, I am.

Mr. BARR. Are you aware of how many the Department of Justice in contraposition to that?

Mr. RADEK. Yes, sir. In fact, the FEC reached out to the FBI for help during this.

Mr. BARR. You defer to the FEC?

Mr. RADEK. Well, sir, I don't defer to them, you did. I didn't pass the law that gave them the ability to interpret the statute.

Mr. BARR. Nobody on this committee has deferred to the FEC. What we're trying to get to the bottom is, despite the fact that we have a number of FBI agents, we have a number of witnesses who are testifying that lead them to the conclusion that the allegations contained in the Common Cause complaint were, in fact, meritorious, and that an independent counsel should be appointed, including the gentleman sitting behind you, Mr. Parkinson, the general counsel for the FBI, that you're sitting there, and you're saying, despite all of that, I'm going to defer to the FEC.

Mr. RADEK. Sir, if we're going to count heads on this issue—you know, the heads probably broke evenly, although I got to say, I think there were more people who agreed with me that it was not a violation. It's not a matter of a democracy. It's a matter——

Mr. BARR. We're not talking about democracy. You're being silly, Mr. Radek.

Mr. RADEK. Exactly.

Mr. BARR. What I'm saying is we have a number of trained FBI agents those aren't just heads, those are trained FBI agents. We have a number of witnesses. We have the general counsel for the FBI. We have the head of the FBI. We have the special-appointed Assistant U.S. Attorney in charge of CAMPCON, or the Campaign Contributions scandal. We have other attorneys. We have Mr. Steve Clark, who felt so frustrated at his inability to reach you with evidence that was persuasive to so many other people yet not to yourself, that's what we have stacked up against your absolute intransigence in seeking the appointment of an independent counsel.

And now, after the fact, making a ludicrous statement that you're going to defer to the FEC, completely abrogate your legal responsibility and the ethical obligation that you have to the Department of Justice and to the FBI as the investigators in this case, and defer to the FEC, which nobody can maintain with a straight face. You may be the first. But nobody has maintained with a straight face, has the capability, the legal or the investigative expertise to look into an issue, the controlling decision on these sorts of complicated matters. Yet, you're willing to do that and apparently have been willing to do that. That's our concern. It's not a matter of democracy or counting heads, that's silly, and you know it's a silly characterization. That's not what we're talking about here.

Mr. RADEK. Sir, after I said counting heads, you began to count heads again. So I don't think it was a silly characterization of what you were saying.

Mr. BARR. Maybe that's the nub of this whole thing. We're in completely different universes here, as I said earlier.

Mr. RADEK. I don't mean to be argumentative, but——

Mr. BARR. I don't mind.

Mr. RADEK [continuing]. My recommendation, along with the recommendations of some very good people in the FBI, FBI legal counsel's office up and down the line at Justice, and everybody that the Attorney General asked to see were based on sound legal arguments. And the arguments on the other side were quite valid, they were quite good, they didn't carry the day with the Attorney General, who was the decisionmaker. I think that it was an invalid argument to say that before the FEC had decided this issue, this was a crime that we were going to put people—potentially put people in jail for. I think that that's an abuse of prosecutorial discretion.

Mr. BARR. You think that the head of the FBI was exercising improper prosecutorial discretion in recommending that the Attorney General simply follow the law and seek the appointment of an independent counsel?

Mr. RADEK. The head of the FBI is not, does not exercise prosecutorial discretion anymore. He's the chief of police. If you want the chief of police to make——

Mr. BARR. He was recommending to the Attorney General that she follow the law based on not just his impression, not just something he read in the paper, but based on the testimony, the very

solid investigation of large numbers of FBI agents, of the FBI general counsel Mr. Parkinson, of Mr. La Bella, they were recommending that the Attorney General seek the appointment of an independent counsel with regard to the campaign violations alleged in the Common Cause complaint and in other complaints.

And that is not—and I'm impressed that you can make the statement with a straight face that that is an improper exercise of prosecutorial discretion. It is not. It is simply following the law and the evidence as presented by FBI agents and by credible witnesses.

Mr. RADEK. In my opinion, the Attorney General followed the law and she made the right decision. That was my recommendation to her. She followed it. She understood——

Mr. BARR. It's very interesting. You all are really very clever. And I give you credit for that also, you and the Attorney General. I think Mr. Parkinson, in one of his memos, sort of laid this out. He didn't use the term "clever," I'm using that.

What he said basically is that you can take a very complex investigation composed of many parts and you can technically correctly and technically legally look in a compartmentalized fashion at each separate allegation, much like, for example, a traffic officer coming upon the scene of a 50-car sequential pileup, and look at each one of those, and see that, aha, there might be a taillight busted here, and you look at that and then you go to the next car and you say, aha, there might have been faulty brakes here. But none of those, in and of themselves, rise to the level that prosecution ought to be exercised and a case brought. Yet, if you look at the whole picture clearly, it warrants it.

You all were very clever. What you do is compartmentalize these things, you look at each separate one and conclude that it, in and of itself, does not rise to the level that would warrant the appointment. And even though you may be technically correct and very smug in going back to the American people and say we did not technically violate the law in not seeking the appointment of an independent counsel, you have clearly, I believe, by failing to deliberately, failing to see the forest for the trees, you have subverted the intent of the Congress and the intent of the American people in having the laws that protect them against these sorts of violations, according to the law at the time when the independent counsel, prior to last year, when it went out of existence, when it lapsed, was the only way that we provided for these sorts of things to be handled and give the American people the assurance they would be handled, and that criminal provisions would apply. You subverted that.

Technically, maybe you were correct in being able to do so and pass a lie detector test that you hadn't violated the law in any particular instance. But overall, you thwarted the ability of the American people to have justice done. And yet, when a specious allegation was raised against the heads of the FBI that you all had a—all were peeved with, you know, you launched immediately into a preliminary investigation. And yet, despite voluminous evidence here, you failed to do so.

That is an injustice to the American people and it does subvert the rule of law. Mr. Lantos may not care about that, but a lot of people do. And I don't think you served the Nation well. These proceedings are concluded.

[Whereupon, at 5:55 p.m., the committee was adjourned.]

[Additional information submitted for the hearing record follows:]

Memorandum

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Off. of Gen. Counsel ____
Asst. Dir.: ____
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Director's Office ____

To : MR. ESPOSITO

Date 12/9/96

From : DIRECTOR, FBI

Subject : DEMOCRATIC NATIONAL CAMPAIGN MATTER

As I related to you this morning, I met with the Attorney General on Friday, 12/6/96, to discuss the above-captioned matter.

I stated that DOJ had not yet referred the matter to the FBI to conduct a full, criminal investigation. It was my recommendation that this referral take place as soon as possible.

I also told the Attorney General that since she had declined to refer the matter to an Independent Counsel it was my recommendation that she select a first rate DOJ legal team from outside Main Justice to conduct the inquiry. In fact, I said that these prosecutors should be "junk-yard dogs" and that in my view, PIS was not capable of conducting the thorough, aggressive kind of investigation which was required.

I also advised the Attorney General of Lee Radek's comment to you that there was a lot of "pressure" on him and PIS regarding this case because the "Attorney General's job might hang in the balance" (or words to that effect). I stated that those comments would be enough for me to take him and the Criminal Division off the case completely.

I also stated that it didn't make sense for PIS to call the FBI the "lead agency" in this matter while operating a "task force" with DOC IGs who were conducting interviews of key witnesses without the knowledge or participation of the FBI.

I strongly recommended that the FBI and hand-picked DOJ attorneys from outside Main Justice run this case as we would any matter of such importance and complexity.

We left the conversation on Friday with arrangements to discuss the matter again on Monday. The Attorney General and I spoke today and she asked for a meeting to discuss the "investigative team" and hear our recommendations. The meeting is now scheduled for Wednesday, 12/11/96, which you and Bob Litt will also attend.

LJF:wss (2)

CONTINUED--OVER

EXHIBIT 1

Memorandum to Mr. Esposito from Director, FBI
RE: DEMOCRATIC NATIONAL CAMPAIGN MATTER

I intend to repeat my recommendations from Friday's meeting. We should present all of our recommendations for setting up the investigation--both AUSAs and other resources. You and I should also discuss and consider whether on the basis of all the facts and circumstances -- including Huang's recently released letters to the President as well as Radek's comments--whether I should recommend that the Attorney General reconsider referral to an Independent Counsel.

It was unfortunate that DOJ declined to allow the FBI to play any role in the Independent Counsel referral deliberations. I agree with you that based on the DOJ's experience with the Cisneros matter--which was only referred to an Independent Counsel because the FBI and I intervened directly with the Attorney General--it was decided to exclude us from this decision-making process.

Nevertheless, based on information recently reviewed from PIS/DOC, we should determine whether or not an Independent Counsel referral should be made at this time. If so, I will make the recommendation to the Attorney General.

Office of the Attorney General
Washington, D. C. 20530

April 14, 1997

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On March 13, 1997, you and nine other majority party members of the Committee on the Judiciary of the United States Senate wrote to me requesting the appointment of an independent counsel to investigate possible fundraising violations in connection with the 1996 presidential campaign. You made that request pursuant to a provision of the Independent Counsel Act, 28 U.S.C. § 592(g)(1), which provides that "a majority of majority party members [of the Committee on the Judiciary] ... may request in writing that the Attorney General apply for the appointment of an independent counsel." The Act requires me to respond within 30 days, setting forth the reasons for my decision on each of the matters with respect to which your request is made. 28 U.S.C. § 592(g)(2).

I am writing to inform you that I have not initiated a "preliminary investigation" (as that term is defined in the Independent Counsel Act) of any of the matters mentioned in your letter. Rather, as you know, matters relating to campaign financing in the 1996 Federal elections have been under active investigation since November by a task force of career Justice Department prosecutors and Federal Bureau of Investigation (FBI) agents. This task force is pursuing the investigation vigorously and diligently, and it will continue to do so. I can assure you that I have given your views and your arguments careful thought, but at this time, I am unable to agree, based on the facts and the law, that an independent counsel should be appointed to handle this investigation.

DOJ-02046



1. The Independent Counsel Act

In order to explain my reasons, I would like to outline briefly the relevant provisions of the Independent Counsel Act. The Act can be invoked in two circumstances that are relevant here:

- First, if there are sufficient allegations (as further described below) of criminal activity by a covered person, defined as the President and Vice President, cabinet officers, certain other enumerated high Federal officials, or certain specified officers of the President's election campaign (not party officials), see 28 U.S.C. § 591(b), I must seek appointment of an independent counsel.

- Second, if there are sufficient allegations of criminal activity by a person other than a covered person, and I determine that "an investigation or prosecution of [that] person by the Department of Justice may result in a personal, financial or political conflict of interest," see 28 U.S.C. § 591(c)(1), I may seek appointment of an independent counsel.

In either case, I must follow a two-step process to determine whether the allegations are sufficient. First, I must determine whether the allegations are sufficiently specific and credible to constitute grounds to investigate whether an individual may have violated Federal criminal law. 28 U.S.C. § 591(d). If so, the Department commences a "preliminary investigation" for up to 90 days (which can be extended an additional 60 days upon a showing of good cause). 28 U.S.C. § 592(a). If, at the conclusion of this "preliminary investigation," I determine that further investigation of the matters is warranted, I must seek an independent counsel.

Certain important features of the Act are critical to my decision in this case:

- First, the Act sets forth the only circumstances in which I may seek an independent counsel pursuant to its provisions. I may not invoke its procedures unless the statutory requirements are met.

- Second, the Act does not permit or require me to commence a preliminary investigation unless there is specific and credible evidence that a crime may have been committed. In your letter, you suggest that it is not the responsibility of the Department of Justice to determine whether a particular set of facts suggests a potential Federal crime,

but that such legal determinations should be left to an independent counsel. I do not agree. Under the Independent Counsel Act, it is the Department's obligation to determine in the first instance whether particular conduct potentially falls within the scope of a particular criminal statute such that criminal investigation is warranted. If it is our conclusion that the alleged conduct is not criminal, then there is no basis for appointment of an independent counsel, because there would be no specific and credible allegation of a violation of criminal law. See 28 U.S.C. § 592(a)(1).

- Third, there is an important difference between the mandatory and discretionary provisions of the Act. Once I have received specific and credible allegations of criminal conduct by a covered person, I must commence a preliminary investigation and, if further investigation is warranted at the end of the preliminary investigation, seek appointment of an independent counsel. If, on the other hand, I receive specific and credible evidence that a person not covered by the mandatory provisions of the Act has committed a crime, and I determine that a conflict of interest exists with respect to the investigation of that person, I may -- but need not -- commence a preliminary investigation pursuant to the provisions of the Act. This provision gives me the flexibility to decide whether, overall, the national interest would be best served by appointment of an independent counsel in such a case, or whether it would be better for the Department of Justice to continue a vigorous investigation of the matter.

- Fourth, even this discretionary provision is not available unless I find a conflict of interest of the sort contemplated by the Act. The Congress has made it very clear that this provision should be invoked only in certain narrow circumstances. Under the Act, I must conclude that there is a potential for an actual conflict of interest, rather than merely an appearance of a conflict of interest. The Congress expressly adopted this higher standard to ensure that the provision would not be invoked unnecessarily. See 128 Cong. Rec. H 9507 (daily ed. December 13, 1982) (statement of Rep. Hall). Moreover, I must find that there is the potential for such an actual conflict with respect to the investigation of a particular person, not merely with respect to the overall matter. Indeed, when the Act was reauthorized in 1994, Congress considered a proposal for a more flexible standard for invoking the discretionary clause, which would have permitted its use to refer any "matter" to an Independent Counsel when the purposes of the Act would be served.

Congress rejected this suggestion, explaining that such a standard would "substantially lower the threshold for use of the general discretionary provision." H.R. Conf. Rep. No. 511, 103rd Cong., 2nd Sess. 9 (1994).

2. Covered Persons -- The Mandatory Provisions of the Act

Let me now turn to the specific allegations in your letter. You assert that there are "new questions of possible wrongdoing by senior White House officials themselves," and you identify a number of particular types of conduct in support of this claim. While all of the specific issues you mention are under review or active investigation by the task force, at this time we have no specific, credible evidence that any covered White House official may have committed a Federal crime in respect of any of these issues. Nevertheless, I will discuss separately each area that you raise.

a. Fundraising on Federal Property. First, you suggest that "federal officials may have illegally solicited and/or received contributions on federal property." The conduct you describe could be a violation of 18 U.S.C. § 607. We are aware of a number of allegations of this sort; all are being evaluated, and where appropriate, investigations have been commenced. The Department takes allegations of political fundraising by Federal employees on Federal property seriously, and in appropriate cases would not hesitate to prosecute such matters. Indeed, the Public Integrity Section, which is overseeing the work of the campaign financing task force, recently obtained a number of guilty pleas from individuals who were soliciting and accepting political contributions within the Department of Agriculture.

The analysis of a potential section 607 violation is a fact-specific inquiry. A number of different factors must be considered when reviewing allegations that this law may have been violated:

- First, the law specifically applies only to contributions as technically defined by the Federal Election Campaign Act (FECA) -- funds commonly referred to as "hard money." The statute originally applied broadly to any political fundraising, but in 1979, over the objection of the Department of Justice, Congress narrowed the scope of section 607 to render it applicable only to FECA contributions. Before concluding that section 607 may have been violated, we must have evidence that a particular solicitation involved a "contribution" within the definition of the FECA.

- Second, there are private areas of the White House that, as a general rule, fall outside the scope of the statute, because of the statutory requirement that the particular solicitation occur in an area "occupied in the discharge of official duties." 3 Op. Off. Legal Counsel 31 (1979). The distinction recognizes that while the Federal Government provides a residence to the President, similar to the housing that it might provide to foreign service officers, this residence is still the personal home of an individual within which restrictions that might validly apply to the Federal workplace should not be imposed. Before we can conclude that section 607 may have been violated, we must have evidence that fundraising took place in locations covered by the provisions of the statute.

Thus, while you express concerns about the possibility of "specific solicitations ... made by federal officials at the numerous White House overnights, coffees, and other similar events," we do not at this time have any specific and credible evidence of any such solicitation by any covered person that may constitute a violation of section 607.

We do not suggest, of course, that our consideration of information concerning fundraising on Federal property is limited to whether the conduct constituted a violation only of section 607. However, at this point in time, we have no specific and credible evidence to suggest that any crime was committed by any covered person in connection with these allegations.

b. Misuse of Government Resources. You next assert that Government property and employees may have been used illegally to further campaign interests -- conduct which might, in some circumstances, constitute a theft or conversion of Government property in violation of 18 U.S.C. § 641. Again, we are actively investigating allegations that such misconduct may have occurred. However, we are unaware at this time of any evidence that any covered person participated in any such activity, other than use of Government property that is permitted under Federal law, such as the reports that the Vice President used a Government telephone, charging the calls to a nongovernment credit card. Federal regulations permit such incidental use of Government property for otherwise lawful personal purposes. See, e.g., 5 C.F.R. § 2635.704; 41 C.F.R. § 201-21.601 (personal long distance telephone calls). Thus, for example, allegations that a Government telephone or telefacsimile machine may have been used on a few occasions by a covered person for personal purposes does not amount to an allegation of a Federal crime. To the extent that there are allegations warranting investigation that individuals not covered by the Independent Counsel Act diverted

Government resources, it is my conclusion, as I explain below, that there is at present no conflict of interest for the Department of Justice to investigate and, if appropriate, prosecute those involved in any such activity.

c. Foreign Efforts to Influence U.S. Policy. You next cite reports suggesting the possibility that foreign contributions may have been made in hopes of influencing American policy decisions. These allegations are under active investigation by the task force. The facts known at this time, however, do not indicate the criminal involvement of any covered person in such conduct.

It is neither unique nor unprecedented for the Department to receive information that foreign interests might be seeking to infuse money into American political campaigns. That was precisely the scenario that underlay the criminal investigations, prosecutions and congressional hearings during the late 1970s involving allegations that a Korean businessman was making illegal campaign contributions, among other things, to Members of Congress to curry congressional support for the Government of South Korea. In a more recent example, in 1996 an individual was prosecuted and convicted for funnelling Indian Government funds into Federal elections through the cover of a political action committee.

Absent specific and credible evidence of complicity by a covered person, it has never been suggested that the mere allegation that a foreign government may have been trying to provide funds to Federal campaigns should warrant appointment of an independent counsel. Nor can it be the case that an independent counsel is required to investigate because campaign contributors or those who donated to political parties believed their largesse would influence policy or achieve access. The Department of Justice routinely handles such allegations, and because of its experience in reviewing and investigating these sensitive matters, embracing, among other things, issues of national security, is particularly well-equipped to do so.

d. Coordination of Campaign Fundraising and Expenditures. You also suggest that the "close coordination by the White House over the raising and spending of 'soft' -- and purportedly independent -- DNC funds violated Federal election laws, and/or had the legal effect of rendering those funds subject to campaign finance limitations they otherwise would not be subject to." We believe this statement misapprehends the law. The FECA does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office. Indeed, the Federal

Election Commission (FEC), the body charged by Congress with primary responsibility for interpreting and enforcing the FECA, has historically assumed coordination between a candidate and his or her political party.

Of course, coordinated expenditures may be unlawful under the FECA if they are made with funds from prohibited sources, if they were misreported, or if they exceeded applicable expenditure limits. However, we presently lack specific and credible evidence suggesting that any covered person participated in any such violations, if they occurred.

With respect to coordinated media advertisements by political parties (an area that has received much attention of late), the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message. Indeed, just last year the FEC and the Department of Justice took this position in a brief filed before the Supreme Court, in a case decided on other grounds. See generally, Brief for the Respondent, Colorado Republican Federal Campaign Committee v. FEC, (S. Ct. No. 95-489) at 2-3, 18 n.15, 23-24. In this connection, the FEC has concluded that party media advertisements that focus on "national legislative activity" and that do not contain an "electioneering message" may be financed, in part, using "soft" money, i.e., money that does not comply with FECA's contribution limits. FEC Advisory Op. 1995-25, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6162, at 12,109-12,110 (August 24, 1995); FEC Advisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185-11,186 (May 30, 1985). Moreover, such advertisements are not subject to any applicable limitations on coordinated expenditures by the party on behalf of its candidates. AO 1985-14 at 11-185-11,186.

We recognize that there are allegations that both presidential candidates and both national political parties engaged in a concerted effort to take full advantage of every funding option available to them under the law, to craft advertisements that took advantage of the lesser regulation applicable to legislative issue advertising, and to raise large quantities of soft political funding to finance these ventures. However, at the present time, we lack specific and credible evidence suggesting that these activities violated the FECA. Moreover, even assuming that, after a thorough investigation, the FEC were to conclude that regulatory violations occurred, we presently lack specific and credible evidence suggesting that any covered person participated in any such violations.

3. Conflict of Interest -- The Discretionary Provisions of the Act

In urging me to conclude that the investigation poses the type of potential conflict of interest contemplated by the Act, you rely heavily on my testimony before the Senate Committee on Government Affairs in 1993 in support of reauthorization of the Independent Counsel Act. I stand by those views and continue to support the overall concept underlying the Act. My decisions pursuant to the Act have been, I believe, fully consistent with those views.

The remarks you quote from my testimony should be interpreted within the context of the statutory language I was discussing. When, for example, I referred to the need for the Act to deal with the inherent conflict of interest when the Department of Justice investigates "high-level Executive Branch officials," I was referring to persons covered under the mandatory provisions of the Act. With respect to the conflict of interest provision, my testimony expressed the conviction that the Act "would in no way preempt this Department's authority to investigate public corruption," and that the Department was clearly capable of "vigorous investigation of wrongdoing by public officials, whatever allegiance or stripes they may wear. I will vigorously defend and continue this tradition.". While I endorsed the concept of the discretionary clause to deal with unforeseeable situations, I strongly emphasized that "it is part of the Attorney General's job to make difficult decisions in tough cases. I have no intention of abdicating that responsibility[.]" These principles continue to guide my decisionmaking today.

There are times when reliance on the discretionary clause is appropriate, and indeed, as you point out, I have done so myself on a few occasions. However, in each of those cases, I considered the particular factual context in which the allegations against those persons arose and the history of the matter. Moreover, even after finding the existence of a potential conflict, I must consider whether under all the circumstances discretionary appointment of an independent counsel is appropriate. In each case, therefore, the final decision has been an exercise of my discretion, as provided for under the Act.

I have undertaken the same examination here. Based on the facts as we know them now, I have not concluded that any conflict of interest would ensue from our vigorous and thorough investigation of the allegations contained in your letter.

Your letter relies upon press reports, certain documents and various public statements which you assert demonstrate that "officials at the highest level of the White House were involved in formulating, coordinating and implementing the [Democratic National Committee's (DNC's)] fundraising efforts for the 1996 presidential campaign." You suggest that a thorough investigation of "fundraising improprieties" will therefore necessarily include an inquiry into the "knowledge and/or complicity of very senior White House officials," and that the Department of Justice would therefore have a conflict of interest investigating these allegations.

To the extent that "improprieties" comprise crimes, they are being thoroughly investigated by the agents and prosecutors assigned to the task force. Should that investigation develop at any time specific and credible evidence that any covered person may have committed a crime, the Act will be triggered, and I will fulfill my responsibilities under the Act. In addition, should that investigation develop specific and credible evidence that a crime may have been committed by a "very senior" White House official who is not covered by the Act, I will decide whether investigation of that person by the Department might result in a conflict of interest, and, if so, whether the discretionary clause should be invoked. Until then, however, the mere fact that employees of the White House and the DNC worked closely together in the course of President Clinton's reelection campaign does not warrant appointment of an independent counsel. As I have stated above, the Department has a long history of investigating allegations of criminal activity by high-ranking Government officials without fear or favor, and will do so in this case.

I also do not accept the suggestion that there will be widespread public distrust of the actions and conclusions of the Department if it continues to investigate this matter, creating a conflict of interest warranting the appointment of an independent counsel. First, unless I find that the investigation of a particular person against whom specific and credible allegations have been made would pose a conflict, I have no authority to utilize the procedures of the Act. Moreover, I have confidence that the career professionals in the Department will investigate this matter in a fashion that will satisfy the American people that justice has been done.

Finally, even were I to determine that a conflict of interest of the sort contemplated by the statute exists in this case -- and as noted above I do not find such a conflict at this time -- there would be a number of weighty considerations

that I would have to consider in determining whether to exercise my discretion to seek an independent counsel at this time. Because invocation of the conflict of interest provision is discretionary, it would still be my responsibility in that circumstance to weigh all the factors and determine whether appointment of an independent counsel would best serve the national interest. If in the future this investigation reveals evidence indicating that a conflict of interest exists, these factors will continue to weigh heavily in my evaluation of whether or not to invoke the discretionary provisions of the Act.

* * * * * * * * * * * *

I assure you, once again, that allegations of violations of Federal criminal law with respect to campaign financing in the course of the 1996 Federal elections will be thoroughly investigated and, if appropriate, prosecuted. At this point it appears to me that that task should be performed by the Department of Justice and its career investigators and prosecutors. I want to emphasize, however, that the task force continues to receive new information (much has been discovered even since I received your letter), and I will continue to monitor the investigation closely in light of my responsibilities under the Independent Counsel Act. Should future developments make it appropriate to invoke the procedures of the Act, I will do so without hesitation.

Sincerely,

Janet Reno

cc: Senator Patrick Leahy

May 15, 1997

To: Director Freeh
Deputy Director Esposito

Re: CAMPAIGN CONTRIBUTION (CAMPCON) INVESTIGATION AND THE INDEPENDENT COUNSEL STATUTE

Attached is an overview of our investigative strategy, resource allocation plan and an analysis of the Independent Counsel Statute aspects of this investigation. This attachment is both classified Secret and contains Federal Grand Jury material. It should not be disseminated or discussed beyond those officials with authorized access.

As reflected in the attached document, the Campcon investigation is a multi-faceted investigation into alleged violations of federal criminal law associated with campaign financing during the course of the 1996 federal election cycle. The investigative plan focuses on three distinct but interrelated matters:

1. An aggressive campaign fundraising operation developed and executed by a core group of individuals from the DNC and the White House, including the President and a number of his closest advisors.

2. Allegations of illegal conduct by a myriad of opportunists and other individuals who gained White House access in order to further their personal, business, and political interests.

3. Efforts by the PRC and other countries to gain foreign policy influence by illegally contributing foreign money to U.S. political campaigns and to the DNC through domestic conduits.

There are reasons to conclude that the "mandatory" provision of the independent counsel statute may have already been triggered. With respect to several pieces of the investigation, the Attorney General certainly could conclude that there is information "sufficient to investigate" whether the President and/or Vice President "may have" violated any federal criminal law. Those investigative areas include the following allegations:

Enclosure

1 - Director Freeh (Copy 1 of 5)
1 - Deputy Director Esposito (Copy 2 of 5)
1 - Mr. Bryant (Copy 3 of 5)
1 - Mr. Gallagher (Copy 4 of 5)
1 - Mr. Parkinson (Copy 5 of 5)

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-- Exceeding campaign spending and contribution limits

-- Solicitation of campaign contributions on federal property (Vice President Gore's telephone solicitations; coffees; overnights)

-- Solicitation of contributions from foreign nationals

-- Misuse or conversion of government property (WhoDB)

Even if the "mandatory" provision of the statute has not been triggered, there are a number of compelling reasons why the Attorney General should invoke the "discretionary" provision of § 591(c):

1. DOJ is investigating the actions of the President and Vice President of the United States. This is precisely the kind of case for which the independent counsel statute was enacted. (DOJ is also investigating certain actions of "covered person" Peter Knight, the Chairman of the Clinton/Gore Committee.)

2. DOJ is investigating persons close to the President, including McLarty, Ickes, Trie and Huang.

3. DOJ is investigating top campaign officials, whose main job was to ensure the re-election of the President.

4. Invoking the discretionary clause would be consistent with recent precedent, particularly the Whitewater matter, in which AG Reno sought an independent counsel because of allegations of criminal conduct by "McDougal and other individuals associated with President Mrs. Clinton."

5. DOJ and the FBI have conflicting duties to (1) keep the President informed about significant national security matters, and (2) simultaneously keep from the White House national security information that may relate to the ongoing criminal investigation.

6. There is a widespread public perception that the Department has a conflict of interest.

7. Because the investigation reaches into the top levels of the White House, the Task Force is proceeding differently than it would in a "normal" investigation.

8. DOJ has now engaged in a five-month "threshold inquiry," involving complicated factual and legal analyses. This

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is the kind of inquiry for which the Department has been severely criticized by Congress in the past.

9. The chief investigator -- Director Freeh -- has concluded that there is a conflict of interest.

For the reasons stated above and in the attached memorandum, I recommend that you meet with the Attorney General and ask her to seek the appointment of an independent counsel under the "discretionary" provision of 28 U.S.C. § 591(c).

Robert M. Bryant
Assistant Director

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III. Legal Issues

A. Overview

As set forth above, the Campcon Task Force is aggressively investigating a variety of fundraising activities by a core group of White House and DNC officials (as well as others). The Task Force is examining these activities through a variety of traditional investigative techniques, including the use of grand jury subpoenas and testimony. Because this criminal investigation has taken our investigators into the highest reaches of the White House -- including an examination of specific actions taken by the President and Vice President -- there must be a careful (and continuing) examination of whether the Independent Counsel statute has been, or should be, triggered. (U)

The Independent Counsel Act establishes a system "to investigate and prosecute allegations of criminal wrongdoing by officials who are close to the President. The purpose of this system is to ensure fair and impartial criminal proceedings when an Administration attempts the delicate task of investigating its own top officials."[2] When this legislation was first enacted in 1978, the Senate Governmental Affairs Committee listed a number of reasons for such a system. The top three reasons were:

(1) The Department of Justice has difficulty investigating alleged criminal activity by high-level government officials. (U)

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[2] S. Rep. No. 123, 100th Cong., 1st Sess. 2 (1987), reprinted in 1987 U.S.C.C.A.N. 2150. To simplify, subsequent citations to legislative history will be cited in this shorthand form: "1987 CAN 2150."

(2) It is too much to ask for any person that he investigate his superior. . . . "[A]s honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential." (quoting former Special Prosecutor Cox) (U)

(3) It is a basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof. This is not a question of the integrity of the individual. . . . The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself.[3] (U)

The Independent Counsel statute can be triggered in one of two ways. First, the Attorney General shall conduct a preliminary investigation where there is information sufficient to investigate whether any "covered person" may have violated any federal criminal law (other than certain minor violations). 28 U.S.C. § 591(a). This is often called the "mandatory" or "covered persons" provision of the statute. Second, the Attorney General may conduct a preliminary investigation under the following "discretionary" provision:

> When the Attorney General determines that an investigation or prosecution of a [non-covered] person by the Department of Justice may result in a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person . . . if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction. (U)

28 U.S.C. § 591(c).[4]

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[3] 1978 CAN 4216.

[4] Section 591(c) was amended in 1994 to give the Attorney General discretionary authority to use the independent counsel process with respect to Members of Congress. It was also

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B. "Mandatory" or "Covered Persons" Provision as it Relates to Campcon Investigation

1. What Triggers the Statute?

The independent counsel statute contains three basic requirements for triggering a preliminary investigation under the "mandatory" provision: (a) Specific information, (b) From a credible source, (c) That a covered person may have violated the law.[5] (U)

a. Specific Information. The purpose of the specificity requirement is to weed out "generalized allegations of wrongdoing which contain no factual support [such as] a letter saying that a particular member of the President's cabinet is a 'crook.'" 1982 CAN 3548. Clearly, the specificity threshold is low one, intended simply to weed out "frivolous or totally groundless allegations." Id.; 1978 CAN 4270. (U)

b. From a Credible Source. The credibility requirement was added to the statute in 1983 after Congress concluded that the existing standard (specificity only) was too low. "Public confidence is not served by investigating merit less allegations made by unreliable sources." 1982 CAN 3548. In considering whether a source is credible, the Attorney General is expected to follow "the usual practices of the Department of Justice in determining the reliability of a source." Id. (U)

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reworded for "simplification" purposes, but otherwise made no change from the existing law in the "substantive reach or scope" of the discretionary provision. The Senate bill would have authorized the Attorney General to use the independent counsel process to investigate a "matter" as well as a person, but that proposed revision was rejected in conference "because it would in effect substantially lower the threshold for use of the general discretionary provision." 1994 CAN 793.

[5] The statute as originally passed in 1978 required a preliminary inquiry whenever the Attorney General received "specific information that [a covered] person has committed a violation" of federal law. In 1982, Congress decided to add a "credibility" requirement. Unfortunately, instead of simply changing "specific information" to "specific and credible," it replaced "specific information" with "information sufficient to constitute grounds to investigate." To figure out what that means, one must look to § 591(d)(1), which sets forth the specificity and credibility requirements.

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One question that has arisen in the course of the Campcon investigation is whether newspaper reports can or should constitute a "credible source." The Public Integrity Section (PIS) has taken the position in this case that newspaper articles cannot be a credible source for purposes of the statute. This is a debatable proposition, particularly where reputable news organizations have dispatched small armies of investigative reporters to track down witnesses and documents. As time goes on, and we are able to follow up news reports with witness interviews and grand jury subpoenas, this issue should become moot. (U)

It is important to note that the statute permits the Attorney General to consider only the two factors of "specificity" and "credibility" in determining whether there are grounds to investigate. In 1987, Congress added the word "only" to the statutory language of § 591(d)(1) in an effort to curb the Department's "disturbing practice" of conducting lengthy "threshold inquiries" before deciding whether the statute had been triggered. 1987 CAN 2164. (U)

c. That a Covered Person May Have Violated the Law. The Attorney General must conduct a preliminary inquiry if she receives specific and credible information that a covered person may have violated any federal criminal law. In 1987, Congress changed the statute from "has committed" to "may have violated." The legislative history makes very clear that DOJ's role should be limited: "It cannot be expected, at this first step in the process, that the Attorney General could or should determine that a criminal act has been committed." 1987 CAN 2164; see also 1982 CAN 3549 ("[I]f facts or suspicious circumstances suggesting that a covered person may have engaged in criminal activity come to the attention of the Department of Justice, these would qualify as 'information sufficient to constitute grounds to investigate,' thus triggering a preliminary investigation.") (U)

In fact, Congress has severely criticized the Department for conducting extended "threshold inquiries," often lasting months and involving "elaborate factual and legal analyses." As stated in the Senate Report:

> It is not clear why the Department of Justice has adopted this practice. Some have suggested that the Department is conducting preliminary investigations in all but name to avoid statutory reporting requirements that attach only after a 'preliminary investigation' has taken place. Since these reporting requirements are the primary means of ensuring the Attorney General's

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accountability for decisions not to proceed under the statute, Congress intended them to attach in all but frivolous cases.[6] (U)

In light of this history, it is critical for the Attorney General to insist upon a rigorous and ongoing analysis of the independent counsel issues arising during the Campcon investigation. It would be particularly useful for PIS to provide a written summary of prior independent counsel experience within DOJ. Under what circumstances has the Attorney General

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[6] According to the 1987 Senate Committee report, DOJ reported processing a total of 36 cases under the independent counsel statute between 1982 and 1987. Of the 36 cases, the Department reported closing 25 prior to conducting a preliminary investigation. It reported closing five of these cases because the allegations did not involve a covered official, and 20 others (which did involve covered persons) because a "threshold inquiry" had determined that the information was insufficient to trigger a preliminary investigation. In the 20 cases involving covered officials, DOJ reported spending an average of approximately 75 days before closing the case. 1987 CAN 2155.

The Senate Committee criticized the Department for failing to clearly articulate why, in the 20 cases on covered persons, it found the information insufficient to trigger a preliminary investigation. The Committee concluded that DOJ had closed 10 cases, despite receiving specific information from a credible source of possible wrongdoing, because it determined that the evidence available did not establish a "crime." In at least five of these 10 cases, the decision appeared to have been based, at least in part, on insufficient evidence of criminal intent. The Committee concluded:

> Thus, contrary to the statutory standard, in 50% of the cases handled by the Justice Department since 1982 in which it declined to conduct a preliminary investigation of a covered official, it relied on factors other than credibility and specificity to evaluate the case. Moreover, in at least half of these cases, the Department of Justice refused to conduct a preliminary investigation into the alleged misconduct, because it had determined there was, at this early stage in the process, insufficient evidence of criminal intent.

Id. at 2155-56.

previously sought an independent counsel? Under the mandatory or discretionary prong? What was the state of the evidence? Where it was decided not to seek an independent counsel, what were the factors? (U)

2. Who are the Potential "Covered Persons" in this Case?

Based on the evidence collected to date, it appears that the only "covered persons" who potentially could be implicated in criminal activity would be (a) President Clinton, (b) Vice President Gore, and (c) Campaign Committee Chairman Peter Knight. Although the "covered persons" provision also includes individuals working at the Executive Office of the President who are paid at or above level II of the Executive Schedule (currently $133,600), there are only six people paid at this level, none of whom are the focus of the Campcon investigation.[7] In particular, former Deputy Chief of Staff Harold Ickes apparently was not paid at level II. (U)

Although Campaign Chairman Knight has surfaced in at least two matters under investigation -- White House "coffees" (which he specifically called fundraisers) and an attempt to pressure the Cheyenne-Arapaho Indian Tribe -- the investigation apparently has not yet developed specific and credible evidence of a potential violation. Consequently, the following summary focuses on the activities of the President and the Vice President. (U)

3. Is there Sufficient Information that One of the Covered Persons "May Have" Violated Federal Law?

a. Exceeding campaign spending and contribution limits: President Clinton. The investigation has developed compelling evidence that the President and his close advisors (particularly Harold Ickes) were personally involved in orchestrating and directing a massive campaign fundraising effort in coordination with the DNC. If there had been any serious doubt about the White House's control over the DNC's budget and expenditures, the 4-17-96 Ickes memorandum should have removed it. In addition, there can be little doubt that the primary purpose of these efforts was the re-election of the President. (U)

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[7] Those six persons, according to the most recent listing provided by the White House Counsel's Office to the FBI's Public Corruption Unit, are the Director and two Deputy Directors of OMB, the Chairman of the Council of Economic Advisors, the U.S. Trade Representative, and the Director of the Office of Science & Technology Policy.

There are serious questions as to whether these efforts constitute violations of the FECA's spending and contribution limits. The circumstances of this case present unprecedented legal issues that have sparked a substantial difference of opinion among various election law experts, particularly on the "hard money vs. soft money" issue. If one thing is certain, it is that the law in this area is unclear and that there are no established enforcement policies either at DOJ or the FEC. See 1982 CAN 3551 ("Any case in which there is no clear policy against prosecution or any arguably exceptional circumstances are present should be sent to a special prosecutor.") DOJ has invited substantial criticism by appearing to resolve these untested legal issues at the outset of the investigation, before the facts are fully developed. We must be particularly careful not to make the following exculpatory factual assumption: because a particular money gift exceeded the statutory contribution limits (or because it came from foreign national or corporation), it must have been a "soft money donation" instead of an illegal "hard money contribution." (U)

Notwithstanding the technical and narrow legal arguments set forth in the Attorney General's 4-14-97 letter to Chairman Senator Hatch, it is difficult to understand how DOJ can dispute the contention that there "may have" been a violation of federal law sufficient to warrant further investigation. The Task Force is, after all, continuing an aggressive investigation of all facets of the campaign fundraising effort. (U)

Given the ambiguous statutory framework in the FECA and the uncertain state of the law, this may well be an area in which prosecution is unwarranted. However, under the independent counsel statute, the Attorney General is not authorized to resolve such matters at the "threshold inquiry" stage. The purpose of the threshold inquiry is to weed out "frivolous" allegations, not to decide whether prosecutions should be brought. The Attorney General is free, when requesting appointment of an independent counsel, to include "the Department's views of the potential prosecutorial merit of the case." 1994 CAN 766. (U)

b. Soliciting campaign contributions on federal property: Vice President Gore. 18 U.S.C. § 607 makes it unlawful "for any person to solicit or receive any contribution within the meaning of section 301(8) of the FECA in any room or building occupied in the discharge of official duties by any [officer or employee of the United States]." On its face, this felony prohibition would appear to cover Vice President Gore's fundraising calls from his White House Office. (U)

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The Attorney General's letter to Chairman Hatch concedes that such conduct "could be" a violation and states that we "have commenced" investigations on allegations of this sort (without referring specifically to the allegations relating to Gore). The letter also stresses that a potential § 607 violation is a "fact-specific inquiry." If we are indeed investigating the Gore allegations, the independent counsel statute should already have been triggered. (U)

The Attorney General's letter (again, without referring specifically to the Gore allegations) implicitly relies on the argument that because § 607 applies only to "contributions" as technically defined in the FECA, it would not prohibit the solicitation of "soft money." However, at this point in the investigation, we cannot conclude either factually or legally that the Vice President was in fact soliciting "soft" instead of "hard" money. (U)

There are other arguments that can be made, but which were not made by the Attorney General. Some have argued that the President and Vice President are exempt, for separation of powers reasons, from the proscriptions of § 607; however, DOJ's Office of Legal Counsel concluded in 1979 that the statute does apply to the President and Vice President. Another argument is that Gore's phone calls did not fall within the intent of § 607, which was principally designed to prevent government workers from being pressured for contributions in their offices. (U)

In any event, the fact remains that there appears to be a violation. The various arguments that have been put forth are just that: arguments, with no conclusive legal authority to resolve them. Whatever we may think of the prosecutive merit of § 607 charges in this context, the allegations do not appear to be "frivolous" for purposes of applying the independent counsel statute. Moreover, the statute does not authorize the Attorney General to rely on prosecutorial discretion in cases involving covered persons. (U)

c. Soliciting campaign contributions on federal property: coffees and overnights. As set forth in the investigative summary, the White House/DNC Core Group devised and implemented an ambitious plan to reward big donors with White House coffees, overnight stays, trips on Air Force One, and other types of access to the President and Vice President. All of these activities are being aggressively investigated through grand jury subpoenas and other traditional law enforcement methods. (U)

With respect to the White House coffees and overnights, the Attorney General's letter to Chairman Hatch relies primarily on one implied argument: that the events may have taken place in

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private areas of the White House residence rather than in areas "occupied in the discharge of official duties." DOJ has relied very heavily on a 1979 opinion from the Office of Legal Counsel, but that opinion has only limited reach. The key issue addressed by OLC was whether § 603 (the predecessor to § 607) prohibited an alleged campaign solicitation by President Carter during a luncheon for Democratic Party donors and fundraisers that took place in the Family Dining Room of the White House. After undertaking a fact-specific analysis of how the Family Dining Room was used and how the luncheon was arranged, OLC concluded that the solicitation "probably" fell outside the scope of § 603. (U)

The 1979 OLC opinion concluded that rooms in the White House may fall outside the scope of § 603 if used for "personal entertaining where there is a history of such use and where . . . the cost of such use is not charged against an account appropriating funds for official functions." On that basis of that fact-specific standard, DOJ appears to have concluded that the White House Map Room -- in which at least one coffee klatch was held -- is not covered by the current § 607 prohibition. The problem is that we know virtually nothing about how the Map Room is traditionally used or how any of the coffees were arranged. And even if the Map Room is eventually deemed to fall within the "personal entertaining" exception, there are over 100 other coffees and similar fundraising events for which we have little information to date. (U)

There are other arguments that certainly can be made to resist a § 607 charge in these circumstances. For example, if it is established that no one made a direct pitch for money during the course of these events, one could argue that there was no legally-viable "solicitation."[8] Similarly, even if there was a "solicitation," one could argue that it was a solicitation for "soft money" instead of "hard money" and therefore did not involve a "contribution." However, these are fact-specific questions and difficult legal issues that cannot be resolved at this time. Here again, we have subpoenaed White House records and are undertaking a criminal investigation of these activities which involve the President and Vice President. (U)

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[8] The one coffee for which we have developed significant information shows strong evidence of solicitation. At a 6-18-96 coffee in the Map Room attended by the President, John Huang, Don Fowler, Pauline Kanchanalak, two Thai businessmen, and others, Huang directly solicited the businessmen -- in the presence of the President -- after Fowler described the upcoming election as the most important since Lincoln.

d. Soliciting contributions from foreign nationals. The Federal Election Campaign Act explicitly prohibits any person from soliciting, accepting, or receiving from a foreign national "any contribution of money or other thing of value . . . in connection with an election to any political office." 2 U.S.C. § 441e. The Campcon investigation has developed innumerable allegations that money from foreign nationals flowed into the DNC as a result of the massive fundraising effort coordinated by the DNC and the White House. The DNC has already turned back at least $1.5 million because of apparent improprieties. (U)

The key legal questions are (1) whether "soft money" falls within the scope of the FECA, and (2) whether the foreign gifts to the DNC were in fact "soft money." DOJ has taken the legal position that all soft money falls outside the scope of the FECA -- including § 441e -- because it fails to meet the strict definition of "contribution" in § 431. This interpretation by the election law experts at PIS has been publicly adopted by the Attorney General. This position has been greeted with intense criticism from some election law attorneys, who correctly point out that, at the very least, these are uncharted areas of the law. The FECA, after all, neither defines "soft money" nor specifically addresses "soft money" gifts to national parties. The uncertain state of the law invites the question of whether DOJ should be resolving these thorny legal issues at such an early stage in the investigation, particularly in the face of independent counsel concerns. Certainly there are significant passages in the legislative history of the independent counsel statute that admonish the Department not to undertake such "elaborate legal analyses" when a covered person is involved. 1987 CAN 2158. (U)

Even if it is appropriate for DOJ to resolve the threshold question of "soft money" at this stage, it is not at all clear that the suspicious foreign gifts in this case all constitute "soft money." In light of the evidence of direct control of DNC fundraising efforts by the White House -- as evidenced by the 4-17-96 Ickes memo and many other documents -- there is a very real issue about whether the "soft money" argument is largely a sham. The FEC's General Counsel is quoted in the 1-6-97 Legal Times as saying that if money "is used for a candidate's election directly, then there is no question that 441e applies." (U)

At the very least, we need to investigate far more thoroughly before we can comfortably conclude -- as a factual matter -- that the specific gifts at issue were in fact "soft money" donations. In some cases, such as the Hsi Lai Temple fundraiser attended by the Vice President, the evidence points specifically to the solicitation of "hard money contributions." Presumably during the course of our investigation, we are asking

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whether the President or Vice President knew about the details of such suspicious transactions. If so, it is fair to ask why the independent counsel statute has not been triggered. If not, we should ask whether we are avoiding such questions in order to stay away from the trigger. (U)

e. Misuse or conversion of government property. There are a number of separate investigative matters that raise the question of whether White House personnel have misused or converted government property. At the moment, the most significant example is that of the WhoDB database, which apparently was a high priority for the President and the First Lady (at least according to an internal White House memo). We are obtaining the database and related White House documents through subpoena and have developed an aggressive investigative strategy to examine its procurement and use. Whether or not the investigation leads to prosecutable offenses, we are again in the posture of investigating the activities of senior White House officials. And while it may turn out that the President had no hands-on role in either the development or use of the database, it is difficult to contend that there is "insufficient information to investigate" for purposes of the independent counsel statute. (U)

C. "Discretionary" Provision

Even if the Attorney General continues to conclude that the mandatory provision of the independent counsel statute has not been triggered, she must continually assess whether to invoke the "discretionary" provision of § 591(c). On balance, there appears to be a compelling case to do so. (U)

1. Reasons to Invoke the Discretionary Provision

a. DOJ is Investigating the Actions of the President and Vice President. The central reason to invoke the discretionary provision is that the Campcon Task Force is investigating the actions of the President and Vice President of the United States. This focus is neither fortuitous nor peripheral; it is because the President and Vice President were personally involved in many of the matters under active scrutiny. Moreover, this is a criminal investigation using the full range of standard investigative techniques, including wide use of grand jury subpoenas. (U)

The independent counsel statute is based upon the fundamental premise that it is a conflict of interest for the Attorney General to investigate potential criminal violations by high-level officials of the Executive Branch. She is now

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supervising an aggressive, wide-ranging investigation that reaches directly into the highest levels of the White House.[9] (U)

b. DOJ is Investigating Persons Close to the President. As set forth in the investigative summary, the Task Force is investigating the activities of a Core Group of persons close to the President. Certain of these persons, such as Thomas "Mack" McLarty and Harold Ickes, are at least subjects (and potential targets) of the criminal investigation. Beyond the Core Group, the Task Force has focused intense investigative effort toward others who also appear to be close to the President, such as Charles Yah Lin Trie and John Huang. Investigation of such individuals is precisely the kind of circumstance for which the discretionary provision was designed. "This [discretionary] provision could apply, for example, to members of the President's family and lower level campaign and government officials who are perceived to be close to the President." 1987 CAN 2165. (U)

With respect to McLarty and Ickes, it appears that Congress intended to capture within the "covered persons" provision individuals who occupy such high-level White House positions. As originally structured in 1978, the total number of covered Executive Branch positions was approximately 120, with approximately 93 of those positions within the Executive Office of the President. In 1983, Congress reduced the total coverage of Executive Branch positions to approximately 70, of which 36 were within the Executive Office of the President. 1982 CAN 3543. As presently written, the "covered persons" section includes any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule. § 591(b)(3). Although he is authorized by statute to appoint and pay twenty-five persons at level II, the President currently pays only six persons at that level. (U)

As these numbers show, the White House has avoided mandatory coverage for virtually all of its top level officials by simply paying them below level II. Whether or not this is an intentional effort by the White House to limit the number of "covered" senior officials, it certainly exposes a loophole in

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[9] On more than one occasion, PIS attorneys have stated that the Task Force is investigating certain White House activities even though it has insufficient predication. While the FBI investigators do not agree that there is inadequate predication, the statement is nonetheless disturbing. If the attorneys truly believe that predication is lacking, it is difficult to justify the use of grand jury subpoenas and other criminal investigative tools.

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the independent counsel statute. In deciding whether or not to exercise her discretion under the statute, the Attorney General should consider whether McLarty and Ickes are among that group of top level officials so close to the President that DOJ investigation of them would "present the most serious conflict of interest of an institutional nature." 1978 CAN 4269. (U)

c. DOJ is Investigating Top Campaign Officials. Because the independent counsel statute arose from the abuses of Watergate, it reserves a unique spot for campaign-related misconduct. Top campaign officers are the only non-government officials to be included as "covered persons" within the mandatory provision of the statute. The reason for including campaign officials is spelled out clearly in the legislative history:

> There are few individuals who are as important to an incumbent President running for re-election or a serious candidate for President than that individual's campaign manager or the chairman of any of his national campaign committee of his or of his party. (U)

1978 CAN 4269.

The mandatory "covered persons" provision of § 591(b)(6) currently includes "the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President."[10] The independent counsel law was originally drafted to cover the chairman of any national campaign committee seeking the election of reelection of the President, but that section was dropped after the Department of Justice expressed concern that it could potentially cover hundreds of campaign committees that spring up during a national campaign, such as "Youth for Carter" or "Doctors for Ford." 1978 CAN 4394. (U)

By its literal terms, the independent counsel statute covers only the chairman and treasurer of the Clinton-Gore Committee (Peter S. Knight and Joan Pollit, respectively), along with any officer "of that committee" exercising authority at the national level. It does not by its terms cover senior officers of the

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[10] Section 591(b)(7), which provides that "covered" government officials remain subject to the independent counsel statute for one year after leaving the office or position, does not apply to campaign officials.

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Democratic National Committee. However, in deciding whether to exercise her discretionary authority, the Attorney General should consider how the DNC was used during the 1996 election cycle. By essentially commandeering the DNC for the purpose of getting the President re-elected, the White House appears to have erased the traditional lines between the President's own campaign committee and the national party committee. In fact, the DNC appears to have been the President's central re-election machine, under the control of senior White House advisors. Under the circumstances, it is almost nonsensical that the independent counsel statute could be invoked for Peter Knight or Joan Pollit but not for Don Fowler and John Huang. (U)

d. Precedent. This Attorney General has invoked the discretionary clause in at least three matters: Whitewater, the White House requests for FBI files, and the Bernard Nussbaum perjury allegation. In the Whitewater matter, the Attorney General invoked the political conflict of interest provision because of allegations of criminal conduct by "McDougal and other individuals associated with President and Mrs. Clinton." Similarly, the Attorney General found a conflict of interest in the Nussbaum matter because the investigation would "involve an inquiry into statements allegedly made by a former senior member of the White House staff." (U)

It would certainly be consistent with those precedents to find a political conflict of interest in this case, where there are strong allegations against "individuals associated with" the President. Charles Trie, for one, has been described as a personal friend. Similarly, Thomas (Mack) McLarty, who serves as "Counselor to the President" and is one of the President's closest friends and advisors, has been implicated in the Tamraz matter. (U)

e. National Security Matters. With respect to the investigation of Chinese government efforts to influence U.S. elections, DOJ and the FBI have conflicting duties to (1) keep the President informed about significant national security matters, and (2) simultaneously keep from the White House certain national security information that may relate to the ongoing criminal investigation. Because of this conflict, the relationships between DOJ, the FBI, and the White House have become a matter of public controversy. The June 1996 FBI briefing of NSC staffers has been the subject of a public quarrel between the White House and FBI, and is a relevant part of the Campcon investigation. (For example, if information of Chinese efforts to influence Members of Congress was in fact passed up the White House chain, such evidence might become relevant in analyzing the criminal intent of White House officials who played instrumental roles in Asian fundraising efforts.) [redacted]

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f. Appearance of a Conflict. There is a widespread public perception that the Department of Justice has a conflict of interest in investigating the campaign financing allegations. When testifying before Congress in 1993 in support of the Independent Counsel Reauthorization Act, the Attorney General emphasized the importance of avoiding the appearance of a conflict:

> There is an inherent conflict of interest whenever senior Executive Branch officials are to be investigated by the Department of Justice and its appointed head, the Attorney General. . . .
>
> It is absolutely essential for the public to have confidence in the system and you cannot do that when there is conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. . . . The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level Executive Branch officials and to prevent . . . the actual or perceived conflicts of interests. The Act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters, and to avert even the most subtle influences that may appear in an investigation of highly-placed Executive officials. (U)

Senate Hearing 103-437, at 11-12 (May 14, 1993). These comments are virtually identical to statements appearing throughout the legislative history of the independent counsel statute. (U)

Notwithstanding her statements in 1993, the Attorney General recently took the position (in her letter to Chairman Hatch) that in order to invoke the discretionary provision of the statute, she "must conclude that there is a potential for an actual conflict of interest, rather than merely an appearance of a conflict of interest." This position, based upon a 3-14-97 memorandum from DAAGs Mark Richard and Robert Litt,[11] has been

[11] The Richard/Litt memorandum relies primarily on legislative history from 1982 and 1994. When it reconsidered the statute in 1982, the Senate passed an amendment allowing the discretionary appointment of an independent counsel "if the Attorney General determines that investigation of such person by

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strenuously challenged by Chairman Hatch and others. (U)

While there certainly is support for the Attorney General's recently-stated position (as set forth in the Richard/Litt memo), it seems contradicted by a host of references in the legislative history. Moreover, it makes little sense conceptually to conclude that appearances can be taken into account for investigating "covered persons" but not other officials. After all, the underlying premise for the mandatory trigger is that there is an actual conflict of interest whenever Attorney General is called upon to investigate a "covered person" (so there is no need to analyze appearances). (U)

On balance, the better argument seems to be that the Attorney General can and should consider the "appearance of a conflict" as one of the factors in deciding to invoke the discretionary clause. And in the circumstances of the Campcon

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the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest, or the appearance thereof." 1982 CAN 3545. However, Congress eventually adopted the House version of the amendment, which did not contain the "appearance" language underscored above. The floor manager of the House bill, Rep. Hall, stated: "The bill as amended deletes the reference to appearances, and thereby requires the Attorney General to determine that an actual conflict may exist in order to utilize the special prosecutor provisions." Congressional Record, Dec. 13, 1982, at H9507.

In 1994, Congress considered two changes relevant to this issue. First, it rejected a DOJ proposal to allow the Attorney General to seek discretionary appointment of an independent counsel if a conflict existed with respect to a "matter" (in addition to a specific individual), concluding that such an amendment "would in effect substantially lower the threshold for use of the general discretionary provision." 1994 CAN 793. Second, Congress extended coverage of the statute to Members of Congress, in circumstances where the Attorney General concludes that appointment of an independent counsel "would be in the public interest." The legislative history characterizes this as a "broader standard" which enables the Attorney General to consider "a larger range of factors and to exercise greater discretion" in cases involving Members of Congress. "For example, the Attorney General could consider not only whether an actual conflict of interest might result if the Department handled the matter, but also whether an appearance of a conflict of interest might weaken public confidence in the investigation and any prosecution." 1994 CAN 781.

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investigation, that factor should weigh heavily. (U)

g. White House Involvement Is Affecting Task Force Investigative Actions. Because top officials at the White House were involved in many of the matters under investigation, the Task Force is proceeding differently than it would in a "normal" investigation. At various times, the Task Force has slowed down when the investigation began to point toward a "covered person." As explained by the PIS Chief in a recent meeting with the Attorney General, such slowdowns resulted from the need to step back and analyze whether the independent counsel statute has been triggered. (U)

h. The Chief Investigator Has Concluded That There is a Conflict of Interest. The chief Campcon investigator, Director Freeh, has concluded that the investigation presents the Department with a political conflict of interest. This by itself does not trigger the independent counsel statute, since the ultimate resolution of the conflict issue rests solely with the Attorney General. However, the Director's view should be a significant factor in the Attorney General's continued analysis of whether to invoke the discretionary provision. (U)

IV. Staffing

A. Overview

The Campaign Financing Task Force is currently staffed with 28 FBI Special Agents (SAs), two DOC-OIG SAs, six DOJ-Public Integrity Section (PIS) Trial Attorneys, one DOJ Internal Security Section Trial Attorney, and a professional support staff of 23 combined analysts, data loaders, computer specialists, paralegals, and other specialists. (U)

The FBI complement is slated for a permanent enhancement of 13 agents and five professional support employees within the next 90 to 120 days. Additionally, effective 5/14/97, ten analysts drawn from FBI Headquarters and various FBI field offices will be detailed to the Task force for a minimum of 60 days to assist in records analysis. (U)

Washington, D.C. Operations

An FBI Inspector In Charge and two Supervisory Special Agents (SSAs) manage two Washington based squads composed of 19 SAs, four of whom are skilled in Foreign Counter-Intelligence investigations. A professional support staff of 21 FBI employees and two contract computer specialists support operations, including an Evidence Control/Processing Center situated on the eleventh floor of FBI Headquarters. One of the SSAs is also

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responsible for coordinating the Los Angeles and Little Rock aspects of the investigation. (U)

A Lead Trial Attorney supervises six DOJ-PIS Trial Attorneys, as well as an attorney assigned to the DOJ Internal Security Section. Their professional support staff is comprised of a paralegal and secretary. A request is pending for one or more paralegals to monitor subpoena compliance, help with the logistics of grand jury witness appearances, and conduct legal research. (U)

Los Angeles, California Operations

One FBI case agent and six "team leaders" comprise the Los Angeles complement of the Task Force. They are supervised by an experienced white collar crime SSA who is cognizant of all case developments and coordinates weekly, or more frequently, with his Washington based counterpart. Eighteen additional agents are available part-time to meet case demands as necessary. (U)

Little Rock, Arkansas Operations

Two agents are assigned full and part time, respectively, to coordinate with Washington in conducting all Arkansas related investigation. (U)

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MEMORANDUM

DATE: SEP 25 1997

SUBJECT: DEPARTMENT OF JUSTICE URGENT REPORT

TO: Janet Reno
Attorney General

Eric H. Holder, Jr.
Deputy Attorney General

FROM: Mark M Richard
Acting Assistant Attorney General
Criminal Division

MARK M RICHARD
Deputy Assistant Attorney General
Criminal Division

DESIGNATION: Criminal

SECURITY CLASSIFICATION: Unclassified - Sensitive

ORIGINATING UNIT: Public Integrity Section
Criminal Division
Lee J. Radek, Chief
Tel. 616-0566

CLARIFICATION & FOLLOW-UP: Mark M Richard
Acting Assistant Attorney General
Criminal Division
Tel. 514-2333

ISSUES: Independent Counsel Matter:
Peter S. Knight's Involvement in Fund-Raising Telephone Calls Placed by Vice President Gore from his White House Office

ATTNY NAME

ATTNY NAME

SYNOPSIS:

/22/97

On September 3, 1997, pursuant to the provisions of the Independent Counsel Act, 28 U.S.C. § 591(d), the Public Integrity Section began a thirty-day initial inquiry into information suggesting potential illegal campaign fund-raising by Vice President Gore. The investigation was commenced following publication of press accounts indicating that Democratic National Committee (DNC) contributions made as a result of telephone solicitations by the Vice President from his White House office were treated as so-called "hard money" contributions under the federal campaign finance laws, in potential violation of 18 U.S.C. § 607.

9/24/97

In the course of the investigation, we have learned that Peter S. Knight, who was Chief of Staff to Vice President Gore during the Vice President's tenure in the Senate, was present in the Vice President's office at the time the Vice President

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DOJ-VP-00022

EXHIBIT
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solicited campaign donations by phone. Knight is a "covered person" under the Independent Counsel Act by virtue of his position as campaign manager of Clinton/Gore '96. On several occasions, Knight telephoned the Vice President's administrative assistant and requested that time on the Vice President's schedule be reserved for fundraising telephone calls. On the appointed day, Knight received "call sheets" from the DNC and personally delivered them to the Vice President and an administrative assistant, who would place the calls to the listed donors. After the calls, Knight or an associate in his law firm would provide the DNC Finance Office with the results of the calls. Knight may have been present during the Vice President's conversations with some donors whose contributions were partially deposited into a DNC "hard money" account.

We have no information at the present time that Knight contemplated that the Vice President would be soliciting "hard money" contributions during his telephone conversations with prospective donors. Nor do we have any evidence that Knight was aware of any DNC practice of depositing the first $20,000 of a donation to the DNC into a hard money account if the donor had not made any hard money contributions during that calendar year.

We see no need to recommend that the Attorney General trigger a separate thirty-day inquiry under the Independent Counsel Act with respect to Knight; to the extent that there is any question as to the propriety of Knight's conduct, it can be handled within the context of the ongoing inquiry involving the Vice President. If an independent counsel ultimately is appointed to investigate the Vice President's telephone fund-raising solicitations, any questions surrounding Knight's involvement in those same events will necessarily be part of the independent counsel's inquiry.

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: The Deputy Attorney General

FROM: Mark M Richard
Acting Assistant Attorney General

SUBJECT: Allegations Concerning Vice President of the United States Albert Gore, Jr., Under the Independent Counsel Act

PURPOSE: To recommend that the Attorney General initiate a preliminary investigation into whether Vice President Albert Gore, Jr., violated federal criminal law, 18 U.S.C. § 607, in soliciting contributions to the Democratic National Committee from his office in the White House.

TIMETABLE: The Attorney General must decide by October 3, 1997, if a preliminary investigation is to be initiated.

SYNOPSIS: The Department of Justice has received specific information from a credible source suggesting that Vice President of the United States Albert Gore, Jr., a covered person under the Independent Counsel Act, may have solicited campaign contributions from his White House office in potential violation of 18 U.S.C. § 607, requiring that a preliminary investigation be commenced.

ATTY NAME
9/30/97
[redacted]

DISCUSSION: Vice President Gore has acknowledged that, in late 1995 and early 1996, he made telephone calls from his White House office to private citizens during which he asked them to make donations to the Democratic National Committee (DNC). On September 3, 1997, the Washington Post reported that more than $120,000 in contributions made by individuals allegedly solicited by the Vice President were deposited by the DNC in a federal, or

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EXHIBIT 5

so-called "hard money," bank account. Federal law generally prohibits the solicitation of "hard money" contributions in federal offices occupied in the discharge of official duties. 18 U.S.C. § 607. The Public Integrity Section has completed an initial inquiry into this matter, and has concluded that the information available relating to the Vice President's fund-raising activities is sufficiently specific and credible as to warrant further investigation and analysis.

RECOMMENDATION: I recommend that you sign the attached filing (Attachment A) notifying the Special Division of the Court of Appeals of the triggering of a preliminary investigation.

APPROVE: _____ Concurring Components: None

DISAPPROVE: _____ Nonconcurring Components: None

Attachments

U. S. Department of Justice

Washington, D.C. 20530

September 29, 1997

MEMORANDUM

TO: Mark M Richard
Acting Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Independent Counsel Matter: Vice President of the United States Albert Gore, Jr.

As you know, the Public Integrity Section has received information suggesting that Vice President of the United States Albert Gore, Jr., a covered person under the Independent Counsel Act Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have solicited campaign contributions from his White House office in potential violation of 18 U.S.C. § 607. As explained below, we have concluded that the information available to us is sufficiently specific and credible as to warrant further investigation and analysis. We therefore recommend that the Attorney General initiate a preliminary investigation pursuant to the Act.

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The Attorney General needs to reach her decision on this matter no later than October 3, 1997, 30 days after the Department of Justice became aware of the information involving the Vice President. 28 U.S.C. § 591(d)(2). We have attached the necessary paperwork to be filed with the Special Division of the Court of Appeals (Attachment A), should the Attorney General decide that further investigation is warranted in this matter. Should she decide that no further investigation is warranted, no paperwork is required.

I. INTRODUCTION AND SUMMARY

On September 3, 1997, the Washington Post reported that records made available by the White House revealed that the Vice President had solicited political contributions by telephone from

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EXHIBIT 6

his West Wing office. Of the donations received as a result of these calls, the Post reported that more than $120,000 were deposited into the Democratic National Committee's (DNC) federal, or "hard money," account. The Post went on to report that the DNC had reimbursed the U.S. Treasury in the amount of $24.20 for fundraising telephone calls apparently made from the Vice President's office. The article implied that the Vice President may have violated federal law by making fundraising solicitation calls from his West Wing Office which resulted in "hard money" contributions . 18 U.S.C. § 607.[1]

As you are aware, under the Independent Counsel Act, the Department of Justice has 30 days in which to assess information concerning covered persons that comes to its attention, and to determine whether the information requires a preliminary investigation under the Act. 28 U.S.C. § 591(d). We have now completed our initial review of the referral. Pursuant to the Act, our review sought to determine whether the allegation constitutes specific information from a credible source such as would warrant further investigation. Id. We also used this brief period to attempt to explore, and to the extent possible, resolve, a number of extremely complex legal issues that arise under section 607.

The evidence we gathered establishes that the Vice President did make fundraising calls from his office. It further establishes that at least two of these calls directly led to contributions to the DNC, and that a portion of those two contributions were deposited by the DNC into hard money accounts. Given this factual support, it is our conclusion that the additional exploration of the facts and the law which a preliminary investigation would permit is warranted. We therefore recommend that the Attorney General trigger a preliminary investigation pursuant to the Independent Counsel Act.[2] Within the context of the preliminary investigation, we

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[1] It also raises a question whether the Vice President may have illegally converted government property by using federal funds to pay for long-distance calls made on behalf of the DNC in violation of 18 U.S.C. § 641. Federal prosecution of such a small conversion would be contrary to established Departmental policy, and thus we plan to pursue this allegation no further.

[2] We note here that the Vice President's counsel, who were only retained midway through the initial inquiry period, have also urged that a preliminary investigation is warranted, in order to give them a full opportunity to respond on behalf of the Vice President, and in order to avoid an appearance that the Department did not fully explore the matter before coming to its conclusion.

will also be permitted to explore the question of whether there exist established Departmental policies that would bar prosecution of a section 607 allegation on these facts, a consideration that is unavailable to us during the course of the initial inquiry. 28 U.S.C. §§ 591(d)(1) and 592(c)(1)(B).

II. IS THERE SPECIFIC INFORMATION FROM A CREDIBLE SOURCE THAT THE VICE PRESIDENT MAY HAVE VIOLATED FEDERAL CRIMINAL LAW?

A. The Allegation

The controversy surrounding the Vice President's fund-raising telephone calls began in early March of 1997 when, in response to published accounts of aggressive fundraising, including phone solicitations, the Vice President held a news conference and revealed that "on a few occasions" calls were made from his White House Office. The following month, the Attorney General declined to initiate a preliminary investigation of this, among other campaign fundraising matters, when she responded to letters from a majority of the Majority Members of the Senate and House Judiciary Committees. Her decision was based in part on the fact that there was no information to suggest that the Vice President's solicitations had been for hard money contributions, as required by section 607. Indeed, the evidence available to us at the time suggested the contrary; the size of the solicited donations and the nature of the described solicitations suggested that it was likely they were soft money solicitations, and public record checks of the few donors identified in the press confirmed that their donations had been deposited into soft money accounts.

Two months later, the press reported that notes written in 1994 by David Strauss, the Vice President's Deputy Chief of Staff, referred to fundraising phone calls by the President, Vice President, and the First Lady.[3]

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[3] The handwritten notes, apparently leaked to the press by Senate investigators, led to the issuance of separate grand jury subpoenas by the campaign financing task force, directed to the White House and David Strauss for the memo and related documents. Records relating to phone calls made by the Vice President in 1996 were first obtained by task force prosecutors the week of July 21, 1997. On July 25, 1997, Strauss was questioned about the four calls he "staffed" in the Vice President's office before the grand jury. None of the donors called on that day contributed federal funds.

On August 26, 1997, the White House provided the press with documents which served as the basis for the Post story eight days later.[4] This material consisted of numerous call sheets, thank you letters, telephone bills, and other documents relating to telephone solicitations by the Vice President. The White House had discovered many of these documents several months before disclosure.[5] The press was thus able to match the far more numerous names of individual donors now revealed on these documents against public FEC records.

On September 3, 1997, the Washington Post reported that more than $120,000 in campaign contributions solicited over the telephone by the Vice President from the White House were deposited into the DNC's federal account. The article named six individuals who, in a period from November 1995 through April 1996, made a donation to the DNC soon after receiving a call from the Vice President.[6] Federal Election Commission ("FEC") records show that the DNC split each gift, depositing a portion into a federal or "hard money" account and the remainder into a non-federal "soft money" account.

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[4] USA Today reported that anonymous White House officials distributed 237 pages of documents to a handful of newspaper reporters on August 26, 1997. The White House had provided these records as part of a larger production to the Task Force a week earlier. Moreover, they were produced without reference to an outstanding subpoena that called for production of documents relating to fund-raising calls. The production was being inventoried when the press accounts were first printed.

[5] Joseph Sandler, Chief Counsel for the DNC, testified before the Senate Governmental Affairs Committee that he discussed with representatives of the White House Counsel's Office an analysis of the hard money deposits made in connection with the Vice President's fund-raising calls in the Spring of this year.

[6] Three of the six persons named in the article -- Peter Angelos, William Dockser, and Robert Johnson -- were interviewed during our 30 day investigation. Two more, E. Blake Byrne and George Marcus, have been unavailable for the past two weeks. These two, along with Sanford Robertson, also named in the Post article, will be interviewed in the coming weeks in the event a preliminary investigation is conducted.

B. Background & Facts Developed During the Initial Inquiry[7]

1. 1994 Telephone Calls

On at least one occasion in 1994, the Vice President made fundraising telephone calls from the DNC headquarters. In addition to providing an historical context, the circumstances surrounding these calls may at some later point in the investigation help shed some light on the Vice President's knowledge of the law and intent during the calls made from the West Wing Office a year later.

The location of fundraising phone calls to be made by the President and possibly the Vice President was discussed during a meeting held in the Fall of 1994.[8] In order to alleviate a projected DNC debt of $5 million by year's end, the President and First Lady had been making fundraising calls and raising money, according to notes taken by David Strauss during the meeting. These notes suggest that the Vice President was being asked to make calls to raise funds for "generic ads" being aired at the time. As part of the "pitch," DNC was "suggesting $50k soft money contribution" from those called. According to the notes, someone at the meeting also added the statement: "make calls from residence".[9]

DNC offices were chosen as the location for the Vice President's fundraising calls, which were scheduled for Friday, October 28, 1994. In preparation for this event, Laura Hartigan

AGENT NAME

[7] Special Agent [redacted] of the FBI, who has had primary responsibility for the FBI's role in this initial inquiry, has reviewed this statement of the facts and concurs.

[8] David Strauss, the Vice President's Deputy Chief of Staff, prepared notes during the meeting, attended by Harold Ickes and Steve Ricchetti, and maybe others. While Strauss states that he has no personal recollection of the meeting, he is able to date the meeting and the notes based on content and Ricchetti's tenure at the White House.

[9] According to Strauss, the reference to the "residence" may have been a statement about where the President was making his phone calls or an admonition to the Vice President to make his calls from his "residence." Harold Ickes recalls Cheryl Mills or someone "at her level" in the White House Counsel's Office advising, around this time, that it would be preferable for the President to make his calls from the residence. According to Ickes, though, this opinion related only to the President's calls. Moreover, neither Strauss, Ricchetti, or Ickes recall passing on information or advice on this topic to the Vice President.

of the DNC forwarded a series of draft call sheets to her boss, Terry McAuliffe. These call sheets contained short biographies, including a history of giving to the DNC. The sheets were apparently provided to Gore upon his arrival at DNC headquarters. McAuliffe, who sat with the Vice President while he made these calls, remembers that the Vice President's visit to the DNC for this call session was designed to boost the morale of DNC employees at a critical point before the 1994 elections. No one yet interviewed recalls discussing the location of the calls with the Vice President.

Documents relating to the 1994 call session at the DNC clearly state that soft money was the goal of the solicitation session. A briefing paper prepared for the Vice President notes that he will call DNC and administration supporters and ask for $50,000 or $100,000 donations to the DNC, depending on the individual. Under "Program Notes," the Vice President's briefing includes the following points:

> The DNC is currently raising money for end of election cycle costs. They are asking for non federal money.
>
> As you know, non federal money can only be used for non partisan activities: Get Out The Vote operations, coordinated campaigns, persuasion advertisements, and non federal advertisements.

In spite of this statement of intent, $2500 of the funds raised by the Vice President during this session appears to have been deposited into a DNC federal account.[10] This, of course, raises no issue under section 607, since the calls were made from the DNC.

2. Inception of 1995-1996 Fundraising Phone Call Project

A year later, in the fall of 1995, DNC Finance officials Richard Sullivan and Marvin Rosen began discussing whether the President and Vice President would again make telephone solicitations on behalf of the DNC. Apparently, after talking about the idea within the DNC, a request was made to Harold Ickes at a regular Wednesday DNC finance meeting held in the White

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[10] A list dated November 29, 1994, and entitled "VPOTUS Phone Call Contributions" lists six individuals with amounts next to their names. FEC records indicate that the contribution of one of these donors, Al Dwoskin, was deposited into the federal account in early November.

House.[11] By memo dated November 20, 1995, Rosen and Sullivan, joined by Don Fowler and Scott Fastrick, memorialized the request. Around this time, Ickes agreed to relay the request to the President and Vice President.

Soon after these discussions, Ickes informed Karen Hancox, Deputy Director of the White House Political Affairs Office, that the President and Vice President had agreed to make the calls. On November 24, 1995, Hancox e-mailed Kim Tilley, the Vice President's scheduler, and David Strauss, his Deputy Chief of Staff, that the "POTUS and VP offered (ON THEIR OWN) to make f.r. calls for the DNC" noting that "Harold" (Ickes) would like an hour set aside for these calls.[12]

Once the project was approved, Richard Sullivan managed the effort for the DNC. Lists of potential contributors were collected from fundraisers connected with the DNC Finance Office. Working with officials from the DNC's Trustee Program, Ari Swiller and Ann Braziel, Sullivan compiled personal information including contribution histories for selected prospects and had it formatted on a sheet entitled "DNC Finance Call Sheet." A separate sheet was prepared for each prospect.

Sullivan and his staff forwarded the call sheets prepared for the Vice President to Peter Knight or an associate in Knight's law firm, Jody Trapasso.[13] Knight, in turn, handed them directly to the Vice President in his West Wing Office just before the calls were made.

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[11] According to several witnesses, there was a standing Wednesday meeting attended by Harold Ickes, DNC officials, and representatives of the White House Political Affairs Office and the Office of the Vice President. The group would meet in the War Room off of the White House mess and discuss issues relating to DNC projects and financing.

[12] None of the witnesses interviewed recalled any discussion during this period about how the telephone solicitations would be carried out. Likewise, no one recalls discussions about the legality or propriety of making these calls from the White House or the question of whether "hard" or "soft" money would be solicited.

[13] Karen Hancox recalls that she may have received the first batch of call sheets from Richard Sullivan in late November or December. In contrast, Sullivan recalls only providing Hancox with call sheets prepared for the President. According to Sullivan, the Vice President's call sheets were always sent to Knight or his associate.

3. The 1995-1996 Calls

From December 1995 through April 1996, the Vice President devoted several blocks of time to making fundraising phone calls from the West Wing Office of the White House. These sessions followed a pattern. Call sheets were generated by the DNC and forwarded to the White House. In anticipation of the phone solicitation sessions, a block of time was requested of Office of the Vice President (OVP) schedulers Kim Tilley or Lisa Berg, most often by Peter Knight. The resulting daily schedule would contain the following information: an entry noting "phone calls"; the time period, often forty-five minutes to an hour; the location, noted as "West Wing Office"; and a staff contact.[14]

On the day of the calls, Knight would obtain the call sheets from Richard Sullivan of the DNC and deliver them to the Vice President's office in the West Wing. A copy was handed to Heather Marabeti, the Vice President's Executive Assistant, or one of two assistants, Joel Velasco or Elizabeth Cotham. Knight would then enter the West Wing Office and sit with the Vice President while one of the three clerical people dialed the numbers on the call sheets.[15] When a prospective donor was reached, the call would be put through to the Vice President in his West Wing Office.[16]

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[14] Our analysis of call sheets, thank you letters, telephone billing records, and schedules have led to the discovery of eleven fund-raising phone call sessions scheduled for the Vice President during this time frame. Significantly, no one interviewed recalls who made the decision to enter "West Wing Office" on the schedule as the location of the sessions.

[15] Heather Marabeti charged the calls on several occasions to a Clinton/Gore calling card that had been provided to her and the other two assistants. Telephone billing records indicate that such a card was used to call several people listed on DNC call sheets. Marabeti does not recall who provided the card; nor does she recall who instructed her to use it. Telephone billing records from AT&T and documents provided by the White House indicate that the remaining toll charges were billed directly to the White House.

[16] When the caller was not available, Marabeti and her assistants would make a note such as "LM" for left message and the date on their copy of the call sheet. They then held onto the sheets with the dated notes in the event that the call was returned.

a. Telephone Solicitations That Led to Federal Funds

Investigation conducted during the initial inquiry established that the Vice President made at least two telephone solicitations from the White House that resulted in funds that were thereafter deposited into the DNC hard money account.[17]

1. Robert Johnson

On February 5, 1996, the Vice President telephoned Robert Johnson, President of Black Entertainment Television (BET), from his West Wing Office in the White House.[18] The DNC Finance Call Sheet prepared in anticipation of this call notes that Johnson gave $50,000 in both 1993 and 1994 and $20,000 of a $50,000 commitment in October of 1995. It also notes that Johnson is a strong Clinton/Gore supporter. Beside the heading "Reason for the call," the Vice President is told to "[a]sk him to write $30k for the media campaign."

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[17] A third call may have led to funds deposited in DNC's federal account but we have uncovered no direct evidence of a solicitation. Phone records show a call from the White House to the office of Peter Angelos was placed at around 1:00 p.m. on April 26, 1996. The Vice President's schedule indicates that this call was made during a time set aside for fund-raising calls. A DNC call sheet prepared for the Vice President also suggests that he ask Angelos to contribute $50,000 to the DNC.

While he remembers the call, Angelos does not remember the Vice President asking for money. Moreover, the standard thank you letter memorializing a pledge to contribute has not been produced by either the White House or the DNC. Finally, while Angelos did make a subsequent donation to the DNC about a month later, Angelos does not link the Vice President's call to his decision to make the donation. Rather, he recalls going to the DNC and speaking with Peter Knight at length before making out a check for $100,000 payable to the DNC for "Pres. Campaign." DNC Finance deposited $20,000 of this gift into a federal account.

[18] Because Johnson was called at his office in Washington, we do not have a telephone bill showing that the call was made from the White House. Telephone bills from February 5, 1996 do confirm that several other numbers that appear on the Vice President's call sheets were phoned on that date from 4:00 to 5:00 p.m. In addition, the Vice President's schedule for that date shows that he was scheduled to make phone calls from the "West Wing Office" from 4:00 to 5:00 p.m. Finally, Peter Knight has a vague recollection of being present in the West Wing Office when the Vice President called Johnson.

Johnson received his call from the Vice President while in his BET office in Washington, DC. According to Johnson, the Vice President spoke of facing a tough election. He noted the need to get the Democrats' message out on issues such as health care. Within this context, Gore asked Johnson to contribute $30,000 to the DNC. Johnson told the Vice President that he would give this amount. He believes he asked his secretary to send the check which was written on his personal checking account.

Johnson gave $30,000 soon after the call. He did so with the understanding that the money was for advertising and "putting the message out."

A copy of the check provided by Johnson indicates that the DNC deposited the $30,000 check into its federal account. FEC records indicate that $10,000 was eventually allocated into a non-federal account. A DNC finance official tasked with the job of keeping track of the Vice President's project made an entry in the computer program entitled "Gore calls": "$30k IN."[19]

2. William Docksер

On the same day, the Vice President telephoned William Docksер, a real estate developer from Rockville, Maryland.[20] The call sheet prepared on Docksер notes that he gave $35,000 in 1995; $20,000 in 1994; and $10,000 in 1992. Under "Reason for the call" the DNC Finance staff states that he "has expressed an interest in making another major contribution to the DNC this year." The Vice President is told to "[a]sk him to send in $25,000 to fund the media campaign."

Docksер too received his call from the Vice President while in his office. He recalls that the Vice President explained that because the recent elections had gone badly, the Democrats were in need of a media campaign. These ads were being run outside of the Washington area, according to the Vice President, and were designed to promote "Democratic issues". The Vice President asked for $25,000 for the campaign and Docksер agreed to contribute in this amount. He recalls now that his gift was in response to the Vice President's request.

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[19] Another entry made by Ann Braziel soon after the call was made reads: "YES-PK to follow up," an apparent reference to Peter Knight. Robert Johnson does not recall a follow-up to the Vice President's call by Peter Knight or anyone else at DNC.

[20] Like the call to Johnson, the Vice President's call to Docksер does not appear on a telephone bill. As explained above, though, circumstantial evidence and Peter Knight's recollection of the Johnson call suggest that the fundraising calls on this date were made from the West Wing Office of the White House.

The witness did not recall the Vice President mentioning the terms "soft money" or "hard money' but he was under the impression at the time that the request was for "soft money". Dockser based that impression on his prior knowledge of the media campaign and a belief that the campaign was being funded by "soft money" gifts. Dockser believed that soft money, by law, could be used for "issue oriented" ads and that hard money was used directly in "election campaigns."

After consulting with DNC fundraiser Ari Swiller, Dockser sent the DNC a personal check in the amount of $25,000 made out to "D.N.C.-Media Fund." Once the DNC obtained the check, a check tracking form was completed and the funds were deposited into two accounts: $20,000 into the federal account and the remaining $5,000 into a non-federal account. An entry showing "25k in" was also noted on the "Gore Calls' computer program.

3. Thank you letters.

After each of these calls, Ann Braziel at DNC headquarters prepared a form letter with the following language:

> It was a pleasure to speak with you today. President Clinton and I thank you for your continued support and contribution to the Democratic National Committee. We appreciate your dedication to our Administration and your help at a time when needed. Thank you for your commitment to make an additional contribution of ____.

The pledged amount was filled in and the letter was sent by courier to the White House for the Vice President's signature.

b. Telephone Solicitations That Did Not Lead To Federal Funds

On at least four occasions, the Vice President called people from the White House who declined to make a gift. An additional solicitation was made to Richard Jenrette who gave money deposited into a non-federal account.[21]

In talking to several of these prospective givers, the Vice President provided an explanation of the DNC media fund. Significantly, he also used the phrase "soft money" when speaking

[21] Four people who were interviewed recall that the Vice President thanked them for their prior support in a phone call but did not specifically ask for money, though some remembered a request for continued "support." Six others recall receiving a telephone message but did not recall a conversation of any kind with the Vice President.

to Eric Becker and Jack Bendheim within the context of his solicitation.

1. Penny Pritzker

The Vice President telephoned Penny Sue Pritzker, President of Classic Residence by Hyatt, on February 5, 1996.[22] Pritzker recalls that the Vice President asked her to contribute money for a media campaign which aired television commercials, aimed at smaller city markets. Pritzker told the Vice President that her family had already given $100,000 to assist in obtaining the Democratic National Convention for Chicago. She declined the Vice President's request to give to the media campaign stating that neither she nor her family would be contributing any more at that time.

Several weeks prior to the call, Pritzker had been invited to attend a private meeting with the Vice President with about a dozen wealthy Chicagoans in a hangar at Midway Airport. Pritzker recalls viewing three to six television commercials with negative messages linking Bob Dole to the policies of Newt Gingrich. The attendees were told that the commercials were going to be shown in smaller city markets throughout the United States because of their demonstrated success in promoting the Presidential reelection effort. The Vice President told the group that attendees would be contacted in the future for financial help in running the media campaign. When he called a few weeks later, the Vice President made mention of the television ads that Pritzker had viewed at the airport event and asked that she contribute so the ads could continue running.

2. Noah Liff

The Vice President telephoned Noah Liff, Chairman of the Board of Steinner Liff Iron and Metal Company of Nashville, Tennessee, on May 2, 1996.[23] Liff has known the Gore family for 30 to 40 years and recalls the conversation in May as a friendly discussion between two friends. The Vice President thanked Liff for his support. He also stated that he could use some help. Liff recalled that the Vice President may have used the following

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[22] Telephone records indicate that this call was made from a White House telephone at 5:05 p.m. Scheduling records and witness accounts detailed above indicate that this call was made from the Vice President's West Wing Office.

[23] Telephone records indicate that this call was made from a White House telephone at approximately noon. Again, scheduling records and witness accounts indicate that this call was made from the Vice President's West Wing Office.

phrase: "any help you can give us here, we would appreciate." Liff does not recall the Vice President asking for a specific amount of money. Nor did he discuss a purpose for requested funds. He does not recall any mention of the DNC media fund in the telephone conversation.

In response to the request, Liff told the Vice President that he had already given $1000 to the Clinton/Gore campaign. He added that he was not in a position to provide additional help at this time.

3. Eric Becker

The Vice President spoke to Eric Becker, Chairman of Sterling Capital in Baltimore, on February 9, 1996. After a preliminary discussion about a children's museum that Becker was developing, the Vice President turned the topic toward political fundraising with the phrase, "let me ask you about a political matter." He went on to explain that the DNC media fund was concentrating on areas scientifically chosen to target swing voters. According to the Vice President, "the news media acts like they don't know about it." Notes of the telephone conversation indicate that the Vice President told Becker that "soft money is permitted." Becker replied that he had just sent $50,000 to DNC Finance official Ari Swiller the day before.[24]

4. Jack Bendheim

The Vice President also spoke to Jack Bendheim, President and owner of Philips Brothers Chemical, on February 9, 1996. Notes of the call taken contemporaneously by David Strauss, who was sitting in with the Vice President, indicate that the Vice President told Bendheim that "soft & corporate ok." He also pointed out that "early is much better than late." Apparently in reply, Bendheim told the Vice President that he had already given $50,000 to the DNC in 1996.

5. Richard Jenrette

The Vice President called Richard Jenrette, Chairman and CEO of Equitable Life Insurance Company, from the West Wing Office to request funds for the DNC media campaign. The Vice President explained that the DNC was running ads and making progress and

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[24] Because their gifts were not deposited into DNC's federal account, Becker, Bendheim, and Jenrette were not interviewed during our thirty-day investigation. The substance of the Vice President's solicitation, however, was recorded by Deputy Chief of Staff David Strauss who took copious notes of the Vice President's side of the conversation as he sat in the West Wing Office on this one occasion.

that it was his job to raise $1 million dollars a week. He added that, as a result of the media funds, the DNC was making more "of our headway in areas where we've been on the air." The Vice President recommended a $25,000 gift sooner rather than later. Jenrette promised he would do something.[25]

c. DNC's Allocation of Funds

When contribution checks arrived at the DNC, fundraisers in the Finance Division would fill out the first two parts of a three-part check tracking form with donor information. The checks and accompanying forms would then be forwarded to an Operations Manager in the Division who would designate on the form the account into which the check would be deposited. The Operations Manager would also input data into their AS400 computer system. The checks and tracking forms would then be copied by Finance with the original being forwarded to the Accounting Division. Accounting would then deposit the checks into one of the DNC's accounts.

Theresa Stirks, a DNC Operations manager hired in April of 1996, recalls that the DNC did not have a policy in place for determining how to allocate contributions. She recalls that any contribution made payable to the DNC for the "media fund," however, would have been designated as "soft money" and deposited into a non-federal account. She recalls learning in May of 1996 that the Accounting Division had been "splitting" a portion of the designated "soft" contributions and depositing them into a federal account.

We do not yet have a clear understanding of the DNC practice of splitting donations, and have focussed our initial inquiry in other areas because we believe that this issue pertains primarily to the question of the Vice President's state of mind. More investigation of the DNC's practice of "splitting" contributions, its origins and how widely known it was, is needed.

d. The Vice President's Knowledge of DNC Allocation

A February 22, 1996 memorandum from Harold Ickes addressed to the President and the Vice President, while somewhat ambiguous, could be read to have informed the Vice President of the DNC allocation practice, if he read the memorandum. The Ickes memo, entitled "DNC media funds," details the "mix of money" required for the media buys for which the Vice President is soliciting funds. According to the memo, a combination of 34% federal, 31% non-federal corporate, and 35% non-federal

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[25] FEC records show that Jenrette gave the DNC $25,000 that was deposited into a non-federal account.

individual is needed for the ad campaign.[26] The Ickes memo also refers to an attached "Confidential Memorandum" from Bradley Marshall, DNC's Chief Financial Officer, to Ickes that appears to set forth the DNC's practice of allocating funds coming in automatically to hard money accounts if the donor had not already donated the maximum in hard money.

Marshall's two page memo, dated February 21, 1996, details a current shortage of federal funds. Within this context, Marshall makes the following observation:

> I understand that Finance has raised and is currently processing, $1.2 million. At this point, I do not know how it will breakdown between Federal vs Non-Federal and Corporate vs Individual.

In an apparent reference to this "breakdown," he adds the following information three paragraphs later:

> Definition of Federal and Non-Federal monies (from the DNC perspective):
>
> Federal money is the first $20,000 given by an individual, ($40,000 from a married couple). Any amount over this $20,000 amount from an individual is considered Non-Federal Individual. An individual can give an unlimited amount of Non-Federal Individual money.

Marshall concludes his memo with a discussion of labor, corporate, and federal PAC contributions.[27]

In a series of memos addressed to the President and Vice President, Ickes detailed the way in which the DNC media campaign was funded throughout this period. Like the Marshall memo forwarded to the President and Vice President in February, 1996, Ickes's other memos show that the ads were paid for during most of this period with a combination of approximately 60% soft and 40% hard money. Moreover, these memos and attached DNC budgetary documents indicate that from November, 1995, through January,

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[26] Joe Sandler has testified before the Senate Governmental Affairs Committee that the "mix" was determined by referring to FEC regulations.

[27] Marshall, when interviewed, remembered several meetings held in the White House where DNC budgetary issues were discussed. On two occasions the President and Vice President were present. The terms federal and non-federal dollars were used during the discussion and the participants noted how difficult it was to raise federal funds.

1996, the media fund suffered from a shortage of federal (hard) funds. According to Ickes and the language of the memos, this shortage was significant since the DNC's soft money could not be used for the ads if the hard money component was unavailable. Ickes states that he believes that had the Vice President read and understood the documents directed to him, he would have known that the DNC needed to raise Federal funds in order to keep the media fund afloat through much of this period.[28]

However, both Marvin Rosen and Peter Knight stated in interviews that during the time the Vice President made telephone fundraising calls from the White House -- November 1995 through early May 1996 -- it was their understanding that the DNC was primarily in need of individual non-federal, or soft money donations. It is unclear at this point whether the Vice President shared this understanding.[29]

C. Summary of Facts Developed During Initial Inquiry

To summarize, the initial inquiry has confirmed that the Vice President did make fundraising calls from his office in the West Wing of the White House. At least two of those calls directly resulted in donations to the DNC, of which a portion was deposited by the DNC into hard money accounts. We cannot at this point discount the possibility that the Vice President may have known of the DNC's need for hard money to support its media campaign and its practice of depositing portions of large donations into hard money accounts. Therefore it is possible that he made the calls with the intent that they would result in donations of hard money contributions to the DNC, leading to the question of whether the solicitation calls are within the scope of section 607. The issue of whether section 607 is potentially applicable to these facts is, as will be set out in more detail below, an extremely difficult question.

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[28] Ickes does not recall discussing any of the topics directly with the Vice President. He believes his memos would have been routed through the "staff secretary" to the Vice President's in-box. He does not know whether the Vice President read the memos.

[29] These statements by Rosen and Knight appear to be in tension with the contents of the memorandum discussed above. In the course of a preliminary investigation, we will attempt to reconcile these apparently conflicting accounts and ascertain the state of the Vice President's knowledge of the DNC's budgetary needs.

III. ANALYSIS OF 18 U.S.C. § 607

The Vice President's conduct, as described above, suggests a possible violation of 18 U.S.C. § 607, a statute which appears simple and straightforward on its face, but when closely analyzed in the context of these facts presents numerous extraordinarily complex legal issues. Furthermore, since there have been very few prosecutions under the statute, there is almost no case law illuminating the difficult issues presented.

First enacted as part of the Pendleton Civil Service Act in 1883, 18 U.S.C. § 607 today provides:

> (a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.
>
> (b) The prohibition in subsection (a) shall not apply to the receipt of contributions by persons on the staff of a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, provided, that such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any room, building, or other facility referred to in subsection (a), and provided that such contributions are transferred within seven days of receipt to a political committee within the meaning of section 302(a) of the Federal Election Campaign Act of 1971.

Thus, in order to prove a violation of section 607, the government must demonstrate that: (1) "any person" (2) solicited or received (3) any "contribution" within the meaning of the Federal Election Campaign Act of 1971 (FECA) (4) in any room or building occupied in the discharge of official duties (5) by any person mentioned in 18 U.S.C. § 603.[30]

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[30] Whether this statute is applicable to the Vice President as a general matter, and specifically to the solicitations he allegedly made from his White House office, present complex issues of statutory construction. We expect that we will refine the analysis that follows as more facts become known in the course of the preliminary investigation, assuming the Attorney General opens such an investigation.

A. Does the phrase "any person" include the Vice President for purposes of section 607?

1. The plain meaning of "any person" and the relevant legislative history

In interpreting statutes, courts first look to the plain meaning of the statutory language. "When ... the terms of a statute [are] unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.' In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" United States v. James, 478 U.S. 597, 606 (1986) (citations omitted); see also Garcia v. United States, 469 U.S. 70, 75 n.3 (1985) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous...."} (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring)).

The term "person" is not defined in section 607. However, this statute has been interpreted broadly to cover both government employees and private citizens. See United States v. Newton, 20 D.C. (9 Mackey) 226 (1891); see also United States v. Burleson, 127 F. Supp. 400, 401 (E.D. Tenn. 1954) (noting that a similarly worded predecessor to the current version of section 607 "prohibit{ed) solicitation or receipt by anybody of contributions in a Government building, or building occupied in whole or in part by Government employees, or persons compensated by money derived from the Treasury of the United States") (emphasis added).

In the absence of explicit statutory language to the contrary, courts interpreting other statutes using similar language have declined to give the term "person" a meaning narrower than its ordinary one. See, e.g., United States v. Nardone, 302 U.S. 379, 382-83 (1937) (criminal statute providing that "no person" shall intercept any wire communication and divulge or publish its contents to any person applies to federal agents who wiretapped telephone lines and later testified regarding the contents of intercepted communications in a court proceeding, even though Congress had recently declined to adopt legislation specifically outlawing wiretapping by federal investigators); LSI Computer Sys., Inc. v. United States Int'l Trade Comm'n, 832 F.2d 588, 589-90 (Fed. Cir. 1987) (interpreting the statutory language "{a]ny person adversely affected by a

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We have invited the Vice President's attorneys to provide us with any information and analysis they believe may be relevant to our inquiry. As of this writing they have not done so, but we expect to receive their views at some point during the preliminary investigation.

final determination of the Commission ... may appeal" to include nonparties to the administrative proceeding); Adhesives Research Inc. v. American Inks & Coatings Corp., 931 F. Supp. 1231, 1243 (M.D. Penn. 1996). This approach is consistent with the U.S. Code's catch-all provision with respect to the interpretation of the word "person": "In determining the meaning of any Act of Congress, unless the context indicates otherwise--the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Dictionary Act, 1 U.S.C. § 1.

Because the Vice President is a "person," as that term is commonly used, it can be argued that the plain meaning of section 607 compels the conclusion that the Vice President (as well as the President) may be prosecuted for violating that statute. The Office of Legal Counsel came to this conclusion in 1979, when asked to opine whether section 607's predecessor could apply to political activities undertaken at the White House by President Carter. See Memorandum for Philip Heymann, Assistant Attorney General, Criminal Division, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel (1979), at 4 [hereinafter, "OLC Opinion"] (prohibition against soliciting or receiving contributions in federal offices occupied in the discharge of official duties is "to be universally observed").

To the extent the statute can be considered ambiguous on this point, there is some additional evidence in the legislative history suggesting that Congress intended to make this prohibition applicable to literally all persons. See, e.g., 14 Cong. Rec. 622 (1882) (statement of Sen. Coke) (the provision would be "applicable to all persons"); id. at 636 (statement of Sen. Hawley) (the provision forbids "any person in the world to have anything to do with collecting or receiving any moneys for political purposes in any public building or ... office of the United States").

2. Arguments suggesting that the Vice President is not covered by the "any person" language in section 607.

It has been suggested that, notwithstanding section 607's broad "any person" language, the statute does not cover solicitations by the Vice President that would be illegal if made by another federal officer or employee (other than the President). See, e.g., Jack Quinn, The Law and Mr. Gore, N.Y. Times, Mar. 10, 1997, at A15. Proponents of this view suggest that Congress's explicit exemption of the President and Vice President from the non-criminal Hatch Act restrictions on political activities by federal employees means a similar exemption should be read into section 607. In addition, they argue that because Congress did not specifically refer to the

Vice President by name as being within the scope of section 607, separation of powers concerns require the statute to be interpreted to exclude him from its coverage. See id.

a. Hatch Act

In his New York Times op-ed piece, former White House Counsel Jack Quinn (who also served at one time as Vice President Gore's Chief of Staff) compares section 607 with the non-criminal Hatch Act, noting that the former does not expressly include or exclude the President and Vice President from its coverage, while the latter, "which limits the political activities of most Federal employees, expressly excludes the President and Vice President from its purview." Quinn, supra.[31] Quinn appears to be arguing that an exclusion of the President and Vice President similar to the one contained in the Hatch Act should be read into section 607.

The President and Vice President indeed have long been explicitly exempted from the definition of "employee" in the Hatch Act, the series of non-criminal provisions which prohibit certain political activities by federal "employees." See 5 U.S.C. § 7322(1). This exemption indicates a congressional recognition that the President and Vice President, as popularly elected leaders, need to be able to engage in more political activity than other public servants. However, the general exemption of the President and Vice President from the Hatch Act's restrictions can alternatively be viewed as providing further evidence of congressional intent to make section 607 applicable to the conduct of the President and Vice President. Inasmuch as Congress manifested through explicit statutory language an intent to exempt the President and Vice President

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[31] Quinn also writes that section 607 "was amended in 1993 so that, according to the Justice Department, its criminal sanctions are no broader than the civil sanctions in the Hatch Act." Id. Section 607 was not amended in 1993. The last substantive revision of section 607 occurred in 1990, when it was changed in substance to its present version. Moreover, we are unaware of anyone in the Department taking the position that section 607's criminal penalties, which include imprisonment, are "no broader" than the civil sanctions in the Hatch Act.

It is possible that Quinn meant to refer here to a measure in the Hatch Act Reform Amendments of 1993 which amended 18 U.S.C. §§ 602 and 603 to provide that those prohibitions "shall not apply to any activity of an employee . . . unless that activity is prohibited by section 7323 or 7324 of [the Hatch Act]." However, even if this is the provision to which Quinn meant to call attention, the Hatch Act Reform Amendments of 1993 did not similarly amend section 607.

from the Hatch Act's restrictions on political activity, Congress' failure in section 607 to provide similar exempting language is telling.

A considerably thornier issue is presented by a specific provision in the Hatch Act Reform Amendments of 1993, which expressly permits high-level employees[32] paid from appropriations for the Executive Office of the President (and by implication, the President and the Vice President[33]), to engage in "political activity ... in [a] room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof," provided certain requirements are met. See 5 U.S.C. § 7324. One might argue that political fundraising is by definition "political activity,"[34] and that therefore this recent amendment to the Hatch Act, which postdates the last substantive revision of section 607, implicitly repeals section 607 to the extent the latter may have covered solicitation or receipt of campaign contributions by the President or Vice President (or by the other federal employees exempted under section 7324).

Repeals by implication are, of course, disfavored, TVA v. Hill, 437 U.S. 153, 189 (1978), and "will not be found unless an intent to repeal is 'clear and manifest.'" United States v. Hansen, 772 F.2d 940, 944 (D.C. Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1045 (1986). This principle "carries special weight when [the court is] urged to find that a specific statute has been repealed by a more general one." United States v. United Continental Tuna Corp., 425 U.S. 164, 169 (1976). If the two statutory provisions in question are not in

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[32] The exemption is limited to those employees whose official duties and responsibilities "continue outside normal duty hours and while away from the normal duty post." 5 U.S.C. § 7324(b)(2)(A).

[33] However, since the President and Vice President are not "employees" within the definition of the Hatch Act, it could be argued that the Reform Amendments do not apply to them, and that therefore while their immediate subordinates may be exempt from the restrictions of section 607, they are not. As can be seen, the deeper one delves into the intricacies of section 607, the more confusing they become.

[34] Indeed, the Reform Amendments clearly regard fundraising as included within the scope of the phrase "political activity." Section 7323 generally permits federal employees to engage in "political activity," but then goes on to provide for several specific limitations on that permission; political fundraising is one of the limitations.

"irreconcilable conflict," the courts have refused to find repeal by implication. Matsushita Elec. Indus. Co., Ltd. v. Epstein, 116 S. Ct. 873, 881 (1996). As explained by the Sixth Circuit:

> A standard principle of statutory construction is that a later statute will not be held to have implicitly repealed an earlier statute unless there is a clear repugnancy between the two. A simple lack of harmony between the statutes will not suffice; when two statutes conflict to some degree they should be read together to give effect to each if that can be done without damage to their sense and purpose. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

Muller v. Luian, 928 F.2d 207, 211 (6th Cir. 1991) (citations omitted) (quoting Morton v. Mancari, 417 U.S. 535, 550-51 (1974)).

Given the stringent standard applicable to findings of implicit repeals offset against the seemingly explicit permission to engage in political activity granted by section 7324, it is difficult to predict whether a court would find repeal of section 607 by the Hatch Act Reform Amendments of 1993 as to high level employees of the Executive Office of the President. The Hatch Act now provides that the President, Vice President, and certain other federal employees may generally engage in "political activity" in rooms and buildings occupied in the discharge of official duties by an individual employed by or holding office in the Government of the United States. Read in light of this Hatch Act provision, the courts could find that section 607 should be read as merely placing one specific restriction upon the type of "political activity" in which the President, Vice President, and others may engage in federal office space -- that is, they may not solicit or receive "hard money" contributions.

When section 607 is read as an exception to section 7324, the two statutes still permit the President and Vice President and those working closely with them to discuss campaign strategy, draft campaign speeches, solicit votes (as well as "soft money" donations), and conduct many other sorts of political activities in their White House offices. The exception to this permissive regime reflected in section 607 can be viewed as a legislative judgment that the solicitation or receipt of "hard money" contributions in federal office space is to be treated differently from other forms of "political activity."

While not definitive, it is illuminating that the White House itself has read the two statutes in this way. In a 1995

memorandum sent to White House staff (including Office of the Vice President staff), White House counsel noted that the Hatch Act Reform Amendments of 1993 permitted most White House employees to "engage in political activity . . . while on duty . . . in a federal building," but in a section entitled "Limitations on Campaign Activities By White House Staff," stated:

> Campaign fundraising activities of any kind are prohibited in or from government buildings. In addition, federal employees are prohibited from soliciting or accepting campaign contributions. This means that fundraising events may not be held in the White House; also, no fundraising phone calls or mail may emanate from the White House or any other federal building.

Memorandum from Abner J. Mikva and Cheryl Mills (Apr. 27, 1995), at 1, 3-4. Although White House counsel did not cite section 607 as the source of this "limitation on campaign activities," it arguably can be inferred from the memorandum that White House counsel believed the Hatch Act Reform Amendments of 1993 did not implicitly repeal section 607, at least with respect to activities of the White House staff to whom the memorandum was directed.[35]

b. Separation of Powers Concerns

In his March 1997 op-ed piece, Jack Quinn cites the 1992 Supreme Court case of Franklin v. Massachusetts for the proposition that separation of powers concerns require a finding that section 607 is not applicable to the President because the statutory language does not specifically include him. Quinn, supra.[36]

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[35] This White House counsel memorandum was not addressed to the President or Vice President. During an interview of Abner Mikva conducted by agents assigned to the Campaign Financing Task Force, Mikva stated that the memorandum was deliberately not addressed to the President and Vice President. However, Mikva stated that he did not offer an opinion at the time on the issue of whether the President or Vice President could legally make fundraising telephone calls from their White House offices.

[36] Quinn writes that this proposition should also apply to the Vice President because, "[a]ccording to the Justice Department, the President and Vice President are interchangeable in this legal analysis." Quinn, supra. This point seemingly derives from a footnote contained in the OLC Opinion, wherein OLC stated that its analysis of section 607's predecessor "would apply to both the President and the Vice President." OLC Opinion

Franklin v. Massachusetts, 505 U.S. 788 (1992), involved a challenge under the Administrative Procedure Act (APA) to the calculation of the 1990 decennial census. The issue presented to the Supreme Court with respect to this claim was whether the President's transmittal to Congress of the Secretary of Commerce's tabulation of the census constituted "final agency action" sufficient to permit aggrieved parties the right to challenge the President's action in court. The resolution of this question hinged upon whether the President was an "agency" within the meaning of the APA. The Court held that the President was not an "agency" for purposes of the APA:

> The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia." 5 U.S.C. §§ 701(b)(1), 551(1). The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

Franklin, 505 U.S. at 800-01.

It does not necessarily follow from Franklin that the separation of powers doctrine requires section 607's "any person" language to be construed as not covering the President and Vice President. Another APA case is instructive on this point. In Portland Audubon Society v. Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993), the Ninth Circuit held that the President is subject to 5 U.S.C. § 557(d)(1)(A), the APA provision which prohibits an "interested person outside the agency" from having ex parte communications relevant to the merits of an administrative proceeding with a member of the applicable agency. In Portland Audubon Society, the government argued that Franklin supported its contention that the President is not subject to the APA's ban on ex parte communications. The Ninth Circuit distinguished Franklin with language that seems relevant to the issue presented with respect to Vice President Gore:

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at 1 n.1.

> Franklin considered the question of whether the President was an "agency" within the meaning of the APA. The Court determined he was not based on the textual silence of the statute and the Court's "respect for separation of powers."
>
> ....
>
> By contrast, the question here is whether the President, like all other government officials and everyone else, is a "person" (specifically an "interested person") within the meaning of 5 U.S.C. § 557(d)(1), which simply forbids improper influence in the deliberations of a quasi-judicial body. We hold that he is and that Congress intended that the President ... be subject to the APA's general prohibition of ex parte contacts.

984 F.2d at 1547. The Ninth Circuit's reasoning undercuts the argument that separation of powers concerns require a construction of section 607 which exempts the Vice President from the statute's coverage.[37] Cf. Clinton v. Jones, 117 S. Ct. 1636, 1648 (1997) ("As Madison explained, separation of powers does not mean that the branches 'ought to have no partial agency in, or no controul over the acts of each other.'") (quoting Federalist No. 47).

B. "Solicit or receive"

Section 607 does not define the words "solicit" and "receive."[38] The dictionary definition of "solicit" is "to make petition to: entreat ... to approach with a request or plea." Webster's New Collegiate Dictionary 1106 (1977). This definition seems to encompass the Vice President's alleged conduct in telephoning potential donors and asking them to contribute to the DNC.

Further guidance as to the meaning of the term "solicit" is found in regulations promulgated by the Office of Personnel Management (OPM) implementing the legislation regulating

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[37] We have specifically asked the Vice President's attorneys to provide us with their views concerning the effect of Portland Audubon Society on the argument that section 607 does not apply to the Vice President.

[38] No allegation has been made, nor have we discovered any evidence, that the Vice President "received" any contributions of "hard" or "soft" money in federal office space.

political activities of federal employees.[39] OPM defines "solicit" as "to request expressly of another person that he or she contribute something to a candidate, a campaign, a political party, or partisan political group." 5 U.S.C. § 734.101.[40]

As detailed above, there apparently is undisputed evidence that the Vice President "solicited" money for the DNC from various individuals during his White House fundraising telephone calls, within the plain meaning of that term and within the meaning of OPM's analogous regulatory definition.

C. "Contribution" within the meaning of the FECA

Section 301(8) of the FECA defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office" -- i.e., hard money. 2 U.S.C. § 431(8)(A)(i). Thus, if the Vice President solicited only nonfederal "soft money" donations during the telephone calls he placed from his White House office, he did not violate section 607.[41] While press commentary continues to

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[39] OPM has stated that it "does not view [18 U.S.C. §§ 600-607] as a source of authority for regulating the partisan political activities of Federal employees." 49 Fed. Reg. 17431, 17432 (1984). However, OPM has classified section 607 as a statute which is "related" to its regulations with respect to partisan political activity. See 5 C.F.R. § 734.702. As such, OPM's views on the meaning of the term "solicit" are instructive.

[40] The terms "solicit" and "solicitation" are not defined in the FECA or in the FECA's implementing regulations. However, one court has found that the phrase "soliciting contributions," as used in the FECA, 2 U.S.C. § 441b(b)(4)(D), "is not unconstitutionally vague since people 'of common intelligence' need not 'necessarily guess at its meaning and differ as to its application ....'" Bread Political Action Comm. v. FEC, 635 F.2d 621, 631 (7th Cir. 1980) (quoting Baggett v. Bullitt, 377 U.S. 360, 367 (1964)), rev'd on other grounds, 455 U.S. 577 (1982).

[41] Section 607's incorporation by reference of the FECA's definition of "contribution" raises yet another complex issue where, as here, there is information suggesting that donors were not told and did not anticipate that their contributions would be deposited into "hard money" accounts. Because the FECA defines a contribution in terms of the donor's intent to influence a federal election, it could be argued that a section 607 violation requires a meeting of the minds between the solicitor and the prospective donor. That is, if a donor does not intend that his or her gift will be used to influence federal elections, it may be that the solicitor's knowledge and intent that this will be

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suggest that this conclusion is subject to dispute, we see no basis for reaching any other conclusion under the law.

The evidence discovered to date indicates that, in at least two instances, the donations sent to the DNC by people who had been solicited by Vice President Gore were split between DNC hard money and soft money accounts. In addition, as detailed above, there is at least some evidence from which it can be inferred that the Vice President was familiar with the DNC practice of depositing the first $20,000 of a large donation into a hard money account in instances where the donor had not previously made any hard money contributions during the relevant calendar year. Further, in several instances the call sheets given to the Vice President indicated that the prospective donor had not made any contributions to the DNC in the relevant calendar year. At least two of those particular donors -- Robert Johnson and William Dockser -- wrote large checks to the DNC, which in fact were split between hard and soft money accounts.

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the result may not be enough to make out the "contribution" element of section 607.

A second possibility is that the requirement of donor intent might be relevant only to the "receiving" prong of section 607, if at all, and not to the "soliciting" prong. Once a donor has written a check with the intent that it be used for nonfederal purposes, the person who receives the check does not alter the donor's intent by depositing it into a federal account. While the donation, in that instance, undoubtedly will influence a federal election, it nonetheless will not have been "made . . . for the purpose of influencing a federal election." 2 U.S.C. § 431(8)(A)(i) (emphasis added). Soliciting, however, involves asking a prospective donor to do something, not reacting to something a donor in fact has already done. An offense under the solicitation prong should theoretically be complete once the solicitor asks for money, regardless of whether the donor agrees to provide it. Thus, it is difficult to imagine that Congress intended to make a donor's actual knowledge or intent an element of the solicitation offense under section 607.

On the other hand, the plain language of the definition of "contribution," when incorporated into the operative language of section 607 does appear to impose a double level of "intent." Thus, a third possible construction is that the statute requires that the solicitor intend to solicit donations that the donor will intend to influence a federal election. However, if, through misunderstanding or lack of communication, the donor lacks that intent, or if the donor refuses to make a hard money contribution, it should not defeat the potential application of section 607.

However, we also have received some testimonial and documentary evidence which tends to negate the inference that the Vice President may have known that portions of the donations he solicited would be deposited into hard money accounts.

At this point in the investigation, where we are not permitted to take into account the Vice President's state of mind, we believe the fact that portions of at least two donations solicited by the Vice President were deposited into hard money accounts constitutes sufficient evidence to warrant further investigation during a ninety-day investigation.

D. "In any room or building occupied in the discharge of official duties"

To violate section 607, a person must solicit or receive a contribution "in any room or building occupied in the discharge of official duties" by a person mentioned in 18 U.S.C. § 603.[42] It appears beyond dispute that the Vice President's office is a "room or building occupied in the discharge of official duties;" indeed, this may be the only legal issue presented by this matter that is beyond dispute.[43]

However, perhaps the most difficult issue presented under section 607 is whether, in order to constitute a violation of section 607, the person solicited must be physically present in the federal room or building in question while the solicitation

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[42] The questions of whether the Vice President is a person mentioned in section 603 and whether the target of the solicitation must be a person mentioned in section 603 are addressed in the next part of this memorandum.

[43] If the Vice President had made the telephone calls in question from his official residence, we would conclude that the solicitation did not take place in a "room or building occupied in the discharge of official duties." See OLC Opinion at 17-18:

> If an area is specifically designated to serve at all times purely as a private residence . . . it can hardly be said to be occupied "in the discharge of official duties." Instead, it represents a haven . . . . Areas within the discrete private residence area included in the White House mansion, although not physically detached from areas formally given over to official office space or to areas used for ceremonial functions, may therefore reasonably be seen to fall outside the reach of the statute.

However, there is no evidence that any of the telephone calls in question were made anywhere but in the Vice President's office.

is occurring. The case which is most relevant to the analysis of this question is United States v. Thayer, 209 U.S. 39 (1908), one of the very few reported cases involving a prosecution under section 607, and provided as an attachment to this memorandum because of its importance to our decision in this case.

Thayer involved a prosecution under a prior version of section 607 of a private individual who mailed contribution solicitations to federal employees working in a federal building. The defendant argued that the act of "solicitation" was complete at the time he took his last step in furtherance of the goal, that is, when he put the solicitation letters in the mail; therefore, he argued, the element of a solicitation in a room or building occupied in the discharge of official duties could not be established. The Supreme Court rejected this contention:

> We can see no distinction between personally delivering the letter and sending it by a servant of the writer. If the solicitation is in the building the statute does not require personal presence, so that the question is narrowed to whether the solicitation alleged took place in the building or outside.
>
> The solicitation was made at some time, somewhere. The time determines the place. It was not complete when the letter was dropped into the post. If the letter had miscarried or had been burned, the defendant would not have accomplished a solicitation. . . . [U]ntil after the letter had entered the building the offense was not complete, but, when it had been read, the case was not affected by the nature of the intended means by which it was put into the hands of the person addressed. . . .
>
> .... [T]he defendant ... did not solicit until his letter was actually received in the building, he did solicit when it was received and read there, and the solicitation was in the place where the letter was received.

209 U.S. at 43-44 (emphasis added).

In his March 1997 op-ed piece, Quinn argues that, "[a]pplying the reasoning in Thayer to the Vice President, his solicitation was made not in the place where the call was made, but where it was received, which was outside of Federal buildings." Quinn, supra. Quinn thus is arguing that a violation of section 607 occurs only if the person being solicited is located in the federal room or building in question. It has also been reported that the Senate Ethics Manual gives the

same reading to Thayer,[44] and expresses the view that Senators may make fundraising calls from their offices. In addition, a recent column by law professor Charles Tiefer, who served in the Senate and House counsels' offices from 1979 to 1995, states that during his tenure as congressional counsel, he consistently advised Members that such calls were not a violation of law. Charles Tiefer, Gore's Phone Calls: Already Cleared, Los Angeles Times, September 23, 1997, at B7.

There clearly is a strong argument to be made that section 607 does not apply to the Vice President's calls, based on Thayer's seemingly unequivocal statement that a solicitation occurs where it is received, and is thus only applicable to solicitations received inside the federal workspace. This argument is further reinforced by the legislative history, discussed in more detail below, which makes it clear that the principal purpose of the Pendleton Act was to protect federal employees from shakedowns for political contributions.

Nevertheless there is substantial room to dispute this conclusion, based on the specific facts of Thayer and an argument that so broad a reading of its statement about where a solicitation occurs takes the statement out of context. It should be kept in mind that Thayer involved facts that are the reverse of those in issue here; there was a solicitation originating outside the federal workspace directed inside. Thayer's holding is that the statute reaches such solicitations; it nowhere explicitly states that section 607 does not reach the reverse, wherein a solicitation originates inside the workspace, but is directed and received outside.

Thayer could be further limited by the fact that the solicitation in that case involved a message sent through the mail, and thus involved a separation not only of space but of time between the "speaking" and the "hearing" of the solicitation; the opinion's focus on the time of the offense suggests that this was important to the Court. Thus, Thayer arguably is limited to the proposition that, when a solicitation is made by letter, the offense is only complete when the sender receives the letter, and the solicitation is to be viewed as occurring in the room where that happens.[45] Given this reading,

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[44] We are seeking to obtain a copy of the Ethics Manual and other relevant analyses from the congressional Ethics Committees, which are likely to have had frequent opportunity to consider the issue, given the importance of fundraising to every Member of Congress.

[45] In a 1978 letter, then-Assistant Attorney General Patricia M. Wald implicitly called into question the continuing viability of Thayer to the extent that decision can be viewed as holding

the logic of Thayer may be inapplicable to a solicitation made in the course of a live telephone conversation. In a telephonic scenario, the solicitation is made and received simultaneously. Thus, the offense may be viewed as immediately complete inasmuch as there is no chance that the solicitation will be "miscarried." Under this theory, if the solicitor is in a federal office at the time he participates in such a telephone conversation, he or she would violate the statute.[46]

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that a person who prepares solicitation letters in a federal office and subsequently sends them to private citizens does not violate section 607:

> [O]ur view [is] that [section 607] would reach the use of Federal office space, including the offices of a United States Senator, to mount direct mail solicitation of campaign contributions sent exclusively to private addresses....
> ....
> Although ... there has to date not been any reported judicial decision specifically holding that [section 607] applies to the use of Federal office space to dispatch political solicitations by mail, we believe that our construction of this statute is supported by its text and purpose, and would be upheld judicially should the issue ever be litigated. In this regard, we do not believe that the way in which political contributions are solicited today gives rise to a situation where the act of "solicitation" occurs exclusively at the place where a mailed request for funds is received. In the context of a statute such as Section [607] which turns on the Federal character of the location where a "solicitation" takes place, we feel that the preparation of a direct mail campaign from a Federal office would also constitute a "solicitation" within its scope.

Letter from Assistant Attorney General Patricia M. Wald, Office of Legislative Affairs, U.S. Department of Justice, to Senator Mark O. Hatfield, Feb. 24, 1978, at 5-6 [hereinafter, "Hatfield Letter"].

[46] In its recent analysis of section 607, the Congressional Research Service recognizes that this interpretation of Thayer "might have the anomaly of prohibiting telephone solicitations from federal buildings where one reaches the party at the other end, but not ... where a message is left on an answering machine to be received at a later time." Congressional Research Service, Memorandum (Mar. 6, 1997), at 7 n.26 [hereinafter, "CRS Analysis"]. Other anomalies would also be created; for instance, it would appear that e-mail messages would not violate the law,

Although there apparently has never been a prosecution under section 607 in a case involving a solicitation directed outside the federal workspace,[47] we have found no indication in our files that a section 607 case has ever been declined on the legal ground that the statute is not intended to cover solicitations

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at least unless the receiving party were on-line and read the message as it was sent.

We suggest that whatever the importance of time and space to the Supreme Court of 1908, Thayer should not be read so as to mandate a reading of a criminal statute that would create such absurd results. It is our view that either Thayer means that section 607 is only violated when a solicitation is directed to an individual inside the federal workspace, or that it says only that such a solicitation is covered by the statute regardless of the location of the solicitor, but expresses no view as to the opposite. Which is the case, we concede, is unclear.

[47] According to the CRS Analysis,

> There is no indication from reported cases of Department of Justice material on the statute that there has ever been enforcement of the statute, in the more than 100 years of its existence, in such a manner as to suggest an interpretation of the law as applying to solicitations made by mail or telephone from a federal building to someone not in a federal building.

Id., at 7; see also Hatfield Letter at 6.

A 1995 news article involving Senator Phil Gramm's fund-raising efforts in connection with his presidential bid suggests that he had made such solicitations:

> The senator himself figures he spends two hours a day dialing for cash from his Washington home, his car and his mobile phone; he says he can even place calls from his Senate office.
>
> .... "I do it wherever I am," he says. "I can use a credit card .... As long as I pay for the calls, I can make calls wherever I want to call."

Harwood, Cash Machine: Candidate Phil Gramm Rarely Skips a Chance to Raise More Money, Wall Street Journal, Feb. 17, 1995, at A1. The Public Integrity Section did not open a matter on the basis of Senator Gramm's implicit admission, deferring instead to the Senate Ethics Committee, which reportedly declined to take action against Gramm because he later denied that he had made such calls.

made from federal property to prospective donors not on federal property. In fact, as noted above, the Department arguably has articulated the view that section 607 may be applied to such situations. See note 43, supra (quoting Hatfield Letter).[48]

We view this issue as difficult and unsettled, and believe that further exploration of the legal issue is required. In light of the extremely short period of time available during the initial inquiry, it is our view that this question should be further researched and analyzed in the course of a preliminary investigation.

E. "By any person mentioned in section 603"

In order for section 607 to be violated, the federal office or building in question must be occupied in the discharge of official duties "by any person mentioned in section 603" (or in any navy yard, fort, or arsenal). Section 603, which also was first enacted as part of the Pendleton Civil Service Act in 1883, provides in relevant part:

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[48] In its analysis, the Congressional Research Service states:

> The Department of Justice has appeared to indicate that, as a practical matter concerning prosecution and enforcement of the statute, it looks upon the law in its traditional and historic framework as relating to activities in federal buildings directed at federal personnel.

CRS Analysis at 7. It then quotes the portion of our election law manual which states that "[p]rosecutable violations of section 607 may arise from solicitations that can be characterized as 'shakedowns' of federal personnel." U.S. Department of Justice, Federal Prosecution of Election Offenses 68 (5th ed. Jan. 1995).

To the extent this implies a practice of not prosecuting technical 607 violations where the solicitation in question is received by prospective donors not present on federal property, it is unclear whether such a practice would constitute an "established polic[y] of the Department of Justice with respect to the conduct of criminal investigations" with which "the Attorney General shall comply" in determining "whether reasonable grounds exist to warrant further investigation." 28 U.S.C. § 592(c)(1). The Appellate Section of the Criminal Division is in the process of analyzing this question, which becomes relevant only once a preliminary investigation is triggered.

> (a) It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for service from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

Two issues are raised in the present context. First, is the Vice President a "person mentioned in section 603," and second, should section 607 be read to require that the target of the solicitation be a "person mentioned in section 603?"

1. **Is the Vice President a "person mentioned in 18 U.S.C. § 603?"**

The language contained in section 603 can be interpreted in several ways. On the one hand, the Vice President could be thought of as an "officer ... of the United States" for purposes of making or receiving contributions prohibited by section 603. On the other hand, perhaps Congress used the "officer ... of the United States" language in "a narrow constitutional sense to denominate persons appointed by the President or head of departments ... and not elected officers such as the ... Vice President." OLC Opinion at 7. See generally, United States v. Germaine, 99 U.S. 508 (1878).

The 1883 floor debates on the provision that is now codified at section 603 contain conflicting indications as to whether Congress intended to include the President and Vice President in the statute's coverage as "officers" of the United States. For example, Senator Edmunds, in the course of reporting a Judiciary Committee bill upon which section 603's predecessor ultimately was modeled, stated:

> I am instructed by the Committee to report an original bill which I send to the Chair to be placed upon the Calendar. And I am authorized by the Committee to make this statement that in the draft of the bill it is not the purpose of the Committee to create any implication as to the right of the legislative power to restrain the President in regard to the matters in question.

14 Cong. Rec. 600 (1882) (statement of Sen. Edmunds), quoted in OLC Opinion at 9. Analyzing section 603's predecessor,[49] OLC noted that Senator Edmunds' "oblique statement could signify that Congress had no intent to bring the President within the scope of [section 603]." OLC Opinion at 9.[50] On the other hand, as OLC recognized:

> Congress was particularly sensitive to the important constitutional issue raised by any attempt to limit the President's discretion with regard to the removal of Presidential appointees as would have been the case under § 3 of the bill, the prohibition on removal now found in 18 U.S.C. § 606. Seen in this light, Edmunds' statement has completely contrary implications, suggesting that a committee disclaimer was necessary since the President was indeed regarded as an Executive officer of the United States whose politically-motivated discharge of a direct subordinate was seen to fall within the scope of the bill.

OLC Opinion at 9-10 (footnote omitted). Moreover, OLC found "critical evidence suggesting that the President falls within the class of persons governed" by section 607, OLC Opinion at 10, in a subsequent statement by Senator Hawley regarding section 606's predecessor, which also applied to "officer[s] or employe[es] of the United States":

> [T]his clause, "by reason of any vote such officer or employe[e] has given or withheld, or may purpose to give or withhold, at any political election," has been stricken out. On a moment's thought it was seen that came in conflict with what is universally admitted to be the right of a Chief Executive to make appointments in a certain branch of controlling offices in accordance with his own political faith. That he has a right to do, and he could not conduct the Government

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[49] In 1979, the relevant provision was codified at 18 U.S.C. § 602, and prohibited slightly different conduct than does current section 603. However, for purposes of the present analysis, the universe of persons "mentioned" in the current version of section 603 is basically equivalent to the 1979 version analyzed by OLC.

[50] To the extent this concern regarding infringement of the President's removal power evidences an intent not to include the President within the scope of the Pendleton Civil Service Act's several provisions, an argument could be made that in this instance the President and Vice President should be treated differently because the Vice President has no similar removal power under the Constitution.

> without it . . . . That would have forbidden, as the draft originally stood by an oversight, the President of the United States from changing his attorney-general from one party to another, or changing a foreign minister, or perhaps even changing a cabinet minister. So that part is withdrawn, and it now only forbids employe[e]s collecting from each other, and forbids persons going into the Government rooms and offices and there collecting money for political purposes. That is clearly a thing we have a right to do. Then it forbids degrading or discharging a man for giving or not giving money. All three of these things are clearly within our legitimate function.

14 Cong. Rec. 522 (1882) (statement of Sen. Hawley), quoted in OLC Opinion at 10-11. OLC concluded from this passage that

> [i]t is clear . . . [Senator Hawley] intended the President to be included among the "officers" governed by the bill. While narrowing the scope of § 606 to limit its sweeping bar on removal for what in essence would simply be political affiliation as evidenced by an officer's past voting record, Hawley left untouched the prohibition on removal for failure to provide political support in the form of monetary contributions. He thus in large measure eliminated the kind of constitutional concern which may have been the basis for the Judiciary Committee's earlier disclaimer.

OLC Opinion at 11. OLC concluded that, while "[a] number of arguments based on the language of [section 603] and certain statements contained in the legislative history of the Pendleton Act might be cited in support of the view that the President does not come within the class of persons mentioned in that provision," the "better view . . . is that the President does, indeed, fall within the terms of [section 603]." OLC Opinion at 13. Such a conclusion presumably would apply to the Vice President as well. See OLC Opinion at 1 n.1.

OLC did not analyze additional language in section 603 which arguably leads to the conclusion that the Vice President is "mentioned" in that statute, namely the phrase "person receiving any salary or compensation for service from money derived from the Treasury of the United States." 18 U.S.C. § 603. The plain language of this provision arguably would include both the President and the Vice President.

However, in prohibiting contributions by persons receiving any salary or compensation from the Treasury to any "such . . . person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress," 18 U.S.C. § 603 (emphasis added), Congress arguably evidenced an intent that

members of Congress are to be viewed as distinct from "person[s] receiving any salary or compensation for service from money derived from the Treasury of the United States." Since Members of Congress, like the President and Vice President, receive payment for service from money derived from the Treasury, the argument could be made that the President and Vice President also should be viewed as distinct from other "person[s] receiving any salary or compensation" from the Treasury, and that Congress's failure to specifically include the President and Vice President in section 603 means that they are not "mentioned" in that statute.[51]

One problem with this argument, however, is that it could lead to anomalous results, as illustrated by the following hypothetical. If the Vice President is not a "person mentioned in section 603," and he calls his secretary into his office and asks him or her to make a contribution to the President and Vice President's reelection campaign, arguably no violation of section 607 occurs because the solicitation has not been made in an office occupied in the discharge of official duties by a person mentioned in section 603. However, if the Vice President (assuming for the moment that he is a "person" within the meaning of section 607) makes the same request in his secretary's office, he violates section 607 because his secretary is a person mentioned in section 603. It is worth noting, of course, that anomalous results seem to be inevitable in attempting to parse the meaning of section 607.

2. Does the target of the solicitation have to be a "person mentioned in section 603" for the statute to be violated?

It has been suggested that section 607 is aimed at

> protect[ing] the integrity of Government employees who work in Federal buildings from coercive solicitations by their employer. This, no doubt, is why the Justice Department has not prosecuted Senator Phil Gramm, the Texas Republican who admitted more than a year ago that he had made telephone solicitations from his Senate office. Mr. Gore and Mr. Gramm both solicited plain citizens, not Government employees.

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[51] But see Hatfield Letter at 6 (noting that section 603's predecessor "encompasses all officers or employees of the United States who are paid from the United States Treasury, including Members of Congress and employees of the Legislative Branch").

Quinn, supra. In essence, Quinn is necessarily arguing that the statutory language should be construed to require that the target of the solicitation be a "person mentioned in section 603."[52]

Quinn's argument derives from the recognition that Congress passed the Pendleton reforms in response to the "problem of 'political assessments' -- the demand for and collection from government employees of a percentage of their salary to support the reigning political party and its campaign activities." OLC Opinion at 7. However, while political assessments may have been the impetus for the legislation, Congress did not expressly limit section 607's coverage to solicitations of federal employees. As OLC noted in 1979,

> the wider sweep of the provision, banning all solicitations on federal premises, including those involving two private citizens, could be seen as an attempt by Congress to assure the integrity of government property. It might also be explained as an [effort] to remove even indirect pressure on government employees resulting from the presence of solicitors on the premises.

OLC Opinion at 21. Moreover, as OLC further noted, section 607's "unqualified statutory language . . . is in marked contrast to [section 607]'s companion provisions, . . . which expressly require that the person solicited be a federal employee. It is therefore reasonable to assume that the choice not similarly to limit [section 607] was a deliberate one." OLC Opinion at 21-22.

In addition, it should be noted that in 1948 Congress amended section 607's predecessor in a way that narrowed its scope in this regard precisely to that which Quinn and others claim it has today:

> Whoever, in any room or building occupied in the discharge of official duties by any person mentioned in section 602 [now section 603] of this title, or in any navy yard, fort, or arsenal, solicits or receives any contribution of money or other thing of value for any political purpose from any such person, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

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[52] In the context presented by the allegations relating to Vice President Gore, this question is closely related to the question of whether the person solicited must be physically present in a federal room or building while the solicitation is occurring. See part D supra.

62 Stat. 722 (emphasis added).[53]

However, the language underscored above was deleted just three years later with no substantive explanation. See S. Rep. No. 1020, 82d Cong., 1st Sess. (1951), reprinted in 1951 U.S.C.C.A.N. 2578, 2584. As OLC noted in 1979:

> Congress's determination that repeal of the 1948 amendment was necessary suggests that the 1948 change had either erroneously gone too far in its attempt to clarify existing law by narrowing the class of potential solicitation targets, or that Congress intended to broaden the application of [section 607] to include more than those persons mentioned in [section 603's predecessor]. In either event, this recent history of congressional amendment can be said to confirm the view that solicitations of private citizens fall within the scope of [section 607].

OLC Opinion at 22. Ultimately, OLC did not take a position in its 1979 analysis with respect to this question.[54]

F. Summary of Legal Analysis

As set out above, there are numerous extremely difficult legal issues that arise under section 607. Several of these mandate further research and analysis. In particular, we are troubled by the legal issue of whether section 607 reaches solicitations that are received outside the federal workplace.

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[53] Although section 607 in 1948 for the first time explicitly limited its coverage to solicitations of persons mentioned in section 603's predecessor, the legislative history of the 1948 amendment indicates that the revision was intended merely "to make it clear that the section [would] not embrace State employees in its provisions [notwithstanding that] [s]ome Federal agencies are located in State buildings occupied by State employees." H.R. Rep. No. 304, 80th Cong., 1st Sess. A51 (1947).

[54] However, OLC noted that, in 1974, the Watergate Special Prosecution Force argued that solicitations of private persons do not violate the statute, and that the Criminal Division then took the opposite view. OLC Opinion at 22. In 1977, Assistant Attorney General Wald adopted the Criminal Division's position on this issue in a letter to Senator Cannon: "Since this statute's purpose is to protect the integrity of Federal office space, the employment status of the actual solicitee and solicitor are not material." Letter from Assistant Attorney General Patricia M. Wald, Office of Legislative Affairs, U.S. Department of Justice, to Senator Howard W. Cannon, Oct. 21, 1977, at 4.

We are seeking the views of the Appellate Section of the Criminal Division to assist us in reaching conclusions on these questions.

IV. CONCLUSION

As discussed above, we have concluded that the facts available to us constitute sufficiently specific and credible evidence to warrant further investigation. This in turn satisfies the threshold standard under the Independent Counsel Act to trigger a preliminary investigation. Therefore, it is our recommendation that the Attorney General commence a preliminary investigation into the allegations involving Vice President Gore, and that the Attorney General so notify the Special Division of the Court of Appeals.

U. S. Department of Justice

Washington, D.C. 20530

October 2, 1997

MEMORANDUM

TO: Mark M Richard
Acting Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Position of the Office of Legal Counsel on Legal Issues Relevant to the Independent Counsel Matter Involving Vice President Gore

Criminal Division attorneys conferred with attorneys of the Office of Legal Counsel (OLC) on October 1, 1997, to obtain OLC's views regarding our memorandum dated September 29, 1997, which analyzes 18 U.S.C. § 607 as applied to Vice President Gore's alleged conduct in making fund-raising telephone calls from his White House office.

The OLC attorneys made clear at the outset that they have only had a few days to think about the issues presented in our memorandum and that they have not reached a consensus among themselves on most of the relevant issues. Thus, the OLC attorneys indicated that they were in a position to share their individual thoughts and concerns with us but not to articulate a formal OLC position as to the various relevant issues. The following describes the OLC attorneys' major concerns and clarifies our views on these issues.

Proof of a "Hard Money" Solicitation

The OLC attorneys expressed concern that our memorandum implies a solicitation of a "hard money" contribution by Vice President Gore could be proved entirely by the fact that portions of at least two checks were deposited by the Democratic National Committee (DNC) into a hard money account.

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EXHIBIT 7

We agree that a conviction could not be obtained under section 607 merely by establishing that the Vice President asked donors to send checks to the DNC and that portions of those checks subsequently were deposited into hard money accounts. We did not mean to imply anything to the contrary in our memorandum. The fact that portions of checks the DNC received from the Vice President's solicitees were deposited into hard money accounts is neither necessary, nor by itself sufficient, to prove that the Vice President violated section 607. However, this fact, when combined with the facts known prior to the publication of the September 3 Washington Post story, led to the conclusion that the Department had received sufficient information to warrant further inquiry into whether the Vice President may have violated section 607.

In the course of our thirty-day initial inquiry into this allegation, we have discovered evidence from which it can be inferred that the Vice President may have known at the time he made his fund-raising telephone calls that the DNC needed hard money to keep its message on the airwaves. See Memorandum at 15-16. In addition, one donor, Robert Johnson, recalls that in the course of their brief telephone conversation during which Vice President Gore asked him to donate $30,000 to the DNC, the Vice President spoke of facing a tough election and asked him to help in getting out the Democrats' message. See Memorandum at 10. Moreover, investigation has verified that portions of at least two donations resulting from the Vice President's solicitations -- including Mr. Johnson's donation -- in fact were deposited into DNC hard money accounts.

While the above evidence by itself would in our view be insufficient to secure a conviction of Vice President Gore under section 607, we are not deciding whether to indict; we are merely recommending whether further investigation is warranted. The evidence described above supports an inference -- weak as it is -- that the Vice President may have solicited contributions to benefit federal candidates. This inference leads us to conclude that the information available to the Department at the present time is sufficiently specific and credible as to warrant the opening of a preliminary investigation. In this preliminary investigation, we will continue to gather facts relevant to the determination of whether the Vice President, while in his White House Office, may have asked any individual to make a hard money contribution to the DNC.

Constitutional Considerations and the 1979 OLC Opinion

The OLC attorneys expressed concern that, similar to the 1979 OLC Opinion, our memorandum does not analyze whether application of section 607 to the President would interfere with his constitutional prerogatives.

Our analysis of the question whether the Vice President (as well as the President) qualifies as "any person" under section 607 relies, in part, on a statement in OLC's 1979 opinion that "the prohibition in [section 607] is to be universally observed." See Memorandum at 19 (quoting OLC Opinion at 4). The present OLC attorneys noted that this statement is dictum, given that OLC concluded in 1979 that section 607's predecessor did not apply to President Carter's conduct because the meeting in question occurred in a White House room not "occupied in the discharge of official duties."

We understand that, within the next ten days, OLC will explore in more depth whether section 607 can constitutionally be applied to the President and the Vice President. The OLC attorneys indicated that the analysis could differ with respect to the President and the Vice President, inasmuch as the Vice President has fewer constitutionally committed functions than the President.

United States v. Thayer

Several OLC attorneys expressed concern that our memorandum gives too much weight to United States v. Thayer to the extent it suggests that Thayer may "mean[] that section 607 is only violated when a solicitation is directed to an individual inside the federal workspace." Memorandum at 32 n.46.

We recognize in our memorandum that Thayer "involved facts that are the reverse of those in issue here." Memorandum at 30. However, we continue to believe it possible -- indeed likely -- that a court analyzing section 607 would afford Thayer considerable weight in deciding whether a fund-raising telephone call originating inside a federal office and directed to a person not located on federal property would be considered a solicitation "in" a federal office.

The OLC attorneys suggested that further research be done with respect to other statutes banning certain forms of "solicitation" to determine where a telephonic solicitation is considered to "occur." We agree that this would be helpful. The Appellate Section of the Criminal Division is in the process of analyzing this issue.

Whether a Case Against the Vice President Would Be Prosecutable Given the Complex Legal Issues Presented by the Analysis of Section 607

The OLC attorneys suggested that, in light of the numerous complexities presented by our analysis of the elements of section 607, we should additionally consider whether a prosecution of the

Vice President could survive a motion to dismiss on due process or other grounds.[1]

Our role in the initial thirty-day period is to determine whether we have specific and credible information suggesting that the elements of a section 607 violation may have been met. Our understanding of the Independent Counsel Act is that, if the answer to this question is in the affirmative, the Attorney General should open a preliminary investigation under the Act, unless it is otherwise apparent that the Vice President has an absolute defense to prosecution, such as a valid claim that the statute of limitations has run. It is not clear to us at the present time whether the due process concerns inherent in a prosecution of the Vice President under section 607, if any, are serious enough to rise to the level of providing the Vice President with such an absolute defense to prosecution.

As noted in footnote 48 of our memorandum, the Appellate Section of the Criminal Division will consider in connection with a preliminary investigation whether the Department has an established policy not to prosecute technical 607 violations where the solicitation in question is received by prospective donors not present on federal property. We would welcome OLC's input on this question in the course of a preliminary investigation.

The Conversion Allegation

In light of the Independent Counsel Act's provision that an established policy of the Department may be taken into account in the context of a preliminary investigation, OLC questioned whether it was appropriate for us to state at this time that we do not intend to pursue further the section 641 allegation with respect to Vice President Gore because "[f]ederal prosecution of such a small conversion would be contrary to established Departmental policy." Memorandum at 2 n.1.

We agree that it would be premature for the Attorney General to formally find that further investigation of the conversion allegation is precluded by an established Departmental policy. Footnote one of the Memorandum was intended to explain why we do not plan to further investigate the conversion allegation in the course of a preliminary investigation.

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[1] In this regard, Martin Lederman of OLC noted that the portion of our election law manual which states that "[p]rosecutable violations of section 607 may arise from solicitations that can be characterized as 'shakedowns' of federal personnel," U.S. Department of Justice, Federal Prosecution of Election Offenses 68 (6th ed. Jan. 1995), may imply a belief that a prosecution in another situation, such as that presented here, would not survive a due process challenge.

DOJ-VP-00116

Memorandum

Subject	Date
Consultation with Public Integrity	October 2, 1997

To	From
Lee J. Radek Chief Public Integrity Section Criminal Division	Dawn Johnsen Acting Assistant Attorney General Office of Legal Counsel

We have received a copy of the memorandum of today's date from you to Mark Richard on the subject "Position of the Office of Legal Counsel on Legal Issues Relevant to the Independent Counsel Matter Involving Vice President Gore." As I have already expressed to you, we have several serious concerns about this memorandum, which I will briefly describe below.

First, OLC lawyers participated in the meeting in order to provide background information and ideas that might be helpful to your office in its work. We expressly noted that we had taken no positions with respect to any of the issues that might be discussed at the meeting. Despite the disclaimer in the memo's second paragraph, both the title of the memo and the subsequent discussion (and, indeed, the existence of the memo itself) suggest that OLC stated some positions to which your office needed to respond in writing. Such a suggestion is inconsistent with both OLC's intention and the comments actually communicated in the meeting. We made clear at the beginning of the meeting that it was to be a brainstorming session in which we could discuss issues freely without taking any positions, formal or informal. Your memo unfortunately leaves a different, and incorrect, impression.

Second, to the extent that the memorandum attempts to report remarks made by OLC lawyers at the meeting, it does so incorrectly and incompletely. Thus, not only did the memorandum leave the mistaken impression that "OLC positions" were expressed, it also mischaracterized the comments that individual lawyers offered in during the meeting. Given the freewheeling and unstructured exchange of ideas that took place, it is not surprising that many comments were inaccurately reported, and we certainly do not mean to suggest that the inaccuracies were in any way intentional, but it further underscores the inappropriateness of the memorandum given the nature of the meeting it tries to describe.

Finally, on a positive note, we are more than willing to continue a dialogue with you and your lawyers on these complicated issues. We think that constructive cooperation is essential in a

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case like this one. We trust, however, that our participation will not again be characterized as it was in today's memo.

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Mark M Richard
Acting Assistant Attorney General

SUBJECT: Allegations Concerning President of the United States William Jefferson Clinton Under the Independent Counsel Act.

PURPOSE: To recommend that the Attorney General initiate a preliminary investigation into whether President of the United States William Jefferson Clinton violated federal criminal law, 18 U.S.C. § 607, in soliciting contributions to the Democratic National Committee from his office in the White House.

TIMETABLE: The Attorney General must decide by October 15, 1997, if a preliminary investigation is to be initiated.

SYNOPSIS: Although we are unable to conclude that the information we have constitutes specific and credible evidence that the President may have violated section 607, we believe that at this time further investigation of the allegation is warranted. We accordingly recommend that the Attorney General initiate a preliminary investigation in this matter and so notify the Special Division of the Court of Appeals.

DISCUSSION: The Public Integrity Section was asked to conduct this 30-day inquiry following a published account of testimony given before the Senate Committee on Governmental Affairs by former White House Deputy Chief of Staff Harold M. Ickes. This article stated that Ickes had testified that on occasion the President had made fund-raising calls on behalf of the Democratic National Committee

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EXHIBIT 8

(DNC), and implied that those calls might have been placed from the Oval Office. This inquiry was opened because it thus appeared that a source in a position to have knowledge of the facts had testified under oath that the President potentially violated a federal criminal statute.

Several unresolved factual issues prevent us from concluding whether the information we have received is sufficient to constitute grounds for further investigation. For that reason, further investigation and, accordingly, the initiation of a preliminary investigation, are warranted here.

In addition, the application of section 607 to the facts of this matter presents a number of novel and difficult issues of law, which merit further research and analysis.

RECOMMENDATION: I recommend that you sign the attached filing (Attachment A) notifying the Special Division of the Court of Appeals of the triggering of a preliminary investigation.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Attachments

Concurring Components:
None

Nonconcurring Components:
None

U. S. Department of Justice

Washington, D.C. 20530

EXHIBIT 9

MEMORANDUM

TO: Mark M Richard
Acting Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Independent Counsel Matter: President of the United States William Jefferson Clinton

As you know, the Public Integrity Section was directed to conduct an initial inquiry into whether the President of the United States, William Jefferson Clinton, a covered person under the Independent Counsel Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have solicited campaign contributions in the Oval Office, or other workspace in the White House, in potential violation of 18 U.S.C. § 607. As explained below, we believe that unresolved factual issues warrant the initiation of a preliminary investigation pursuant to the Act.

The Attorney General must reach her decision on this matter no later than October 15, 1997, 30 days after the Department of Justice became aware of the information involving the President. See 28 U.S.C. § 591(d)(2). We have attached the necessary paperwork to be filed with the Special Division of the Court of Appeals (Attachment A), should the Attorney General decide that further investigation is warranted in this matter. Should she decide that no further investigation is warranted, no paperwork is required.

I. INTRODUCTION AND SUMMARY

The Public Integrity Section was asked to conduct this 30-day inquiry following a published account of testimony given before the Senate Committee on Governmental Affairs by former White House Deputy Chief of Staff Harold M. Ickes. This article, published on September 14, 1997, titled "Aide Said He Prodded President to Complete Fund-Raising Calls," stated that Ickes had testified that on occasion the President had made fund-raising

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calls on behalf of the Democratic National Committee (DNC), and implied that those calls might have been placed from the Oval Office. This inquiry was opened because it thus appeared that a source in a position to have knowledge of the facts had testified under oath that the President could have potentially violated a federal criminal statute. See 18 U.S.C. § 607.

As you know, under the Independent Counsel Act, the Department of Justice has 30 days in which to determine whether information suggesting that a covered person may have committed a crime warrants a preliminary investigation. 28 U.S.C. § 591(d). Under the Act, the Attorney General is required to conduct a preliminary investigation whenever she receives information sufficient to constitute grounds to investigate whether any covered person may have violated any federal criminal law. In making that determination, the Attorney General may consider only the specificity of the information received and the credibility of the source of the information, and may not consider the issue of intent. Thirty days are now nearly elapsed, and due to the scope of the investigation required, the unavailability of witnesses, and the complexities of the legal issues presented, we are unable to determine the specificity and credibility of the information we now have. We therefore recommend that a preliminary investigation is necessary to resolve these issues.

As we discussed in our previous memorandum to you concerning similar allegations against the Vice President, this matter raises a number of extremely complex legal issues involving the scope and applicability of the relevant criminal statute, 18 U.S.C. § 607, to the alleged fund-raising telephone calls. These issues continue to be under intense study by several components of the Department.[1] We therefore have focused our factfinding effort in this initial inquiry on the two key issues under section 607 that have been resolved: that a violation under section 607 occurs only if the solicitation is for hard money and if it occurs in the nonresidential areas of the White House.

At this stage of our investigation, several unresolved factual issues prevent us from concluding at this time whether the information we have received is sufficient to constitute grounds for further investigation. For that reason, we believe that further investigation and, accordingly, the initiation of a preliminary investigation, are warranted here.

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[1] As part of our continuing investigation into the Vice President's fund-raising calls, we are undertaking to resolve those legal issues to the maximum extent possible, and we anticipate that the analysis and conclusions ultimately reached in that matter will govern this matter as well.

First, it now appears that at least one donor, John Torkelson, whose name appears on a so-called Presidential call sheet, acknowledges having received a telephone call from the President that could possibly be construed as a solicitation for a hard money contribution. Although the donor asserts that he was never solicited for a campaign contribution during the call, his recollection of the President asking him for his continued "support" in the context of a conversation concerning the upcoming congressional elections could possibly be construed as a solicitation within the meaning of section 607. Further factual exploration of the nature, circumstances, and location of that call will enable us to determine whether it may fall within the prohibition of the statute.

Second, as of October 14, 1997, interviews of seven prospective donors -- at least two of whom made hard money contributions to the DNC -- have yet to be completed.

Third, it is appropriate to interview the President in connection with this matter. The President's attorneys have indicated the President's willingness to be interviewed, but, because of scheduling conflicts, this could not be accomplished prior to the expiration of the 30-day period.[2]

Fourth, and finally, we believe that our conclusion would be more complete with a fuller understanding of the White House telephone system and its ability to reproduce call detail for telephones in the White House complex. This is especially significant to determining where within the White House complex the President was located at the time he placed the call to the donor referred to in the first factual issue above. The records available at this time do not list that call, and it is unclear whether any available records might.

It bears emphasizing that at this time our investigation has revealed very little evidence that the President may have violated section 607. Indeed, until the discovery of the interview report of Mr. Torkelson on Friday, it was our belief that we would likely be able to close this matter this week based on a lack of factual support for the allegation. First, based on the FBI's own interview of Harold Ickes as well as a thorough review of Ickes' Senate deposition transcript, we have concluded that Ickes' statements and testimony do not amount to specific

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[2] In this regard, the President's lawyers have submitted an affidavit by the President in which, among other things, the President states he does not recall having made any campaign contribution solicitation telephone calls since becoming President. Inasmuch as this affidavit does not answer all of the questions that would be asked in an interview, it may not obviate the need for a further interview of the President in this matter.

information that a violation under section 607 may have occurred. Second, aside from Mr. Torkelson, no donor interviewed to date whose name appears on a DNC call sheet or similar document recalls having been solicited by the President for a hard money contribution as required under the statute. Finally, only limited inculpatory inferences can be drawn from the documents and other records, and even interpreted in the light most suggestive of the President's guilt, the documents themselves are not sufficiently specific to lead one to believe that section 607 may have been violated.

II. IS THERE SPECIFIC INFORMATION FROM A CREDIBLE SOURCE THAT THE PRESIDENT MAY HAVE VIOLATED FEDERAL CRIMINAL LAW?

A. The Statute

As we stated above, the relevant criminal statute -- 18 U.S.C. § 607 -- raises a number of extremely complex legal issues in relation to its application to the facts at hand. All of these issues have been raised, but by no means resolved, in our recent memorandum to you concerning the related fund-raising allegations against the Vice President. We attempt no further analysis of the statute here, and instead simply adopt the analysis from our earlier memorandum and assume for purposes of this analysis that section 607 would cover any telephone call to any person, anywhere, by which the President solicited a contribution of federal funds ("hard money") during a call placed from any of the non-residential areas of the White House.

In relevant part, section 607 provides as follows:

> (a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

The elements of this statute seem deceptively straightforward: in order to make out a violation of section 607, the government must establish that: (1) "any person," (2) solicited or received, (3) any "contribution" within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 (i.e., any "gift . . . made by any person for the purpose of influencing any election for federal office"), (4) in any room or building occupied in the discharge of official duties, (5) by any person mentioned in 18 U.S.C. § 603.

As we pointed out in our recent memorandum concerning the Vice President, in the context of the facts at hand, this statute raises numerous complex issues of statutory construction for which there is no undisputed answer, such as (1) whether Congress intended the President, in light of his unique constitutional responsibilities, to be included as "any person" within the meaning of the statute; (2) whether a solicitation over the phone occurs "in" the room or building in which the solicitor is located, or where the prospective donor is located, or both; (3) whether the purely residential areas of the White House are occupied "in the discharge of official duties"; (4) whether the President is a "person mentioned in section 603"; and (5) whether the statute only applies if the target of the solicitation is a federal government employee.

Some of these issues were addressed in a 1979 Office of Legal Counsel Memorandum analyzing the predecessor statute to section 607 in the context of political activities engaged in by President Carter at the White House. See Memorandum for Philip Heymann, Assistant Attorney General, Criminal Division, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel (1979) [hereinafter, "OLC Opinion"]. We view that opinion as governing our analysis here, such that to the extent it addressed an issue, we apply the same conclusion reached by OLC. Thus, consistent with the OLC Opinion, we conclude the following: (1) that the President is included within the meaning of the phrase "any person" as set forth in section 607; (2) that the prohibition of the statute would not cover conduct taking place within the purely private, residential portions of the White House; (3) that the President is a "person mentioned in section 603"; and (4) that section 607's prohibition applies to solicitations of private citizens as well as government employees.

At this time, our legal research has not definitively resolved the issue of whether a telephone solicitation can be deemed to have occurred "in" the room or building in which the solicitor is located. For purposes of this analysis, therefore, we assume that a telephone solicitation could be deemed to have occurred "in" both the location of the caller and the location where the call was received. In sum, we assume for purposes of our analysis here that section 607 would cover any telephone call placed from any of the nonresidential areas of the White House to any person, anywhere, by which the President solicited a donation to be made for the purpose of influencing any election for federal office.

B. The Facts

1. The Allegation

The allegation that precipitated this 30-day inquiry was a newspaper account of the sworn deposition of former Deputy Chief of Staff Harold M. Ickes in the Special Investigation of the Senate Committee on Governmental Affairs. On September 14, 1997, the New York Times reported in an article titled "Aide Says He Prodded President to Complete Fund-Raising Calls" that Ickes had testified that he had pressed the President to make fund-raising calls from the White House on behalf of the Democratic National Committee, that on occasion he was "fortunate enough to find out that [the President] had, in fact, made a phone call." Furthermore, the article reported Ickes as stating that he consulted White House Counsel Lloyd Cutler, who had said that the President could make calls from the Oval Office. Based on these statements in the article, the Attorney General concluded that further exploration of the facts in the context of a 30-day inquiry was warranted to determine if the President may have violated section 607 by expressly soliciting hard money from the Oval Office in these fund-raising calls.

2. Scope of the Investigation

The thrust of the investigation has been to determine whether the President did in fact make any fund-raising calls on behalf of the DNC, and if so, determine whether any such calls may have potentially violated section 607 because hard money was expressly solicited in a phone call placed from a nonresidential area of the White House. To this end, we undertook to identify from White House, DNC, and Clinton-Gore Reelection Committee records the universe of potential donors the President might have been asked to call as part of this telephone solicitation initiative.

Several undated documents list potential donors whom the President could contact. There are also a number of so-called "call sheets" or call memoranda identifying specific donor calls to be made during the time periods October 1994 (two distinct sets); November-December 1995; and February-March 1996. In total, these documents resulted in the identification of 68 specific potential donors who might have been solicited over the telephone by the President.

With this information, we have undertaken to interview each of these potential donors regarding any fund-raising contact they might have had with the President. In addition, we have undertaken to interview all relevant White House and DNC personnel who could potentially provide information concerning the President's participation in the DNC's telephone fund-raising initiative. We have sought any information suggesting that the

President may have actually made any of the intended fund-raising calls on behalf of the DNC. Thus, with respect to White House personnel, we endeavored to interview anybody by or through whom any request of the President to make such calls would have been made and anybody who might actually have been privy to the placing of any such phone calls. We also sought to identify any relevant documents either corroborating or disproving that such calls were made, such as long distance telephone toll records for the White House, White House operator diaries of long distance calls, and records of scheduling requests and the President's annotated daily schedule. With respect to DNC personnel, our interviews sought to develop evidence that the President had made any of the requested calls. We also requested from the DNC documents that might reflect that calls had been made, particularly as some of the call sheets make clear that status reports on the progress of the fund-raising initiative were contemplated as was some form of DNC follow-up.

3. Harold M. Ickes

As recounted above, it appeared based on the New York Times article that Ickes had testified in his June 26-27, 1997, Senate deposition to having learned at some point that the President had in fact made fund-raising calls. The article also strongly implied that those calls had been made from the Oval Office. Read in context, however, Ickes' testimony was considerably vaguer than the Times article suggested on the issue of whether any calls had actually been made. Further, Ickes neither stated nor implied in his deposition that any such calls had been made from the Oval Office.

Indeed, upon being shown a memorandum and DNC call sheets from November 1995, Ickes testified, "my recollection is that I don't think he [the President] made one of these phone calls." Ickes admitted that he had asked the President to make the calls and that he believed the President intended to make the calls, but that, "I think in this instance -- I don't know as a fact -- I don't think he made one of them." It was in this context that the following exchange took place:

Ickes: "[Q]uite frankly, I think it's fair to say, he made few, if any, of the phone calls in '95 and '96, and as I said before, I think in my three years there, I only asked him to make phone calls, two, three, maybe four times at the most."

Counsel: "Did you receive feedback from any of those times that he had made telephone calls?"

Ickes: "Yeah, when I was fortunate enough to find out that he had, in fact, made a phone call. . . .

. . .

Counsel: "So, in the first instance, you would look at the list that went in to make sure that the people were appropriate people to call, and then, if the President said he did call, you would contact [Marvin] Rosen to make sure there was some follow-up so you could actually get the money."

Ickes: "Yes. There wasn't much of the latter."

As this context shows, Ickes testimony was considerably more tentative than the New York Times story suggested, inasmuch as the premise assumed in the question (that the President had made telephone calls) had just been denied by the witness ("I don't think he made one of them"; "few, if any").

During his deposition, Ickes was also shown call sheets from the February 1996 time frame. These were the only other call sheets shown to Ickes during his June deposition. Upon examining these call sheets, Ickes testified, "I have no recollection whether the President made these calls or whether he made any of them, if so, to whom he called, and if so, whether any of them gave money as a result of the calls." Thus, at the end of his two-day deposition in June, Ickes had in fact not testified to any specific recollection of the President having made any fund-raising calls on behalf of the DNC.

Further, Ickes did not testify during that deposition that White House counsel Lloyd Cutler had said that the President could make calls from the Oval Office. Rather, Ickes testified that around the time that the DNC was asking the President to make calls, Ickes had checked with one of the lawyers in the Counsel's office, probably Cheryl Mills, and was told that the President could make telephone calls to solicit money and that White House counsel preferred that any such calls be made from the residence. Significantly, Cheryl Mills had a similar recollection of her conversation with Ickes, as we learned in our own interview of her. Ickes testified that he had no knowledge as to which part of the White House the President had made these calls from, if in fact they had been made at all.

Ickes was recalled by the Senate for another deposition on September 22, 1997. At that time, he clarified his earlier testimony in this respect:

I do not know whether the President made any phone calls in '95, '96. I do recall his making a small number of telephone calls in 1994 in connection with

> the health care [sic] to raise money for the -- or to try to raise money for a special media fund that we had established -- or that had been established by the DNC to support the President's health care initiative, but as I think I made clear in my testimony to you the other day or however many weeks or months ago it was, I do not know as a fact that the President made any phone calls in '95 and '96, and my sense was that he did not.

Later in his testimony, as in his interview with us, when Ickes was shown the 1994 call sheets, he acknowledged that these may be the calls he remembered the President making in 1994. In our interview, Ickes elaborated that he did not recall any of the specific conversations and stated that the calls might not have been solicitations at all, but could have been thank you calls.

Although Ickes identified his own handwriting appearing in portions of the call sheets, he could not recall the circumstances under which he had made these notations.[3] In both his deposition and his interview with us, Ickes stated that the calls he remembers the President making in 1994 where made from the study in the residence portion of the White House (located on the third floor of the mansion, second floor of the residence).

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[3] Ickes recognized his handwriting on the October 1994 call sheets but disclaimed any recollection of the circumstances under which he made those notations. On the October 18, 1994 sheet, several of the names of prospective donors have check marks beside them and several have dollar amounts written in. Alongside the name John Torkelson is the handwritten notation "BC called" and what appears to be the figures "50,000", "25", and "25". Based on Torkelson's interview, we believe that the President did call him in this time frame, and at the time, Torkelson had paid $50,000 of a $100,000 pledge which he intended to fulfill by making two additional $25,000 contributions. Other notations -- such as "will give" and "will give no specific $" -- appear in Ickes handwriting on the October 18th call sheet alongside several names, and a natural inference one could draw from these notes is that they were taken by Ickes contemporaneously with the placing of the call by the President. On the October 21, 1994 sheet, Ickes has written "likes BC but will not contribute to DNC" alongside the name Dennis Bakke, and alongside the name Alice Walton is the notation, "she called President this week -- did BC call her back." Again, Ickes did not recall from where or under what circumstances he got the information that he apparently wrote on this call sheet. Given the nature of these notes, however, it seems that the more natural inference, but by no means the only inference, is that these notes were written in anticipation of calls being made, rather than suggestive of calls actually having been made.

In sum, Ickes' testimony and statements alone, which is what began this initial inquiry, do not rise to the level of a specific and credible allegation that the President may have violated section 607. First, Ickes has no specific recollection of the President having made any fund-raising calls at all; while he remembered calls in 1994, he stated that they may have been thank-you calls. Moreover, with respect to the calls Ickes remembers the President making, Ickes recalls they were made from a purely private residential area within the White House mansion.

4. The Prospective Donors

We identified a universe of 68 prospective donors from documents obtained from the DNC. We have endeavored to interview all 68 persons even though it is not at all clear from the documents that each of the documents was seen by the President or even that all of the listed names were intended to be solicited by the President. As of October 14, 1997, all but seven of these have either been interviewed personally or have given some proffer of information through counsel. Of the seven prospective donors outstanding, the FBI has informed us that two of those persons gave hard money contributions to the DNC at some time after the date on which their names appear on a document suggesting that they might have been called by the President.[4]

We know through telephone records produced by the White House (and can infer from notations on call sheets and call memoranda) that the President placed telephone calls to at least six prospective donors on October 18, 1994, the date of a memorandum listing 23 total names. It appears likely that these are the 1994 calls that Ickes remembers.

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[4] The first, Walter Kaye, appears on a November 22, 1995, call sheet. We have no evidence that the call sheets from November 1995 ever reached the President. Kaye's first contribution after November 22, 1995, was a $100,000 nonfederal contribution to the DNC on December 7, 1995. He made a $20,000 federal contribution on August 5, 1996.

The second hard money contributor(s), Ron and Janet Burkle, appear on an undated list created at the DNC and headed by the title, "POTUS calls." That list contains 17 names, one of which is "Burkle." From FEC records, we surmise that the list means to refer to Ron or Janet Burkle, husband and wife. They gave $20,000 in federal money on April 28, 1995. As far as we know, that date does not fall within a time period during which call sheets were being prepared, and neither of the Burkles appeared on an October 1994 call sheet -- the one time period that we can say with certainty the President did make calls that could be construed as fund-raising calls.

All six calls were from the residence. The phone records are corroborated by the President's annotated schedule for October 18, 1994, which indicates that he left the Oval Office for the residence during the time that the calls were placed. Because these calls were from the residence, we do not view any of these, regardless of the content of the conversations, to have been in potential violation of Section 607.

Although only six donors' telephone numbers appear on the residence phone records, it is probable that other donors from the October 18, 1994, call sheet received calls from the President on that date. First, all six of the names known to have been called are circled. Three other names are also circled: John Connelly (who admits having received a phone call in 1994 relating to "health care," and whose name is accompanied by the handwritten notation "$200,000" on the call sheet); Arthur Coia (who, through counsel, states that he recalls once receiving a call in 1994 relating to "health care," and whose name is accompanied by the handwritten notation "80,000" on the call sheet); and John Torkelson (whose name is accompanied by the handwritten notations "BC called," and "50,000 (illegible) 25 25"). A second call sheet, dated October 21, 1994, omits all six names known to have been called, plus these three additional circled names. With one exception, every uncircled name appears on the October 21, 1994, call sheet.[5]

Second, we are informed that phones in the residence carry both the residence's private 638 exchange as well as the official White House 456 exchange. Therefore, it is possible to place a call from a 638 exchange, at one moment, immediately followed by a call from the 456 exchange all from the same telephone equipment without leaving the residence; calls from the 456 exchange would not appear on the telephone documents we have been able to obtain to date. It is also possible that the President left the residence and called other donors from other locations in the complex (or called them prior to leaving the Oval Office for the residence).[6] We believe the reasonable inference from these facts is that every person whose name is circled received a telephone call, and in all likelihood received it on October 18 from the White House residence.

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[5] David Geffen, who states that he was never solicited by the President, is not circled on the October 18 sheet and has no handwritten notations alongside his name. Nonetheless, his name does not appear on the October 21 call sheet -- the only uncircled name that does not.

[6] This inference seems unlikely since Ickes understood that it was preferable to make calls from the residence, and it appears that the President actually went to the trouble of doing so when he called several donors on the same list.

The FBI report of interview for Torkelson gives us reason to believe that, notwithstanding Torkelson's assertion that he was not "solicited" for a contribution, the context of the conversation could be construed to contain a solicitation. In relevant part, the report of the interview states:

> Due to the passage of time, it was difficult for [Torkelson] to recall the President's exact words. The general nature of the call was that the Democrats were in serious trouble in the upcoming House and Senate elections. Clinton was especially worried about what was going on in the Senate races. The Democrats were not out of the woods yet and there was still much to be done. Clinton thanked him for the significant contributions he had already made to the Democratic Party. The President did not solicit him for any campaign contribution during this call. Torkelson characterized this call as a "courtesy call" similar to those received from all politicians. Clinton briefed him on the status of the campaign, thanked him for his contributions and asked for his continued support. He was not asked to make additional campaign contributions by Clinton. The President did not mention the DNC media fund or media campaign during this conversation. Torkelson had no previous knowledge of this fund or campaign. The President did not mention his election, re-election or support to the Administration. The main concern expressed by Clinton was the Senate elections.

Torkelson also stated that, while he understood generally the distinction between federal and non-federal contributions (being a member of the Democratic Senatorial Campaign Committee (DSCC)), he did not discuss these concepts during the conversation with the President.

In early 1994, Torkelson had pledged $100,000 to the DNC. Through his corporation, Torkelson had given $50,000 in soft money to the DNC prior to the phone call from the President, thus satisfying half of his pledge prior to the call. Again through the corporation, he gave $25,000 more in soft money in November 1994, after the President's call. Torkelson said that he gives hard money from his personal account and soft money from his corporate account. Moreover, he stated that the President's call did not in any way influence his decisions about contributions to the DNC, DSCC, or any individual campaign.[7]

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[7] Torkelson did not complete his $100,000 pledge because he decided instead to give to the DSCC in support of the reelection of Virginia Senator Charles Robb.

We believe that Torkelson's statements, as reported by the FBI, suggest that further investigation is warranted. Although Torkelson asserted that he was never solicited for a campaign contribution during the call, his recollection of the President asking him for his continued "support" in the context of a conversation concerning the upcoming congressional elections could possibly be construed as a solicitation within the meaning of section 607. Further factual exploration of the nature, circumstances, and location of that call will enable us to determine whether it may fall within the prohibition of the statute.

5. Documents

(a) The David Strauss notes. David Strauss, the Vice President's Deputy Chief of Staff, prepared notes during a meeting in 1994 that appear to state that the President had made fund-raising calls on behalf of the DNC. The notes reflect that Strauss was meeting with Steve Ricchetti and Harold Ickes to discuss the DNC's need to raise money and the idea of doing so through telephone calls by the President, First Lady, and Vice President. Although the notes are undated, Strauss believes the meeting took place in late 1994, but before November, the month in which Ricchetti left the White House. Strauss does not recall the meeting and he could not elaborate on the notes other than what they say, but confirms that his notes reflect the statement, "BC made 15-20 calls -- raised $500K."

We believe the most natural inference one could draw from this document is that Ickes stated in this meeting that the President had already made 15-20 solicitation calls and had raised $500,000 for the DNC -- depending on when the memo was prepared, he may have been referring to the October 18 calls described above. Nevertheless, everything else that is reported in the notes tends to be exculpatory.

For example, Strauss' notes reflect the "pitch" that was to be used in the solicitations: that the "DNC purchased $2 million of air time for generic ads and we need to raise more money to stay on the air." Not only does the reference to generic ads suggest the solicitation was for soft money, but Strauss' notes reflect that the solicitor was expressly to suggest a "50K soft money contribution." Further, Strauss' notes reflect the statement, "make calls from residence," though he could not recall whether this was meant as an admonition or a description

of past practice.[8] In sum, although the notes tend to corroborate the fact that the President had made some phone calls, to the extent they can be read to reflect not only what the Vice President should do, but also what the President has done, they would tend to suggest that the President had not violated section 607 in the calls he had made.

(b) The February 1996 Call Sheets. The White House produced to us a memorandum from Ickes to the President dated February 7, 1996, attaching the names of ten potential donors that the DNC believed might respond favorably to a call from the President. The document is stamped with the notation, "The President Has Seen," which is dated May 20, 1996. Most donors are identified by a separate call sheet dated February 6, 1996, although two call sheets appear to have been created in November 1995. In his cover memo, Ickes purported to provide the call sheets at the President's request.[9]

Two of the call sheets, those for donors Gail Zappa and Arthur Goldberg, are marked with a backward check mark. None of the remaining sheets is marked in any way. Ickes testified in his Senate deposition that he believed the check marks to have been made by the President, indicating that the President had placed calls to Zappa and Goldberg, though not necessarily indicating that a conversation actually occurred. Later, Ickes clarified his understanding of the check marks' significance by stating that the marks meant at least that the President had seen the call sheets, but not necessarily that he attempted to call either Zappa or Goldberg.

The FBI conducted a full interview of Zappa, who stated that she has never had a telephone conversation with the President and that the President had never solicited any donation from her.

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[8] According to Strauss, this could either have been a reference to where the President was making his phone calls or an admonition to the Vice President to make his calls from his "residence."

[9] The White House typed onto the memo, as a substitute for the President's own handwritten note, the following unintelligible note:

H Ickes
At least 2 of these have cons given
~~I talked to or not~~ -- who hasn't yet
good time to call ----

In his deposition, Ickes stated that this notation was unintelligible to him.

Likewise, Goldberg stated that the President had never solicited a contribution from him over the telephone. In his affidavit, the President stated that he believed the check marks on the call sheets were his and that, although he does not recall placing the marks there, he believed he would have done so either because he thought he had recently seen these individuals or, for some other reason, thought they had recently made contributions.

In sum, on this record, it is difficult to ascertain what significance, if any, to attach to the existence of the check marks. However, inasmuch as the donors themselves have denied having been solicited by the President over the telephone, we do not believe the documents themselves create a contrary inference compelling enough to contradict those statements.

(c) White House telephone records. We have requested that the White House voluntarily produce all records, including any available call detail records, pertaining to any telephone solicitation calls made by the President for the period October 1, 1994, through December 31, 1996. White House personnel have explained that the White House complex is served by three exchanges: 456, 395, and 638. Exchanges 456 and 395 are the "official" phone exchanges, which can be accessed from both the official and private areas of the White House. The primary long distance carrier for those lines is Sprint FTS 2000; to the extent those lines are full, any additional long distance calls roll over onto AT&T lines. Exchange 638 is the private residential exchange, for which we are told the long distance carrier is AT&T.

We have been informed by the White House that only limited long distance call detail records are available. First, we were informed that call detail for the "official" exchanges was available only to the extent a call rolled over onto the AT&T lines and accordingly appeared on an AT&T bill. Moreover, even where that occurred, one would never be able to determine the location within the complex from which any such call was placed because the calls as reported on the bill were broken down only by trunk line, not individual phone extension. Second, we were informed that call detail from the private residential exchange was not available because long distance calls were not itemized on the phone bills. Third, we were informed that operator diaries of long distance calls placed by the President through the White House operators were available, but would only include records of long distance calls actually placed using the assistance of an operator.

A subsequent interview of a White House telecommunications manager suggested that the White House had the in-house capability to record call detail, though it was unclear whether White House staff had activated that capability. For security

reasons, that feature is not supposed to have been activated. The White House has indicated it will determine whether call detail is available, but as of this date has been unable to do so.

It was further determined that AT&T or Sprint, or both, could themselves possibly have records of White House call detail, and that Sprint may have provided GSA with monthly tapes of such detail as Sprint does for other federal agencies.. The White House has indicated that it will cooperate in seeking any additional records from AT&T and Sprint, and we are in the process of determining the availability of any such records from GSA.

In addition, it now appears that we were initially misinformed that the monthly bills for the 638 exchange did not include call detail; we are now told that the monthly bills for that exchange do include call detail, but that the Usher's Office discards the monthly bills as they are paid. Of course we intend to follow up on any such available records through both the White House and AT&T. Finally, the White House has represented to us that they have produced all responsive White House operator diaries.

As this discussion makes apparent, we intend to use the additional time afforded by the initiation of a preliminary investigation to ensure that all available records of long distance phone calls from the White House complex have been obtained and analyzed.

6. Summary of Other Interviews

(a) **The White House Interviews.** In an effort to determine whether White House employees were aware of actual fund-raising phone calls placed by the President from the White House, the FBI interviewed the following personnel: current Chief of Staff, Erskine Bowles; former Chief of Staff, Leon Panetta; former Deputy Chief of Staff Harold Ickes; Assistant to the President and Deputy Counsel Bruce Lindsey; Deputy Counsel to the President Cheryl Mills; Counselor to the President Doug Sosnik (formerly Political Director for the President); former Director of Scheduling, Anne Walley Hawley; Director of Scheduling, Stephanie Street; Deputy Assistant to the President and Director of Oval Office Operations, Nancy Hernreich; Personal Secretary to the President, Betty Currie; former Deputy Political Director Karen Hancox; Presidential Aide (and annotator of the President's daily schedule) David Stephen Goodin; and Chief White House Usher Gary Walters.

In general, with the exception of Ickes, not a single member of the White House staff reported any knowledge -- whether through direct observation or hearsay -- that the President had, in fact, made fund-raising calls from the White House. Lindsey told us that, once the issue became one of public and press interest, the President had repeated to him what the President had said publicly about the matter -- that he had no specific recollection of ever making a fund-raising call, but that he could not rule out the possibility that he had done so. Lindsey informed us that the President had offered some explanation for two call sheets from February 1996 bearing the President's backward check mark. Lindsey said the President, upon hearing that some documents bore the check, stated that he did not believe the check marks meant that he had called the donors: instead, the President suggested that the check marks meant only that he had seen the donors at events near the time of his review of the call sheets in 1996 and believed either that they had given already or were likely to give.[10]

Several members of the staff reported that, because they attended campaign strategy meetings with the President and Vice President throughout 1995 and 1996, they knew about a plan for the President and Vice President to make fund-raising calls. Nevertheless, with respect to the President, they all reported that they either did not know or did not believe that the President had ultimately made these calls.[11] We asked these persons whether they had learned in the time since public and press interest in potential Presidential calls arose that the President had, in fact, made calls. None had learned from the President or others that calls had, in fact, been made, except to the extent that contemporaneous documents suggested that some calls may have been made and that Ickes had some recollection of phone calls that had been reported in the press. Several indicated that they recalled Ickes "grumbling" or "grousing" about the fact that the President was not making calls as he had

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[10] This account is generally consistent with the statements contained in the President's affidavit dated October 10, 1997.

[11] The 1994 call sheets pre-date the inception of the weekly strategy meetings and appear to have been the idea of DNC personnel working in conjunction with Ickes. It is clear that the President did, in fact, place calls to donors listed on those documents on October 18, 1994 -- the date on the face of the memorandum from Terence McAuliffe and Laura Hartigan (both then of the DNC) to Ickes transmitting the donors' names and phone numbers. Those calls that we know at this time to have been made on October 18, 1994, were placed from a telephone in the White House residence. We have no evidence suggesting that other White House officials were privy to the 1994 plan for the President to call potential donors.

agreed. In addition, several stated that, at the time of the plan, they never believed that the President would make the calls -- notwithstanding the plan that he would -- because the President did not like to do so.[12]

Consistent with Ickes' recollection that he sought some legal guidance on whether it would be permissible for the President to raise funds, Deputy Counsel to the President Cheryl Mills stated that she recalled receiving a call from Ickes in 1994 or 1995, in which Ickes inquired whether the President could make fund-raising calls. Mills said that she did not surmise from this conversation that the President would, in fact, be asked to make calls. She told Ickes that the President was permitted to make fund-raising calls and said that the President should probably do so from the residence.

During our interview, Mills was careful to state that she did not opine that it would be unlawful to make calls from other locations within the White House. She stated that she knew at the time of the Ickes call about the 1979 OLC memorandum and, therefore, understood that the residence was a clearly permissible venue for a fund-raising solicitation. Therefore, in response to Ickes question, she gave the "easy" answer that the calls should be placed from the residence. Subsequent to the Ickes call, Mills did not render more formal legal advice; although she has done research to determine whether places other than the residence would be permissible, she stated that she did not communicate the results of that research during the time period of the Ickes call.

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[12] We discussed with several persons whether they recalled efforts by Ickes or others to secure time on the President's schedule for the purpose of making fund-raising calls. None recalled such a discussion. Personnel in the Counsel's office have told us that they reviewed so-called "scheduling request forms" throughout the relevant time period and that no such requests exist. The President's schedulers told us that such requests were generally required to be in writing and that they were reviewed in scheduling meetings chaired by the Chief of Staff. We are aware, through an electronic mail message from Karen Hancox to the Vice President's scheduler, that such a request was made of the Vice President in November 1995. The schedulers also informed us that the President's schedule generally included approximately three to four hours of "phone and office time." It appears that when the President called donors on October 18, 1994, he did so during this "phone and office time." Therefore, the absence of a scheduling request or an actual entry on the President's daily schedule for "fund-raising calls" or other such designations cannot be considered dispositive.

The staff, including Chief Usher Gary Walters, describe the "residence" as that part of the executive mansion that begins on the second floor from the ground. They further stated that the President's "study" is within the residence. The only calls that Ickes claims to recall occurred in the study, according to Ickes. That recollection is to some extent corroborated because most of the calls that we know to have been made were made from a residence telephone extension.[13]

(b) **The DNC Interviews.** Inasmuch as the call sheets originated at the DNC, we endeavored to interview any DNC personnel connected with the creation and transmission of the call sheets to determine what information, if any, they could tell us about whether the President had in fact made any telephone calls soliciting contributions of hard money.

Virtually everyone we interviewed recalled a plan for the President to make phone call solicitations on behalf of the DNC, but no one recalled ever subsequently learning that the President had in fact made such calls. For example, Richard Sullivan remembered a plan to have the President make calls and recalled that call sheets had been prepared for the President. To Sullivan's recollection, however, the President never made any of the calls he had been asked to make. Donald Fowler recalled that call sheets had been prepared for both the President and the Vice President in the late 1995/early 1996 time frame. Fowler recalled hearing that the Vice President was making his calls, but that the President was not.

With respect to the 1995 and 1996 call sheets, the feedback the DNC personnel did get concerning the President's call sheets suggested the President was not making calls. Jacob "Ari" Swiller, a DNC fund-raiser who participated in preparing some of the President's calls sheets in 1995 and 1996, recalled that the President's call sheets were returned to the DNC in order that they could be regenerated for the Vice President because the President was not making his calls. Ann Braziel, whose immediate supervisor at the DNC was Swiller, also recalled that the President did not make his fund-raising calls. Braziel was responsible for, among other things, monitoring the progress of the President's calls and recording the results on a spreadsheet listing all of the prospective donors. A copy of that

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[13] Since we are informed that even the residence telephones contain "official" 456 lines as well as private 638 lines, we are unable to rule out the possibility that a call at any given time on a 638 line was followed -- by simply pushing a different button on the same telephone -- by a call on a 456 line from the very same telephone in the residence.

spreadsheet produced by the DNC contains no annotations, which Braziel indicated further suggested the President did not make any of the calls.

III. CONCLUSION

As discussed above, although we have not concluded that the facts available to us amount to specific and credible evidence that the President may have violated section 607, we believe that at this time further investigation of the allegation is warranted. We accordingly recommend that the Attorney General initiate a preliminary investigation in this matter and so notify the Special Division of the Court of Appeals.

Attachments

U: S. Department of Justice

Washington, D.C. 20530

November 19, 1997

TO: Mark M Richard
Acting Deputy Attorney General

FROM: Charles G. La Bella
Supervising Attorney
Campaign Financing Task Force

SUBJ: Section 607 Analysis

I have reviewed all the materials submitted by [redacted] and Lee Radek concerning the application of Section 607 to the calls made by the President and Vice President. I have not, however, seen any report on the POTUS or VPOTUS investigations. It is my understanding that no evidence has developed which suggests that the POTUS made any phone calls from public rooms in the WH. As to the VPOTUS, some phone calls were made from his office in the WH, but none were made to federal offices or to federal employees. Assuming these facts to be true, the only potential 607 violation involves the VPOTUS calls made from his WH office.

I am sending you this brief outline of my thoughts on what I see as the two difficult issues concerning the IC inquiries: 1. Is there an established or written Department policy concerning the prosecution of potential Section 607 violations that is dispositive of the conduct at issue; and 2. If there is no such policy, or it is not dispositive of the conduct at issue, does Section 607 apply to the telephone calls at issue?

Unfortunately, I will be gone on official business from Tuesday through Saturday night. As a result I will miss what I am sure will be lively and informative discussions on these issues. While I will try to stay in contact and be available for a conference call, I understand that it will be difficult to participate in a meaningful way. I will give [redacted] and my secretary numbers at which I can be reached. I hope that my perspective adds something to the discussion.

DOJ-VP-00428

EXHIBIT
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CONCLUSION:

1. A DEPARTMENT POLICY: I do not believe that there is an established policy which would permit the Attorney General to conclude that no further investigation should be conducted on the facts that have been developed to date. At best, there appears to be a practice that has developed over the years concerning the Department's prosecution of potential Section 607 cases. Even assuming that what I see as a practice is in fact construed to be a policy as that term is used in the ICA, application of this policy requires a fact-based analysis and, in the final analysis, the exercise of prosecutorial discretion. As such, it falls short of the clear policies that Congress contemplated in crafting this portion of the ICA.

2. APPLICATION OF SECTION 607: With respect to the application of Section 607 to the facts developed to date, it is important first to distinguish between the POTUS and VPOTUS. As to the former, to the best of my knowledge, absolutely no evidence has been developed to indicate that any solicitations were made by him from public rooms in the WH. Therefore, as to him, there is no need to engage in analysis as to whether Section 607 applies to his personage nor whether it covers solicitation of non-federal employees. Under no interpretation of the statute does it apply to solicitations from the private quarters of the WH. Since these were the only phone calls he made, there is no basis for appointing an IC to further investigate these solicitations.

As to the VPOTUS, however, I agree that the statute does cover a sitting vice-president. Moreover, it is undisputed that he did make some solicitations from his office in the WH and that some of the money so solicited went into federal (hard money) accounts. (During his interview, the VPOTUS indicated that he believed he was soliciting only soft money and therefore the issue of intent is a prosecutorial hurdle which may present serious difficulties. That however, is for a later time.)

The application of Section 607 is far from clear. On balance, I think that the issue will be decided based upon the analysis of a solicitation `a la Thayer. Where I part company with those who look to the Thayer analysis, however, is the application of this analysis to the facts presented by the VPOTUS calls. It is absolutely clear to me that any prosecutor reviewing this fact pattern would conclude that a further investigation is not warranted for two reasons. First, a fair reading of Section 607 and Thayer suggests that phone calls to non-federal buildings for the purpose of soliciting campaign funds, may not constitute a violation of the act. It is true that most prosecutors would not be willing to say that this conclusion is dictated as a matter of law because of the very ambiguity outlined in the memo authored b[redacted] However, virtually every prosecutor faced with this situation would conclude, without hesitation, that the issue is sufficiently ambiguous as to preclude a criminal prosecution. Second, even if the Thayer analysis were not controlling, in the exercise of prosecutorial discretion virtually any prosecutor would decline further investigation or prosecution on these facts. The problem is that both conclusions, in my view, involve the exercise of some degree of prosecutorial discretion. Both the spirit and intent of the Independent Counsel Act militate in favor of this type of decision being made by an IC and not the Attorney General.

1. PROSECUTORIAL POLICY CONCERNING THE ENFORCEMENT OF SECTION 607

The Department certainly has a practice concerning the declination of potential 607 cases. It is clear that absent aggravating circumstances, it is the practice of the Department to decline a technical violation of Section 607. I disagree with Lee only slightly in that I do not think this practice has risen to the level of a policy of the Department. It seems clear that the practice developed because the statute itself was calculated to avoid using the fact of employment as leverage to engage in old-fashioned arm twisting of federal employees to contribute. The Department simply aligned its enforcement efforts with the spirit of the statute. However, I am not at all sure that the Department would forgo a potential prosecution against a target of a corruption investigation, if this were the only evidence it could develop. For example, assume we had evidence that a particular politician were accepting bribes but we could not bring the case because to do so would expose a valuable intelligence asset. Assume further that this same target had engaged in a technical violation of Section 607. Would the Department take the position that since there were no aggravating circumstances in connection with the 607 violation, the matter should be declined? Or would the Department use the 607 violation to justify a prosecution even though there were no aggravating circumstances in connection with the 607 conduct? Only if the answer is that the Department's policy as set out in [redacted] memo must lead to a declination of the 607 matter, is it truly a policy and not a mere practice of the Department.

Even assuming that the standard outlined above were deemed to be a policy of the Department, the fact is that, for the reasons set out in Lee's memo, it is not the type of clear policy that was contemplated under the ICA as preempting a further investigation. Indeed, the Senate Report cited in [redacted] memo and quoted by Lee in his memo, establish that this is not the type of "clear policy" that Congress agreed would obviate the need for further investigation and the appointment of an IC.

Quite apart from the clarity (or lack thereof) of this policy, its implementation – that is the detection (or absence) of aggravating circumstances – requires a prosecutor to engage in a fact-based analysis. In this case, for example, a prosecutor would have to look at (investigate) the conduct of the parties involved to determine if there were any aggravating circumstances. This is precisely the type of subjective analysis that the Senate Report, referred to above, was intent on reserving for an IC. Absent a list of standard (and perhaps exclusive) " aggravating circumstances" which are delineated in the Department's policy and which could be checked off by a prosecutor, the analysis required under the policy is, by definition, a subjective one. This is the type of analysis that is intended to be made by an IC.

2. APPLICATION OF SECTION 607 TO THE TELEPHONE CALLS

The issue here is simple: Either the law applies to solicitation phone calls made from a federal workplace but not received in a federal workplace, or it does not. The argument is likewise well framed: A telephonic solicitation from a federal workplace occurs, for purposes of Section 607, where the call is made from, where the call is received, or in both places. The

answers are anything but simple. Two very talented attorneys who spent weeks researching the point disagree on the application of the Thayer decision to the facts at issue ....to what degree the decision is controlling (dicta vs. holding) ....the rules under which Section 607 should be interpreted (the rule of strict construction)....and the plain meaning of the statute itself. In addition, two experienced supervisors in the Public Integrity Section are split on these same issues.

The legislative history of Section 607 seems at every turn to suggest that the section was never intended to reach the conduct involved in the VPOTUS situation: calls from the federal workplace to non-federal locations. When you add to this the analysis of Section 607 in the Thayer decision, the possible application of 607 to these facts becomes even more tenuous.

In Thayer, the Court focused upon the place where the solicitation occurred. Based upon a written correspondence, the Court concluded that the solicitation occurred where the letter was received and opened. While some argue that the technology associated with a telephonic communication renders the Thayer analysis inapplicable, I think for purposes of this statute, the similarities between a letter and a telephone call are compelling. Analogous concerns to those enumerated by the Court about receipt of a written solicitation exist for receipt of a telephonic communication. Like a letter, an oral solicitation is complete only when it is heard. If, for example, if a message on a message machine is never retrieved, the crime is not complete. And in connection with a Section 607 violation, unlike almost all other federal crimes, there is no criminalization of an attempt. See e.g., 21 U.S.C. § 846 (criminalizing attempt in controlled substance crimes); 26 U.S.C. § 7201 (attempt to evade income tax); 18 U.S.C. § 1113 (attempted murder); 18 U.S.C. § 1341 (mail fraud attempt); 18 U.S.C. § 1956 (attempted money laundering); 18 U.S.C. § 1951 (attempted Hobbs Act violation); 18 U.S.C. § 1952 (attempted Travel Act violation). By not including an attempt component, it appears Congress intended that only completed solicitations (i.e., conveyance of the message) "in" a federal workplace constitute a violation of Section 607.

While the above legal analysis leads me to conclude that Section 607 does not apply to the VPOTUS calls, two factors nevertheless motivate my recommendation that an IC be appointed. First is the fact, discussed above, of such disagreement among so many talented attorneys. This disagreement underscores just how ambiguous the statute is and how reasonable prosecutors might, justifiably, reach opposing conclusions. Second, and at least as important, is the "real world" rationale of the ICA. While I do not profess to be an expert on the Act, it seems to me that what is missing so far from the analysis concerning the existence of a Department policy and the application of Section 607 to the facts in this case, is a context within which to view the ICA.

We generally know when the ICA is triggered and, within the four corners of the ICA, under what circumstances the AG shall apply for the appointment of an IC. The ICA was calculated to ensure, among other things, that absent an allegation that is either void of merit or one that presents a set of facts which under established Department policies does not warrant further investigation, decisions involving covered persons (or those who present a personal,

financial or political conflict of interest) will be made by an IC. The purpose of these provisions is to ensure that the American people will have faith in the integrity of these decisions. That is to say, these decisions are to be made by someone who is truly independent from the connections that may appear to undermine the integrity of a decision -- even if it is a legally, morally and factually correct decision. In this regard, it is very much an issue of appearance.

Based upon my untrained review of the ICA and the facts surrounding the VPOTUS telephone calls, the questions are too close for the Attorney General to decide easily as a matter of policy or as a matter of law. Whether there is an established Department policy concerning the prosecution of potential 607 violations as well as the application of Section 607 to the VPOTUS facts, present questions on which reasonable minds - within the Department - can and do differ. While I believe that as a matter of prosecutorial discretion, 10 out of 10 prosecutors would decide that no further investigation is warranted and the matter should be closed, that is beside the point. In order to reach this decision, one must exercise some degree of prosecutorial discretion. Similarly, the existence (or not) of an established Department policy on 607 prosecutions is a jump ball. Neither the law nor the policy present the type of bright lines needed for the Attorney General to announce that no further investigation is warranted.

Having said this, however, I think that, unlike earlier filings, I would propose a detailed or "speaking" application for the appointment of an IC. First and foremost, the public needs to understand what this preliminary inquiry and IC referral is, and isn't about. It concerns only whether phone calls made from public rooms in the White House are against the law. None of the myriad other allegations against the POTUS and VPOTUS has reached the point where specific and credible evidence even warrants a preliminary inquiry. Second, the Attorney General should distill the legal analysis on the two key issues presented and state – quite clearly – that based upon the facts developed to date she could make a determination on whether to investigate/prosecute the matter any further. However, because reasonable minds can differ on whether the undisputed facts constitute a technical violation of the law, it is essential that the public perceive the decision as having been made by someone outside the political arena. Therefore, to ensure public confidence in the determination, these issues should go to an IC for a prompt resolution.

While the issues to be presented to an IC should be narrowly drawn and carefully delineated, that is no guarantee that an IC will not attempt to expand his/her jurisdiction to include the whole world of campaign financing. However, the investigation on the policy and application issues is essentially complete - another fact which can and should be made known to the public. What remains is the exercise of sound independent judgment to determine if the Department's policy or the application of Section 607 preclude the need for further investigation. If our papers are carefully drafted, a good case can be made for a narrowly focused IC review to answer the policy and solicitation "in" questions which are so well laid out in the research done to date.

U. S. Department of Justice

Washington, D.C. 20530

EXHIBIT 11

November 21, 1997

MEMORANDUM

TO: Mark M Richard
Acting Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Independent Counsel Matter: Vice President of the United States Albert Gore, Jr.

INTRODUCTION

The Public Integrity Section has completed a preliminary investigation based on information suggesting that Vice President of the United States Albert Gore, Jr., a covered person under the Independent Counsel Act Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have solicited campaign contributions from his White House office in potential violation of 18 U.S.C. § 607, in connection with fundraising telephone calls he made on behalf of the Democratic National Committee (DNC). Section 607 makes it a felony for any person to solicit or receive a so-called "hard money" contribution (i.e., a contribution intended to influence a federal election) in federal office space. It is not illegal under section 607 to solicit "soft money" -- i.e., non-federal -- contributions in a federal office.[1]

[1] Such solicitations would, of course, be Hatch Act violations for virtually all executive branch employees. The President and the Vice President are specifically exempted from the Hatch Act.

In a separate memorandum, we have analyzed several legal issues presented by application of section 607 to the conduct of the Vice President (as well as the President). In a second memorandum, we have discussed whether, assuming that the Vice President may have technically violated section 607, a written or other established policy of the Department would bar a prosecution of the Vice President (or the President) under section 607, given the facts as we know them. We will not repeat the legal discussion of those issues here; rather, for the purposes of this memorandum, we will assume that section 607 can be applied to telephone calls made by the Vice President from his official workspace and that no written or other Departmental policy exists which would forestall a prosecution of the Vice President based on those facts. All of these issues remain open, at the time of this writing, for your decision, and will affect the nature of the final report to the Special Division of the Court.

Given the facts known to us at the initiation of the preliminary investigation, we determined it was appropriate to explore two possible scenarios that might hypothetically support a section 607 theory. First, the Vice President may have been directly requesting a hard money contribution from some of these donors -- "I hope you'll make a contribution to support my reelection effort." Second, the Vice President may have known about the DNC's practice of depositing a portion of large contributions into hard money accounts, and therefore, when he made vague or ambiguous requests for support, without specifically referring to the campaign or the reelection effort, he was soliciting hard money because he knew that a portion of whatever he raised would be so designated.

In the course of our investigation, we have discovered substantial evidence that Vice President Gore asked several prospective donors to make soft money contributions to the DNC during telephone solicitations made from his White House office. We have no direct evidence that the Vice President asked any prospective donor to make a hard money contribution in the course of his telephone solicitations. There are a few circumstances and a few ambiguous descriptions by donors of their conversations with the Vice President which raise the question of whether he may have been asking for what could be characterized as hard money contributions. However, in each of these instances, an opposite, and more likely inference can be drawn. That is, the same evidence can be viewed as leading to the stronger contrary inference that the Vice President was asking the donor in question to make a soft money contribution. Moreover, to the extent that an argument can be made that the Vice President could be viewed as having objectively asked for hard money in any of these instances, there is, we believe, clear and convincing evidence that the Vice President subjectively intended to ask only for soft money.

We conclude that further investigation of these allegations is not warranted because an independent counsel would not be able to demonstrate that the Vice President knowingly solicited any hard money contributions from his White House office. Accordingly, we recommend that the Attorney General decline to seek the appointment of an independent counsel in this matter.

The Attorney General needs to reach her decision on this matter no later than December 2, 1997, 90 days after the Department of Justice received a letter from a majority of the Majority Party members of the Committee on the Judiciary for the United States House of Representatives requesting that she seek appointment of an independent counsel in this matter. 28 U.S.C. § 592(a)(1). Because we do not yet know the decision on our recommendation with respect to the legal issues forwarded to you earlier, and in order to give the Attorney General as much time as possible to consider this decision, we are not attaching draft documents to be filed with the Special Division of the Court to this recommendation, although we are proceeding to prepare these documents immediately.

II. SUMMARY OF SECTION 607

In relevant part, section 607 provides as follows:

> (a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

The elements of this statute seem deceptively straightforward: in order to make out a violation of section 607, the government must establish that: (1) "any person," (2) solicited or received, (3) any "contribution" within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 (FECA) (i.e., any "gift . . . made by any person for the purpose of influencing any election for federal office"), (4) in any room or building occupied in the discharge of official duties, (5) by any person mentioned in 18 U.S.C. § 603. Each of these elements are discussed in our earlier memorandum, mentioned above.

The element at the heart of the factual investigation in this matter is whether the Vice President's solicitations were

for a "contribution within the meaning of section 301(8) of the FECA"; in other words, whether they were for hard money.[2]

III. SUMMARY OF FACTS[3]

On September 3, 1997, the Washington Post reported that records made available by the White House revealed that the Vice President had solicited political contributions by telephone from his West Wing Office. Of the donations received as a result of these calls, the Post reported that more than $120,000 were deposited into the DNC's federal, or "hard money," account. The Post went on to report that the DNC had reimbursed the U.S. Treasury in the amount of $24.20 for fundraising telephone calls apparently made from the Vice President's office. The article implied that the Vice President may have violated section 607 by making fundraising solicitation calls from his West Wing Office which resulted in "hard money" contributions.

Based on the fact that a plausible inference could be made that if hard money contributions had been made by a donor, the solicitor may have asked for a hard money contribution, it was determined that it was necessary to conduct an inquiry to determine whether the Vice President may have solicited hard money contributions from his White House office. We undertook to conduct the legal research described above to consider whether section 607 would apply under these circumstances, and at the same time undertook an investigation intended to fully explore the facts of this matter.

Our investigation has conclusively established, and indeed the Vice President freely admitted in the course of our interview of him, that the telephone calls in issue were placed from his office in the White House, and that the primary purpose of the calls was to further the fundraising interests of the DNC. Thus, the primary factual matter at issue in this investigation was whether the Vice President solicited hard -- as opposed to soft -- money contributions in the course of his conversations with prospective donors.

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[2] Because the FECA defines a "contribution" in terms of its intent to influence a federal election (as opposed to state or local elections), these funds are generally categorized by the Federal Election Commission (FEC) and by political committees as "federal" and "non-federal." The popular press and common parlance frequently refer to the funds as, respectively, "hard" (regulated contributions intended to influence a federal election) and "soft" (all other political donations).

[3] The FBI has reviewed the facts set out in this memorandum and concurs with their accuracy.

A. THE INTERVIEW OF THE VICE PRESIDENT

As you know, as part of our preliminary investigation, we interviewed the Vice President. A summary of the information provided by him is included to provide an appropriate context within which to consider the remainder of the investigative results. Although we do not put undue weight on the statements of the subject of an independent counsel preliminary investigation in reaching our factual conclusions, it is worthy of note that the four prosecutors who participated in the interview each found the Vice President to be credible and forthcoming. A copy of the Report of Interview is attached to this memorandum.

According to the Vice President, in the Fall of 1995, he and the President volunteered to make fundraising telephone calls for the DNC media fund in order to decrease the number of fundraising events away from Washington, D.C., that would have been both time-consuming and physically exhausting. He stated that it was his intent to solicit soft, non-federal money from the people he called. Indeed, he believed at the time, in error, that by law an individual could not give any more than $2000 in federal money to the DNC per election cycle. He was not aware that the DNC had a practice of allocating the first $20,000 given by a donor in a calendar year into a hard money account. He was also unaware of any prohibition against making fundraising solicitations from his West Wing Office so long as the calls were not being paid for by taxpayer dollars.

This last point is important when reviewing the interview results of the donors. He states that he was not consciously avoiding mention of hard money or seeking to make it clear in all conversations that he was discussing only soft money, as he might have if he had been aware that section 607 barred solicitation of hard money contributions from his office. Rather, he was consciously seeking to raise soft money, a fact which he made explicitly clear in a number of conversations to encourage contributions, but which he was unaware was necessary to make the solicitations legal.

A more detailed description of the interview of the Vice President follows:

1. Inception of the Fundraising Call Plan

In response to a pressing need for additional funds to keep the DNC media ads on the air, the Vice President and the President volunteered to make telephone solicitations during the

Fall of 1995.[4] It was understood by him at the time that money for the DNC's ads could be raised more easily if both the Vice President and the President were personally involved in the fundraising efforts. The Vice President remembers first discussing the topic of the calls during what he termed a "small group" meeting with the President and close aides.[5] He believes he may have advocated for the phone call project since phone calls were an easier, less expensive, and less time-consuming way of raising funds than out-of-town fundraising events.

Soon after the "small group" meeting, the topic of fundraising phone calls for the media fund was again raised during a November 21, 1995 meeting attended by the President, Vice President, several close aides, and DNC Finance officials in the White House Map Room. Several documents discussed during this meeting show that the media fund, originally budgeted at $10 million for calendar year 1995, was in need of several million dollars to stay afloat through the end of the year.[6] Another memo discussed during the meeting suggests a plan for raising "an additional 4 million to be applied to paid television" by the end of the year that includes additional events and "18-20 calls by POTUS/10 calls by VPOTUS" projected to yield $1.2 million. Significantly, a document entitled "DNC Budget Analysis -- 11/21 POTUS PRESENTATION" provides a more precise description of the additional funds needed at the time:

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[4] The Vice President described the media fund as an undertaking to help raise money for the media campaign, a series of television and radio ads first suggested by Dick Morris and begun in the Spring of 1995. The primary goal of the ads, according to the Vice President, was to prepare for an anticipated battle with Speaker of the House Newt Gingrich and congressional Republicans over the federal budget. He also admitted that a secondary goal of the media campaign was to frame the Democratic position for the Clinton/Gore reelection effort in 1996. The Vice President, who early on became an advocate for the campaign, would take part in deciding, among other things, the content of the ads that would be aired.

[5] The Vice President does not recall the date of the "small group" meeting when the calls were first discussed. Nor does he remember who was in attendance, although he states that Leon Panetta and Harold Ickes were frequently invited to this type of meeting. He recalls many of the meetings as impromptu sessions that did not appear on his schedule.

[6] A memo by Harold Ickes dated December 18, 1995 and addressed to the President, among others, describes several of the documents and memorializes the fact that they were discussed during the Map Room meeting.

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5. To increase the media budget from $10.0 million to $13.0 million, the DNC needs to raise or borrow an additional $3.0 million. Approximately $1.0 million, or 35% of this money must be hard.

6. To meet this need, the DNC plans to raise an additional $2.2 million with new events in December 1995, and borrow the remaining $0.8 million.

7. Assuming $1.0 million of this new $2.2 million raised for the media budget is hard, the DNC will end the year with . . .

(Emphasis in the original).

While the Vice President believes that the fundraising phone calls probably would have been discussed during the November meeting in the Map Room, he does not think it would have been anything but a passing reference to the need to make the calls. He stated that the number of phone calls was not discussed at this or any other meeting. He also claimed that the location from which the calls were to be made did not come up during meetings held at this time.

The Vice President does recall that the general topic of the media budget being increased was raised and discussed during the November meeting. He does not recall a discussion at this or any other meeting about the DNC's specific need, at this time, for both hard and soft money in order to keep the ads on the air. In fact, the Vice President recalls that he believed, at the time, that the ads were paid for with non-federal money, claiming that he was not aware that there was a hard money component to the media fund.[7]

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[7] As discussed more fully below, when shown the memos from Harold Ickes discussed during the meeting, the Vice President stated that as a general rule he did not read Ickes's memos since, among other things, the memos usually advocated a position on an issue that would invariably be discussed at length at a meeting anyway. In the Vice President's view, these memos were ideological tracts used by Ickes in his struggle with Morris over DNC funding priorities. Specifically, the memos were designed to show that Morris's extravagant funding plans would bankrupt the DNC. The Vice President explained that for these reasons he would typically move them from his in-box to his out-box without further review. He added that the absence of "checkmarks" on any copies of the Ickes documents, often used by the Vice President to note that he had read a document, was a further indication that he had not read these documents.

2. The Calls

The Vice President admitted that he made telephone solicitation calls from his West Wing Office on several occasions beginning in the end of November or early December of 1995 and continuing into May of 1996. He confirmed that on some occasions Peter Knight sat in the office with him. According to the Vice President, David Strauss was present once or twice and Heather Marabeti, his Executive Assistant, may have sat in on some of the calls.

The Vice President stated that the phone call sessions, which were entered on his daily schedule during this period, would begin with an assistant handing him a stack of DNC call sheets. He claimed that he rarely read these sheets until his assistant announced that a prospective donor was on the line. Once contact was made, the Vice President would read the call sheet, noting spouse information and additional items often as he was inquiring about the health of the spouse or other family members. The Vice President said that he would often, although not always, launch immediately into his "pitch," asking the prospective donor for his or her support.

The Vice President, in some instances, remembered specific conversations. For example, he recalled that Robert Johnson suggested that the DNC buy advertising time on black-owned radio and television stations. Similarly, he recalled talking to Peter May about making an appearance at the Simon Weisenthal Center. For the most part, though, his memory was limited to confirming that certain notations that he, David Strauss, or Peter Knight made on the call sheets accurately set forth what was said at the time.

When shown two such notations referring to "soft money" and, in one case, "non-federal money," the Vice President stated that he often mentioned "soft money" in his pitch to prospective donors. By way of explanation, he said he understood "soft" or non-federal contributions as being most often--"90%"-- corporate contributions. Thus, he felt that the people he was talking to would be more likely to give if they were specifically told that he sought "soft" money since they would know that they could give from corporate or business assets instead of their own personal money. He added that since he believed, at the time, both that individuals were unable to give more than $2000 in federal contributions to the DNC per election cycle and that the DNC needed non-federal money to run the media campaign, he never asked for federal contributions. Moreover, asking only for soft money corresponded to his belief that the media campaign was to be funded entirely with soft money.

3. Knowledge of the Law

The Vice President said that the first time he became aware that his telephone solicitations from the West Wing Office may have violated a federal statute was March 2, 1997, the Sunday that Bob Woodward's story of his fundraising telephone calls ran in the Washington Post. After reading Woodward's account, the Vice President recalls watching as Sunday talk show guests speculated that his calls, reported by Woodward that morning, may have been prohibited by the Pendleton Act if made from a government office. Before that, he had not been advised that soliciting from a government office may be a problem. To the contrary, he was left with a vague impression from the Ethics Committee training he received while in Congress that section 607 does not apply to telephone calls made from federal space.

The Vice President explained that the "advice" he mentioned during a press conference related to advice on how the calls would be paid for and had nothing to do with the legality of making calls from the White House. Specifically, he recalls asking his Executive Assistant, Heather Marabeti, "if it is alright" to initiate and dial the calls from his White House office. This question, according to the Vice President, was posed before one of the first scheduled phone call sessions when he learned that calls would not be routed from, and, therefore billed to, Peter Knight's office as had been done with previous "thank you" calls in 1995. Upon hearing from Marabeti that a calling card would be used, the Vice President believed that the calls could be legally made from his West Wing Office.

The Vice President explained that his concern, at the time, over the charges for the calls was tied to his knowledge of the House and Senate rules that barred outgoing fundraising calls from government offices but allowed incoming calls. According to the Vice President, the congressional rules regarding fundraising phone calls concerned the reimbursement issue, not where the call was actually made. As he understood the rules, so long as the call would not be billed as a government expense, it could take place on a phone in an official office. By way of example, he pointed out that he was advised, while in Congress, that if he left a message for a prospective donor, it was fine to leave his office number. When the party called him back he could then make a solicitation over his office phone since there would be no charge to the taxpayer. The Vice President claimed that he followed these rules closely while in the House and the Senate.[8] His understanding of these rules also led him to raise the

[8] At least two other witnesses interviewed during our 60-day investigation confirmed that then-Senator and Congressman Gore would leave his office and go to an apartment rented by his parents to handle campaign-related matters.

reimbursement issue when he began making fundraising calls from the White House.[9]

B. THE DNC'S ALLOCATION PRACTICE

As will be explained in more detail below, in four or five instances donors made contributions to the DNC as a result of the Vice President's solicitation calls, and a portion of those contributions was deposited into the DNC hard money account. As you are aware from the results of the 30-day initial inquiry, we confirmed that the deposit of a portion of several donors' contributions into hard money accounts was not a result of their request, but rather was done by the DNC without their knowledge. This, of course, significantly undercuts the basis for the reasonable inference on which this investigation was initially founded, that a hard money contribution may have been made as a result of a solicitation for hard money. Nevertheless, we explored the circumstances of this diversion practice in order to permit an informed consideration of a possible theory that if the Vice President was aware of the DNC's practice, and then made vague or ambiguous solicitations for a political contribution, in general terms without specifying whether the contribution was to be hard or soft, this conduct could be considered to violate section 607.

Based on the results of our investigation, there is little, if any, reason to believe that the Vice President had any awareness of the DNC's practice. As set out above, he states that he was unaware of it, and that, in fact, he believed that hard money donations to the DNC were severely limited to relatively small sums. No witness states that he or she had any knowledge or reason to believe that the Vice President was aware of the allocation practice. Furthermore, each of the White House staff we interviewed denied any knowledge of the allocation practice, and Bradley Marshall, the only DNC official involved in the allocation process at the DNC who had any contact with the White House, does not recall ever discussing the issue with anyone at the White House. Only the Ickes/Marshall memoranda, described in detail below, provide any support even for an inference that he may have known of the allocation practice.

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[9] When asked why he made similar fundraising calls from the offices of the DNC shortly before the 1994 elections, the Vice President explained that he went to the DNC on that occasion primarily to boost morale among young DNC staffers who were (justifiably) concerned that the Democrats might be about to lose control of the Congress. This explanation is consistent with that of Terry McAuliffe, who was interviewed in the course of the initial inquiry. The Vice President stated that he did not make these calls from the DNC out of a concern that it might be unlawful to place them from his White House office.

Moreover, even if it could be demonstrated that the Vice President read the memoranda, which he denies, this fact, by itself, does not support an inference that the Vice President asked any donor to make a hard money contribution.[10]

1. Background

Sometime after the 1994 election, the DNC, in an effort to maximize its federal contributions, began a practice of splitting large checks into federal and non-federal components if the donor's preference was not made clear on the checks.[11] Once split, the portion of the gift designated as federal was deposited into the DNC's federal account until the donor objected to this allocation on a form attached to a "redesignation letter" or otherwise communicated his or her wishes to the DNC.[12] Because the DNC failed to send "redesignation letters" from late 1995 through the first half of 1996, however, portions of several of the contributions solicited by the Vice President that were deposited initially into the DNC's federal account remained federal contributions.

2. March 1995 to November 1995

From March through November 1995, Christine Scullion, as Director of Finance Operations, handled the incoming contributions at the DNC. Before Scullion was given a contribution, a three-part check tracking form was partially completed by the Finance Department fundraiser responsible for the gift. Once the top portion noting name, address, date of birth, and other details about the donor and the second portion noting information on how, when, and where the gift was made was

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[10] The DNC's allocation practice continues under review by the campaign financing task force, which is exploring it as a possible fraud. Should that ongoing inquiry develop evidence that the Vice President or any other covered person participated in the practice, we will reconsider at that time its implications under the Independent Counsel Act.

[11] Prior to this, when DNC fundraisers wanted to raise large donations, they typically asked donors to provide two checks, one up to $20,000 for the federal portion, and the other for the remaining amount to be deposited into a non-federal account.

[12] According to Joe Sandler, General Counsel of the DNC, in his testimony before the Senate Governmental Affairs Committee, this practice of "parking" funds in the DNC's federal account until the donor provided final approval was "grounded, at least by analogy, in sections 102 and 103 of the FEC regulations." The merits of this position will be explored in the course of the task force's review of the allocation practice.

filled in, the check was attached to the form and turned over to Scullion personally or left on her desk for processing.

Once Scullion received a check and tracking form, it was her job to make the initial determination of how to allocate a contribution. Normally, she would make this determination from the check itself. For example, if the check were a corporate check, she would direct that it be applied to a non-federal corporate account. Similarly, if the check were drawn on a personal account but had "non-federal" written on it, it would be directed to a DNC non-federal individual account. Scullion entered her allocation determination on the bottom portion of the tracking form.

Next, Scullion would enter the data into a temporary "hold file" in the DNC's AS400 computer system. Scullion would then send the original check and tracking form to Accounting Department employee Michelle Pollard who would check the information in the computer against the hard copy provided to her. If all matched, Pollard would take the transaction out of the "hold file" and "post it" to the general database. Pollard then readied the check for depositing into one of several DNC accounts.

Soon after she began, Scullion was told by Neil Reiff, Deputy General Counsel of the DNC, that a portion of any check over $20,000 could be allocated into the federal account so long as a form letter was sent out asking the donor's permission for the allocation.[13] It was Scullion's job to determine which of the contributions received by the DNC could be split into federal and non-federal contributions. As part of this job, she would send the "redesignation" letters, signed by Richard Sullivan, Director of the Finance Department, to each donor whose gift was being split. She also informed the Accounting Department by first e-mailing a list and later sending a copy of the letter itself along with the contribution check.[14]

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[13] It was Scullion's understanding that the DNC sought federal money from its contributors but she does not recall being told to try to maximize a contributor's federal gift.

[14] Scullion believed at the time that funds which she designated for splitting were deposited into a non-federal account and kept there until the donor approved the "split." As a result, Scullion apparently did not tell the Accounting Division when donors failed to return their redesignation forms. This lack of communication may have resulted in funds remaining in the DNC's federal account without the approval of the donors.

3. November 1995 to March 1996

In November 1995, Susan Ochs took over Scullion's duties in the DNC's Finance Department. Ochs was trained to process incoming contributions by Scullion, her predecessor, and by Neil Reiff. As part of this training, Ochs was instructed by Scullion and Reiff to split or "redirect" contributions from individuals who had not exceeded their annual contribution limit of $20,000 for federal money into the DNC federal account. Like Scullion, it was Ochs's impression that the DNC sought federal contributions from its donors. She understood that the policy of splitting the contributions was implemented to achieve this goal.

In implementing the directions she was given to split or "redirect" contributions, Ochs would first determine if a donor providing a large check had given less than $20,000 in federal contributions to the DNC. If so, Ochs would make a mark next to the non-federal individual box on the check tracking form and then write "redirect?" -- sometimes with a dollar amount entered -- to indicate to Michelle Pollard in Accounting that the contribution was eligible to be split, with a portion to be deposited into the DNC's federal account. She would then forward the check and the tracking form to the Accounting Department.

While Ochs was told that she was responsible for asking donors to agree to the splitting of their contributions, she believed, throughout her time on the job, that Pollard and the Accounting Office would inform her when the contributions were, in fact, split. Apparently unknown to Ochs, though, each contribution noted with a "redirect?" was deposited into the DNC federal account by Pollard, and her supervisors Maria Galdo and Bradley Marshall, the DNC's Chief Financial Officer, without getting back to her to let her know this had occurred. As a result, numerous contributors were not made aware of the final disposition of their contributions.

The DNC's practice apparently caused several donors, including Andrew Morse, Robert Johnson, and E. Blake Byrne, all solicited by the Vice President, to exceed their federal contribution limits for calendar years 1995 or 1996. Because these contributors were unaware that the DNC had allocated $20,000 of their gift to a hard money account, they did not know that additional federal contributions made to other candidates or committees and totalling more than $5000 would cause them to exceed their annual federal contribution limit of $25,000.

Scullion, Ochs, Pollard, Galdo, Marshall, and Reiff have all admitted to being involved in the DNC's allocation practice. None of these witnesses, though, claimed to have any knowledge or information that the Vice President or anyone else at the White

House was aware of the practice of reallocating funds into hard money accounts.[15]

4. The Ickes/Marshall Memos

The only evidence that could be construed to suggest that the Vice President was aware of the allocation practice is a February 22, 1996, memorandum from Harold Ickes addressed to the President and the Vice President, with an attached memorandum from Bradley Marshall, the DNC's Chief Financial Officer. The Marshall memorandum, while ambiguous, suggests the fact that the DNC was engaging in the allocation practice. The Ickes memo, entitled "DNC media funds," details the "mix of money" required for the media buys for which the Vice President is soliciting funds. According to the memo, a combination of 34% federal, 31% non-federal corporate, and 35% non-federal individual is needed for the ad campaign.[16] The Ickes memo also refers to the attached "Confidential Memorandum" from Marshall.

It should be kept in mind, however, as discussed in more detail later, that the Vice President states that he has no memory of reading these memoranda, and that it was his practice at the time not to read Ickes' voluminous memoranda. There is no evidence to the contrary.

Marshall's two-page memo, dated February 21, 1996, describes a shortage of non-federal, or soft funds.[17] Within this context, Marshall makes the following observation:

> I understand that Finance has raised and is currently processing, $1.2 million. At this point, I do not know how it will breakdown between Federal vs Non-Federal and Corporate vs Individual.

In an apparent reference to this "breakdown," he adds the following information three paragraphs later:

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[15] Of these six DNC employees, only Marshall ever had dealings with White House personnel. Marshall does not recall ever discussing the DNC's allocation practice with any members of the White House staff.

[16] Joe Sandler has testified before the Senate Governmental Affairs Committee that the "mix" was determined by referring to FEC regulations.

[17] Our September 29 memorandum contained a typographical error, incorrectly describing the Marshall memo as making out a shortage of "federal" funds.

> Definition of Federal and Non-Federal monies (from the DNC perspective):
>
> Federal money is the first $20,000 given by an individual, ($40,000 from a married couple). Any amount over this $20,000 amount from an individual is considered Non-Federal Individual. An individual can give an unlimited amount of Non-Federal Individual money.

Marshall concludes his memo with a discussion of labor, corporate, and federal PAC contributions.[18] When the memorandum is read knowing of the DNC practice, it appears that it reflects the allocation practice. However, we believe that it is not reasonable to assume that someone reading this memorandum without an independent knowledge of the practice would have understood it to mean that the DNC was automatically, without obtaining prior approval, allocating a donor's contribution to hard money. Indeed, both Ickes and the President state that they too, like the Vice President, were unaware of the allocation practice, and it is beyond dispute that Ickes read and thought about the Marshall memorandum.

In an additional series of memos addressed to the President and Vice President, Ickes detailed the way in which the DNC media campaign was funded throughout this period. Like the Marshall memo forwarded to the President and Vice President in February, 1996, Ickes's other memos show that the ads were paid for during most of this period with a combination of approximately 60% soft and 40% hard money. Moreover, these memos and attached DNC budgetary documents indicate that from November, 1995, through January, 1996, the media fund suffered from a shortage of federal (hard) funds. According to Ickes and the language of the memos, this shortage was significant since the DNC's soft money could not be used for the ads if the hard money component was unavailable. Ickes states that he believes that had the Vice President read and understood the documents directed to him, he would have known that the DNC needed to raise federal funds in order to keep the media fund afloat through much of this period.[19]

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[18] Marshall, when interviewed, remembered several meetings held in the White House where DNC budgetary issues were discussed. On two occasions the President and Vice President were present. The terms federal and non-federal dollars were used during the discussion and the participants noted how difficult it was to raise federal funds.

[19] Ickes does not recall discussing any of the topics directly with the Vice President. He believes his memos would have been routed through the "staff secretary" to the Vice

The Vice President claimed that he was unaware that the DNC was "splitting" some large contributions and depositing up to $20,000 into the federal account. He does not recall seeing the Ickes/Marshall memoranda that appear to set forth this practice. He added that it is unlikely that he would have read the memo, even though it was addressed to him among others, since he did not, as a general practice, read Ickes' work product. By way of further evidence that he had not seen the Marshall statement, the Vice President said that he remained unaware, throughout this period, that the DNC's media campaign was being funded, in part, with federal contributions.

The Vice President explained that when Ickes started producing these types of memos, he would take them out of his in-box and set them aside without reading them, believing that Ickes was simply stating his position in an ongoing battle with Dick Morris over tactics. Specifically, the Vice President felt that the memos were designed to show why Morris's plans, especially regarding the media campaign, were extravagant and would eventually bankrupt the DNC. The Vice President felt that his Chief of Staff, Ron Klain, would inform him of anything that he needed to see in the memos. He also assumed that the subject matter in the memos would be raised in his presence during various meetings he would attend.

Based on the uniform statements of the DNC officers and employees who were actually responsible for the allocation practice that they had no knowledge or reason to believe that the Vice President knew of the practice, and the lack of evidence that the Vice President read the Ickes/Marshall memoranda, or if he read them, that he understood them to suggest that the DNC was splitting contributions without the knowledge of the donors -- which they do not say -- it is our view that there are no reasonable grounds to investigate further this matter based on the theory that the Vice President may have been deliberately seeking contributions without making it clear whether he was soliciting hard or soft funds, knowing that a portion of the contribution would be allocated to hard funds.

This leaves the question of whether the Vice President directly solicited hard money contributions during any of his conversations with potential donors.

C. THE DONOR INTERVIEWS

A total of 216 prospective donors were identified from call sheets and lists provided by the White House, the DNC, and Peter Knight. Based on our interview results, at least 43 of these

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President's in-box. He does not know whether the Vice President read the memos.

prospective donors had telephone conversations about political contributions with the Vice President.[20] As many as five of the

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[20] 154 people who were interviewed or otherwise provided a statement said that they did not recall receiving a telephone call regarding political contributions from the Vice President. Another seven were not available to be interviewed, because of illness, travel schedules, or because they did not respond to our efforts to contact them. Nine prospective donors declined to provide a statement of any kind on the topic. Finally, we interviewed four individuals who received telephone solicitations from the Vice President in the Fall of 1994. However, those calls were made from DNC offices, and thus raise no questions of impropriety.

It is our view that the fact we have not been able to speak with 16 people whose names appeared on call sheets does not foreclose our ability to recommend that this matter be closed now. First of all, we are still expecting that most of these individuals will be interviewed before the end of the preliminary investigation period. Furthermore, of the 16, the documentary evidence -- phone records and notes on call sheets -- suggests that only a handful of the 16 were actually called. As to one of those, Eric Becker, we are confident that we have a full understanding of the conversation based on the copious notes taken during the conversation by David Strauss. In light of the consistency of the investigative results, it is our view that the likelihood that the few remaining donors would offer new evidence sufficiently compelling as to affect our recommendation is remote.

If it is nevertheless felt that we cannot close this matter without speaking to all prospective donors, it is our recommendation that we should seek the permission of the court to extend the preliminary investigation another 60 days. This preliminary investigation period has already been truncated to an even briefer period than normal by the fact that it was the subject of a letter from the majority members of the House Judiciary Committee. While the FBI has done a remarkable job of conducting a very large number of interviews in this foreshortened period, we have not had the luxury of time to try to persuade reluctant witnesses or to track down individuals who are traveling. An extension would give us the opportunity to try to complete the record.

It is not entirely clear whether the Congress intended the extension period to be available when a matter is pending pursuant to a Judiciary Committee request. We see nothing in the statute or the legislative history that would clearly bar such an extension, however, and believe that seeking an extension would be preferable to seeking an independent counsel simply because a

43 were solicited by the Vice President and gave a gift that was deposited, in part, into the DNC's federal account. Another 11 were solicited and provided contributions to the DNC; their gifts were deposited into a non-federal account. Eight prospective donors were solicited but declined to give. The remaining 19 remember the purpose of the call as a thank you rather than a solicitation. Donations of three of these 19 individuals subsequently were split and partially deposited into a DNC federal account without their knowledge.

We will discuss here in detail only those telephone conversations that raise colorable issues as to whether the Vice President may have solicited hard money, or that provide useful context to interpreting the calls. An addendum to this memorandum will outline in chart form the results of the remainder of the interviews with donors.

1. Solicitations That Led to Contributions Deposited Into a DNC Federal Account

As mentioned above, this investigation was predicated on the plausible inference that if a donation was made to the DNC that was deposited into a hard money account, then it may have been that the solicitor of the funds requested a hard money donation. Our investigation has established that the Vice President made four telephone solicitations from the White House which resulted in donors contributing funds to the DNC that were thereafter deposited into a DNC hard money account. A fifth is strongly suggested by the circumstantial evidence.

As explained above, we have concluded that because the investigation established that the deposit of the funds into a federal account was accomplished without the donors' prior consent or knowledge, the mere fact that these donors made contributions a portion of which was deposited into a hard money account does not in and of itself suggest that they were solicited for a hard money contribution. Furthermore, four of the five describe the solicitation as having been for the "DNC media fund" or more generically for a DNC advertising campaign, rather than for any particular federal election.[21] Recall that the Vice President explained that he believed that the media campaign was funded solely with soft money, and thus, he explained, when he requested support for the media fund, in his mind he was expressly requesting soft money contributions.

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few interviews remain outstanding.

[21] The fifth donor in this category, Peter Angelos, does not remember whether the Vice President referred to the media fund or even whether the Vice President asked him to contribute.

In addition to the fact that a portion of their contributions were deposited into a hard money account, the donations of two of the five raise an additional issue. These two recall some mention of elections in the course of the conversation; Robert Johnson recalls that the Vice President mentioned facing a "tough election," and William Dockser recalls a discussion of the fact that the recent elections had gone badly. Because hard money contributions are defined as those intended to influence a federal election, such references in a fundraising conversation must be closely examined. The implications of these references will be discussed in more detail later in this memorandum.

a. Robert Johnson

On February 5, 1996, the Vice President telephoned Robert Johnson, President of Black Entertainment Television (BET), from his West Wing Office in the White House.[22] The DNC Finance call sheet prepared in anticipation of this call notes that Johnson gave $50,000 in both 1993 and 1994 and $20,000 of a $50,000 commitment in October of 1995. It also notes that Johnson is a strong Clinton/Gore supporter. Beside the heading "Reason for the call," the Vice President is told to "[a]sk him to write $30k for the media campaign."

Johnson received his call from the Vice President while in his BET office in Washington, D.C. According to Johnson, the Vice President spoke of facing a tough election. He noted the need to get the Democrats' message out on issues such as health care. Within this context, Gore asked Johnson to contribute $30,000 to the DNC. Johnson told the Vice President that he would give this amount. He believes he asked his secretary to send the check which was written on his personal checking account.

After the call, Ann Braziel at DNC headquarters prepared a form letter containing the following language:

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[22] Because Johnson was called at his office in Washington, we do not have a telephone bill showing that the call was made from the White House. Telephone bills from February 5, 1996 do confirm that several other numbers which appear on the Vice President's call sheets were phoned on that date from 4:00 to 5:00 p.m. In addition, the Vice President's schedule for that date shows that he was scheduled to make phone calls from the "West Wing Office" from 4:00 to 5:00 p.m. Secret Service records show that Peter Knight entered the White House just prior to the scheduled phone session on February 5, 1996. Knight has a vague recollection of being present in the West Wing Office when the Vice President called Johnson.

> It was a pleasure to speak with you today. President Clinton and I thank you for your continued support and contribution to the Democratic National Committee. We appreciate your dedication to our Administration and your help at a time when needed. Thank you for your commitment to make an additional contribution of ____.

The pledged amount was filled in and the letter was sent by courier to the White House for the Vice President's signature.

Johnson gave $30,000 soon after the call. According to Johnson, he made the contribution with the understanding that the money was for advertising and "putting the message out." At that time, Johnson did not realize that the DNC could accept any hard money from individuals.

A copy of the check provided by Johnson, as well as check tracking forms and DNC computer records, indicate that the DNC deposited Johnson's $30,000 check into a federal account. A DNC Finance official tasked with the job of keeping track of the Vice President's project made an entry in the computer program entitled "Gore calls": "$30k IN."[23] DNC records indicate that $10,000 was eventually allocated into a non-federal account. Federal Election Commission records further reflect that the DNC's allocation of Johnson's gift may have caused him to exceed the $25,000 annual limit for federal contributions in 1996.

b. William Dockser

Also on February 5, 1996, the Vice President telephoned William Dockser, a real estate developer from Rockville, Maryland.[24] The call sheet prepared on Dockser notes that he gave $35,000 in 1995; $20,000 in 1994; and $10,000 in 1992. Under "Reason for the call" the DNC Finance staff states that he "has expressed an interest in making another major contribution to the DNC this year." The Vice President is told to "[a]sk him to send in $25,000 to fund the media campaign."

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[23] Another entry made by Ann Braziel soon after the call was made reads: "YES-PK to follow up," an apparent reference to Peter Knight. Robert Johnson does not recall a follow-up to the Vice President's call by Peter Knight or anyone else at the DNC.

[24] Like the call to Johnson, the Vice President's call to Dockser does not appear on a telephone bill. As explained above, however, circumstantial evidence and Peter Knight's recollection of the Johnson call suggest that Vice President Gore made fundraising calls on February 5, 1996 from his West Wing Office in the White House.

Dockser too received his call from the Vice President while in his office. He recalls that the Vice President explained that because the recent elections had gone badly, the Democrats were in need of a media campaign. These ads were being run outside of the Washington area, according to the Vice President, and were designed to promote "Democratic issues." The Vice President asked for $25,000 for the campaign and Dockser agreed to contribute in this amount. He recalls now that his gift was in response to the Vice President's request.

The witness did not recall the Vice President mentioning the terms "soft money" or "hard money" but he was under the impression at the time that the request was for "soft money." Dockser based that impression on his prior knowledge of the media campaign and a belief that the campaign was being funded by "soft money" gifts. Dockser believed that soft money, by law, could be used for "issue oriented" ads and that hard money was used directly in "election campaigns."

A thank you note to Dockser containing the same language as set forth above was prepared for the Vice President's signature following the call. After consulting with DNC fundraiser Ari Swiller, Dockser sent the DNC a personal check in the amount of $25,000 made out to "D.N.C.-Media Fund." Once the DNC obtained the check, a check tracking form was completed and the funds were deposited into two accounts: $20,000 into the federal account and the remaining $5,000 into a non-federal account. An entry showing "25k in" was also noted on the "Gore Calls" computer program.

c. E. Blake Byrne

Also on February 5, 1996, the Vice President telephoned E. Blake Byrne, President of Argyle Television, from his White House Office.[25] The DNC Finance call sheet, prepared in anticipation of this call, notes that Byrne gave $25,000 in April of 1995 and another $25,000 in September of 1995. It also notes that "this is an easy call-he is very concerned about the Radical Right and its effect on the rights of Gay Americans." Beside the heading "Reason for the call," the Vice President is told to "[a]sk him for $25,000 to fund the media campaign."

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[25] Clinton/Gore calling card records indicate that a 2 minute and 18 second phone call to Byrne's office from the White House occurred on February 5, 1996, at 4:39 p.m. As noted above, the Vice President's schedule for that date shows that he was scheduled to make phone calls from the "West Wing Office" from 4:00 to 5:00. Byrne recalls his office forwarding the call to Grand Rapids, Michigan, where he travelling on business.

During the conversation, the Vice President asked Byrne to contribute $25,000 to the DNC media fund. Byrne was familiar with the fund from his work and agreed to make what he believed to be a soft money donation to the media fund. The Vice President instructed Byrne on how to fill out his contribution check. The contribution request was the only topic during a short conversation.

On February 12, 1996, Byrne wrote a check to the "Democratic National Committee Media Account" for $25,000. A DNC check-tracking form was completed but no revenue code was checked. The DNC deposited $20,000 into a federal account; the remaining $5,000 was deposited into a non-federal account. A DNC Finance official tasked with the job of keeping track of the Vice President's project made an entry in the computer program entitled "Gore calls": "$25k IN."

d. Andy Morse

On December 11, 1995, the Vice President telephoned Andy Morse, Senior Vice President at Smith Barney Shearson, from his White House Office.[26] The DNC Finance call sheet prepared in anticipation of this call notes that Morse gave $25,000 in both 1993 and 1994. Beside the heading "Reason for the call," the Vice President is told to "[a]sk Andy to contribute an additional $25,000 to the DNC Media Fund."

According to the Vice President, the purpose of his call was to raise money for the DNC media fund in response to a media blitz by the Republican National Committee. The Vice President asked Morse to contribute to the fund. In response, Morse said he would consider the matter. According to Morse, the terms hard or soft money did not come up in the conversation.

Morse received a follow-up call from a DNC employee soon thereafter. On February 23, 1996, he wrote a check payable to the "Democratic Nati Committee," assuming that the contribution would be recorded as a soft money gift. Instead, the DNC deposited $20,000 into a federal account and $5,000 into a non-federal account. This allocation by the DNC put Morse over the

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[26] The Vice President's schedule for December 11, 1995 shows that he was scheduled to make phone calls from the "West Wing Office" from 9:00 to 9:45 a.m. The call sheet for Morse shows a notation made by the staff assistant placing the call from the West Wing Office that the call was "Done" on "12/11" at "9:40."

legal annual limit of $25,000 for federal contributions for 1996 by $450.[27]

e. Peter Angelos

Phone records show that a call lasting approximately four minutes was placed from the White House to the office of Peter Angelos at around 1:00 p.m. on April 26, 1996. The Vice President's schedule indicates that this call was made during a time set aside for fundraising calls. A DNC call sheet prepared for the Vice President also suggests that he ask Angelos to contribute $50,000 to the DNC. Approximately a month after this telephone call, Angelos wrote a check to the DNC in the amount of $100,000 which contained a notation in the memo line of "Pres. Campaign." DNC Finance deposited $20,000 of this gift into a federal account. A DNC check tracking form identifies Peter Knight and the Vice President as "solicitor" of the $100,000 gift from Angelos.

While he remembers receiving a call from Vice President Gore, Angelos does not remember the Vice President asking for money. Nor does Angelos link the Vice President's call to his decision to make the donation a month later. Rather, Angelos recalls going to the DNC and speaking with Peter Knight at length before making out his $100,000 check. No thank you letter memorializing a pledge to contribute has been produced by either the White House or the DNC in connection with the Angelos call.[28]

Because Angelos does not even recall this conversation as being a solicitation, and instead links his subsequent gift to conversations with Peter Knight, we do not believe that this call could be considered to be a basis for a potential 607 prosecution.

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[27] Morse did not learn that $20,000 of his gift had been allocated to the DNC's federal account until September of 1997 when he received a letter from Steve Grossman of the DNC, apologizing for what Grossman termed a "mistake." Morse's attorney replied by letter that since this allocation put Morse over the legal limit by $450, Morse would like the records changed to reflect a gift of federal money in the amount of $19,550.

[28] The Vice President does not remember the details of his conversation with Angelos.

raising $50,000 in 1995 and 1996 for the DNC. In making his pitch, the Vice President said something to the effect that, "the DNC was gearing up for the 1996 campaign." The Vice President did not mention a specific dollar figure that he was presently seeking, nor did he mention the terms "hard" or "soft" money. Instead, he observed: "If you would be helpful, sooner rather than later, it would be appreciated."

Dayton was a Managing Trustee of the DNC. As such, he had pledged either to contribute or raise $50,000 in 1995 and 1996 for the DNC. According to Dayton, prior to receiving the telephone call from the Vice President, he had already told David Mercer of the DNC that he wanted his $50,000 gift to be soft money.

Soon after the call, Dayton spoke with David Mercer of the DNC to find out how Dayton should satisfy his pledge to give $50,000. Mercer directed Dayton to write a $30,000 check to the DNC's non-federal account; $10,000 to the New York (state) Democratic Party; and $10,000 to the New Jersey (state) Democratic Party. Dayton made a notation on the lower left portion of each check denoting "Non-Federal account." He wrote the checks within three days of speaking with the Vice President. Per directions, the DNC deposited Dayton's check into a non-federal account. The gift was noted on the "Gore Calls" spreadsheet: "YES-$50k; $50k IN."

The evidence clearly suggests that this call was a followup to a previous commitment by Dayton, and is thus, we believe, properly categorized as a "thank you" rather than a solicitation. Dayton already had a specific intent to make a soft money contribution, and there is no suggestion that anything about his conversation with the Vice President led him to believe that he was being solicited for hard money. We conclude that the brief conversation about a Senate campaign and the fact that the DNC was "gearing up" for elections is insufficient to suggest that the Vice President was seeking a donation to an election campaign. Certainly Dayton did not so interpret the conversation, or he would either have changed his subsequent donation to a hard money contribution, or told the Vice President that he couldn't make a hard money contribution, but would be willing to contribute soft money.

2. Federal Money, But No Solicitation.

The Vice President called at least 18 people who, while active in DNC fundraising or giving, recall the conversation as a thank you, not a solicitation. Curiously, three of these individuals were recorded on the DNC spreadsheet entitled "Gore Calls" as having given in response to the Vice President's call. For example, an entry next to Eli Broad's name reads: "sent $50K; $50k in." Similarly, an entry opposite George Marcus indicates an amount of $50,000 and then "$50K IN" and an entry opposite Ira Leesfield indicates "YES-maybe $50k" and "$30k IN." In addition, these three donors each received a thank you letter from the Vice President following their telephone conversations with him. Although the thank you letters do not explicitly indicate that the donors have contributed or agreed to contribute to the DNC as a result of being asked by the Vice President to do so, such an inference possibly can be drawn from them. Each of the gifts recorded for these three donors had $20,000 allocated to a DNC federal account without their knowledge.

It may be that each of these individuals, as regular substantial contributors to the DNC, interpreted the Vice President's call as expressions of appreciation for previous contributions, and did not consciously link their later gift to the Vice President's call. Another possibility is that they may have previously promised to contribute, and interpreted the Vice President's call as a "thank you" for that promise, even though the contribution had not yet been delivered. In any event, it is our view that a section 607 prosecution cannot be based on a conversation in which the donor affirmatively believes there was no solicitation, notwithstanding ambiguous thank you letters which possibly call into question the accuracy of the donor's memory. However, even assuming for the sake of argument that the Vice President asked Broad, Leesfield, and Marcus to give to the DNC despite the fact that they do not remember this happening, we have no evidence that the Vice President asked any of them to make hard money contributions. Finally, as explained above, our investigation has established that the mere fact that their contributions were reallocated into hard money accounts is not sufficient to support an inference that they were solicited for hard money, because those reallocations were accomplished unbeknownst to them, without their knowledge or prior approval.

3. **Telephone Solicitations That Led To Non-federal Donations, but in Which Federal Elections Were Mentioned -- Mark Dayton**

On February 5, 1996, the Vice President telephoned Mark Dayton, head of Vermillion Investments Corporation, in his office in Minneapolis, Minnesota. The conversation started with "small talk," then shifted to Senator Paul Wellstone's Senate campaign. The Vice President next alluded to Dayton having committed to

4. Telephone Solicitations That Led To No Donations

a. Solicitations That May Have Been Ambiguous

i. Penny Pritzker

The Vice President telephoned Penny Sue Pritzker, President of Classic Residence by Hyatt, on February 5, 1996.[29] Pritzker recalls that the Vice President asked her to contribute money for a media campaign which aired television commercials, aimed at smaller city markets. Pritzker told the Vice President that her family had already given $100,000 to assist in obtaining the Democratic National Convention for Chicago. She declined the Vice President's request to give to the media campaign, stating that neither she nor her family would be contributing any more at that time.

Several weeks prior to the call, Pritzker had been invited to attend a private meeting with the Vice President with about a dozen wealthy Chicagoans in a hangar at Midway Airport. Pritzker recalls viewing three to six television commercials with negative messages linking Senator Robert Dole to the policies of Speaker Gingrich. The attendees were told that the commercials were going to be shown in smaller city markets throughout the United States because of their demonstrated success in promoting the presidential reelection effort. The Vice President told the group that attendees would be contacted in the future for financial help in running the media campaign. When he called a few weeks later, the Vice President made mention of the television ads that Pritzker had viewed at the airport event and asked that she contribute so the ads could continue running.

ii. Noah Liff

The Vice President telephoned Noah Liff, Chairman of the Board of Steiner Liff Iron and Metal Company of Nashville, Tennessee, on May 2, 1996.[30] Liff has known the Gore family for 30 to 40 years and recalls the conversation in May as a friendly discussion between two friends. The conversation began on a personal note with the two trading information on family and

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[29] Clinton/Gore calling card records indicate that this call, which lasted for four minutes and 42 seconds, was made from a White House telephone at 5:03 p.m. Scheduling records and witness accounts detailed above indicate that this call was made from the Vice President's West Wing Office.

[30] Clinton/Gore calling card records indicate that this call was made from a White House telephone at approximately Noon. Scheduling records and witness accounts indicate that this call was made from the Vice President's West Wing Office.

mutual friends. Liff and the Vice President then spoke about how Liff approved of many of the policies and stances taken by the Administration.[31] After a brief discussion, the Vice President thanked Liff and then made a request for Liff's help.

Liff's best recollection is that the Vice President said something to the effect that any help Liff could provide would be appreciated. He responded by saying he had already given his "legal limit" and was unable to give any more.[32] According to Liff, nothing more was said by either party on the topic of "help" and the conversation ended on a friendly note.

Significantly, Liff also stated that he may not have been aware, at the time of the telephone call, that he could have provided a soft money donation to the DNC. He explained that his political gifts had all been made directly to candidates during this period. He believes now that he may not have learned about the option of giving non-federal gifts until the publicity about the Vice President's fundraising phone calls surfaced in the media this year. Even if he was aware, he believes that he did not consider the option when the Vice President raised the topic of "help." He is quite sure, though, that the Vice President did not specifically mention the DNC, the Clinton/Gore campaign, or the topic of a soft money gift during their conversation.

b. Solicitations in Which the Vice President Asked for Soft Money

The following descriptions involve three solicitation phone calls which we believe clearly cannot form the basis of a 607 violation because there is documentary and/or credible testimonial evidence that the Vice President asked the donors in question for soft money. We include these facts here because they provide examples of cases in which it appears from the conversations either that the Vice President made the fact that he was requesting soft funds explicit, or that both the Vice President and the donor expressly were discussing a soft money contribution.

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[31] In his first interview, Liff referred to a discussion of his "support of the Administration." In his second interview, Liff explained that by this reference to "support" he did not mean financial support. By support, Liff explained, he meant approval of the way the Administration was governing.

[32] While Liff claimed, in his second interview, that he did not consider what the Vice President meant by help, his response seems to confirm what he said in the first interview: that the Vice President was referring to monetary help. Additionally, Liff recalls that he did not state how much he had given or to whom. He does recall using the phrase "legal limit."

i. Eric Becker

The Vice President spoke to Eric Becker, Chairman of Sterling Capital, in Baltimore, on February 9, 1996.[33] After a preliminary discussion about a children's museum that Becker was developing, the Vice President turned the topic toward political fundraising with the phrase: "let me ask you about a political matter." He went on to explain that the DNC media fund was concentrating on areas scientifically chosen to target swing voters. According to the Vice President, "the news media acts like they don't know about it." Notes of the telephone conversation indicate that the Vice President told Becker that "soft money is permitted." Becker replied that he had just sent $50,000 to DNC Finance official Ari Swiller the day before. FEC records indicate that Becker did not make a further contribution to the DNC during this time frame.

ii. Jack Bendheim

The Vice President also spoke to Jack Bendheim, President and owner of Philips Brothers Chemical, on February 9, 1996. Notes of the call taken contemporaneously by David Strauss, who was sitting in with the Vice President, indicate that the Vice President told Bendheim that "soft & corporate ok." The Vice President also pointed out that "early is much better than late." Apparently in reply, Bendheim told the Vice President that he had already given $50,000 to the DNC in 1996.

Bendheim confirmed in an interview that he was solicited by the Vice President and that he declined to give. While Bendheim does not recall the term "soft money" being used in the conversation, as suggested in Strauss's notes, it was Bendheim's understanding, however, that the Vice President was asking for non-federal money in his call.

iii. Johnny Johns

On December 1, 1995, Johnny Johns, President of Protective Life Insurance Corp., telephoned the Vice President at a number previously left for him by a member of the Vice President's

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[33] So far, Becker has refused to be interviewed by us in connection with this matter. However, the substance of the Vice President's solicitation was recorded by Deputy Chief of Staff David Strauss, who took copious notes of the Vice President's side of the conversation as he sat in the West Wing Office on this occasion. The details provided here of the Vice President's conversation with Becker come from Strauss' notes.

staff.[34] After waiting for several minutes, the Vice President came on the line and explained that since the Republican Party was engaging in an extensive media campaign, the Democratic Party needed to respond. The Vice President asked Johns for a $50,000 contribution. Because Johns interpreted the request by the Vice President as a request for a contribution from his corporation, not from himself personally, Johns responded that he did not have the authority to commit the corporation. He added that this type of contribution would need to be decided by a committee within the corporation. He promised that if the corporation decided to make such a contribution, he would get back in touch with the Vice President.[35] The entire context of the conversation with the Vice President focused on the need for action by the Democratic Party in response to the action being taken by the Republican Party.[36] No action was ever taken by the corporation.

5. Telephone Solicitations That Led to Nonfederal Donations But in Which No Federal Elections Were Mentioned

As above, we here describe two additional conversations as examples of cases in which it appears that the Vice President made the fact that he was requesting soft funds explicit, because each donor states that he filled out his subsequent contribution check according to the instructions of the Vice President, and the check expressly indicate that they are soft money contributions. The contributions were deposited into soft money accounts.

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[34] While Johns does not recall what day he received the call, he does remember returning to his office one day in December of 1995 and receiving a message that the Vice President had called him. Clinton/Gore phone records indicate that a one minute call was made to Johns' office on December 1, 1995. In addition, a thank you letter, signed by the Vice President and mailed to Johns, references December 1 as the date of the call.

After receiving the message, Johns personally dialed the number left for him. The call was answered by a male secretary who eventually put the Vice President on the line.

[35] Johns' version of the conversation is corroborated by documentary evidence. For example, Johns' call sheet has a notation written by the Vice President in quotation marks as if to indicate a quote from Johns: "Let me go back & talk to my people and ask." An entry on the DNC spreadsheet entitled "Gore calls" reads: "He will ask and call Gore or Knight."

[36] Johns does not believe the Vice President mentioned his own election or any other specific election.

a. James Hormel

On December 1, 1995, the Vice President telephoned James Hormel, Chairman of Equidex, Inc., in his office in San Francisco. The Vice President asked Hormel for $50,000 to support "an advertising campaign for the DNC."[37] The two had a conversation about the DNC media fund. Hormel said he would consider the Vice President's request.

Hormel made a note with instructions given during his conversation with the Vice President as to how a donation should be forwarded to the DNC: "Check request: $30,000.00. Payable to: DNC-NonFederal Acct per V.P. Gore's request Send to: Peter Knight 1615 L St. NW #650 W DC 20036 202659-3005." His December 11, 1995 check was made payable to the "Democratic National Committee NON-FEDERAL ACCOUNT" for $30,000. The DNC deposited this gift into a non-federal account. Hormel's gift was tallied on the spreadsheet: "YES-$50K-Pastrick will follow up; $30K IN."

Prior to the call, Hormel attended a session where the Vice President addressed a small group about the ads being run by the DNC. The meeting provided a forum for the Vice President to make a presentation on the media campaign to the private sector. Hormel recalls no connection being made between the DNC media fund and the Clinton/Gore reelection effort.

b. Merv Adelson

On December 18, 1995, the Vice President telephoned Merv Adelson, Chairman of East Capitol Associates, at his office in Los Angeles.[38] The Vice President asked Adelson for a contribution of $25,000.[39] Adelson readily agreed to contribute

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[37] Next to the contribution history on Hormel's call sheet, staff assistant to the Vice President Joel Velasco, at Peter Knight's direction, made a notation: "no federal $ '95." At the bottom of the sheet, the Vice President wrote "Non-federal $ "soft" and "will call back."

[38] According to Adelson, the call was first received at his office in Los Angeles and then patched through to his residence in Aspen, Colorado.

[39] Adelson recalled that the request for funds was for a specific purpose, although he could not recall for what purpose. Adelson could only recall that the reason given by the Vice President for the request of funds was reasonable. To the best of his recollection, the terms hard, soft, federal, and non-federal were not used in the phone conversation, but the way that he completed his check, which he says he did pursuant to the Vice President's direction, strongly suggests that he was told to

$25,000. The only question Adelson posed to the Vice President was to whom should he make the check payable. While he does not recall the response, Adelson said he would have followed instructions given by the Vice President.[40]

On January 24, 1996, Adelson's accountant wrote a check in the amount of $25,000 made payable to the "Democratic National Committee Non-Federal Account C/O Peter Knight". The DNC deposited this check into a non-federal account. Entries on the DNC spreadsheet entitled "Gore calls" were made opposite Adelson's name: "YES-25K; letter sent 12/18/95; 25k IN."

IV. ANALYSIS

Section 607 prohibits only solicitation or receipt in federal office space of "any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971." Section 301(8) defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office" -- i.e., hard money. 2 U.S.C. § 431(8)(A)(i).

Thus, a contribution made to a political campaign or a political party, specifically intended to support the election of the candidate, is a contribution within the meaning of section 607. On the other hand, a contribution to a political party -- as opposed to a campaign committee -- intended to support the party's general ability to "get out the word" about important issues is a soft money contribution, and not included within the scope of section 607.

Section 607 contains no explicit intent requirement. However, a 1908 district court opinion interpreted a predecessor version of section 607 as a general intent offense. United States v. Smith, 163 F. 926, 927 (M.D. Ala. 1908) ("The guilty intent to violate the law flows from the knowing and intentional doing of the acts which the statute forbids. Ignorance of the statute, or of the extent of its provisions, is no excuse."). Reading a general intent requirement into section 607 is consistent with the rebuttable presumption that Congress intends to incorporate some mens rea requirement in its definition of federal crimes. See United States v. Garrett, 984 F.2d 1402,

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complete his check to a non-federal account.

[40] While Adelson remembers taking instructions from the Vice President, he also provided us with a one-page fax cover sheet from Peter Knight's assistant to Adelson's secretary which states: "Mr. Adelson's check should be made out to Democratic National Committee -- Media Fund."

1410 (5th Cir. 1993) (noting that courts "will presume that Congress intended to require some degree of mens rea as part of a federal criminal offense absent evidence of a contrary congressional intent").

Thus, based on the Smith case and normal principles of construction of criminal statutes, we believe that, in prosecuting an alleged violation of section 607, the government must prove that the defendant knew that he or she was: (1) engaged in the act of soliciting or receiving; (2) in a federal office; and (3) was soliciting or receiving, in particular, a hard money contribution. However, we do not believe that the government would be required to prove that the defendant acted willfully, i.e., that he or she knew it was illegal to make such solicitations in federal office space.

Under the Independent Counsel Act, although intent is properly considered in the context of a preliminary investigation (as opposed to a 30-day initial inquiry), the Department is limited in the extent to which it can rely on evidence of lack of intent to justify declining to seek an independent counsel. Section 592(a)(2)(B)(ii) provides that the Attorney General cannot decline to seek the appointment of an independent counsel based on "a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind."

The facts developed during our investigation indicate that as many as five people solicited by the Vice President from his West Wing Office gave money that subsequently was deposited into a DNC federal account. As explained above, we have concluded that this was done without the donors' knowledge or prior consent, and thus does not provide any inferential support for the notion that they were solicited for hard money contributions. Furthermore, we have no direct evidence that the Vice President actually asked these or any other prospective donors to make federal contributions. Indeed, in each of the situations where the conversation was explicit, the evidence is to the contrary; the Vice President requested soft money contributions. To the extent the words used by the Vice President in any of his solicitations were ambiguous, the stronger inference to be drawn from the facts and the context is that the Vice President was asking for soft money. Moreover, even if the Vice President's words could have been understood by a reasonable person as seeking federal contributions, there is, we believe, clear and convincing evidence that the Vice President intended to solicit only soft money donations.

A. Evidence that the Vice President Asked Prospective Donors for Non-Federal "Soft Money" Contributions

We have discovered direct and circumstantial evidence that Vice President Gore explicitly or implicitly asked several prospective donors to make "soft money" contributions to the DNC during the telephone solicitations in question.

1. Notes on Call Sheets

Notes taken on several DNC call sheets during conversations between the Vice President and the listed donors provide evidence that the Vice President asked for soft money in those conversations. For example, call sheets for Eric Becker and Jack Bendheim contain handwritten notes by David Strauss, then the Vice President's Deputy Chief of Staff, which reference "soft money." According to Strauss, these notes which state, "soft money is permitted" and "soft and corporate OK," memorialize parts of the Vice President's side of the conversation. Another call sheet for James Hormel has the phrase "non-federal $ soft" noted in the Vice President's handwriting. During his interview, the Vice President explained that these three notes are indicative of the types of references he made during his telephone solicitations.[41]

In addition, a notation by the Vice President on Johnny Johns's call sheet in quotation marks as if to indicate a quote from Johns -- "Let me go back & talk to my people and ask." -- is consistent with a solicitation for a soft money corporate contribution, which is how Johns recalls the conversation

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[41] It could be argued that the Vice President's statement to Becker that soft money is "permitted" could have implied to Becker that the requested gift could also be made in the form of hard money. However, because the Vice President asked Becker for $50,000, it is clear that a knowledgeable donor would have understood the Vice President to be asking for at least $30,000 in soft money. That $30,000 could not only possibly be soft money; rather, it had to be soft money. There is no reason to believe that, in stating that soft money is "permitted" on February 9, 1996 -- two weeks before Marshall wrote his memorandum describing the DNC allocation practice, which, of course, the Vice President denies he even read at the time -- the Vice President was trying to tell Becker that the first $20,000 of his contribution could be given as hard money. If that had been the Vice President's intent, he presumably would have said so directly. In our view, the most reasonable inference to be drawn from the Vice President's statement to Becker that "soft money is permitted" is that the Vice President was trying to make sure that Becker knew he had the option to make the contribution through his corporation.

proceeding.[42] This inference is also supported by an entry on the DNC spreadsheet entitled "Gore calls" in connection with Johns's call which reads: "He will ask and call Gore or Knight."

2. Donors Who Understood the Vice President to Be Soliciting Soft Money

At least seven people called by the Vice President have indicated that they understood the Vice President to be explicitly or implicitly asking them for non-federal contributions.

William Dockser told us that the Vice President did not mention either "soft money" or "hard money" during their conversation, but instead referred to the need to fund the DNC's media campaign. Dockser was left with the impression that the Vice President was requesting soft money, given Dockser's belief that the DNC's issue-oriented ads were being funded by soft money gifts. Similarly, E. Blake Byrne, who also was familiar with the media fund from his involvement in the media business, indicated that he agreed during his conversation with the Vice President to make what he believed would be a "soft money" donation. Andy Morse told us that the Vice President did not mention either "hard" or "soft" money during their telephone conversation. However, when Morse wrote his contribution check, he assumed that the contribution would be recorded as a soft money gift.[43] Jack Bendheim also recalls no mention of hard or soft, federal or nonfederal money during his conversation. Nevertheless, Bendheim told us that because the media campaign was "issue-oriented," he understood the Vice President to be asking for soft money.

James Hormel's own contemporaneous notes as to how his donation should be forwarded to the DNC -- "Check request: $30,000.00. Payable to: DNC-NonFederal Acct per V.P. Gore's request Send to: Peter Knight 1615 L St. NW #650 W DC 20036

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[42] Corporations are prohibited under the Federal Election Campaign Act from giving hard money contributions. 2 U.S.C. § 441b. However, corporations may donate to a national party committee's nonfederal account. Thus, unless it is to be inferred that the Vice President was soliciting a plainly illegal contribution -- which in our view is clearly unwarranted -- the two were clearly discussing a soft money contribution.

[43] As noted above, the DNC deposited portions of the Dockser, Byrne, and Morse gifts into a hard money account without their knowledge.

202659-3005." -- suggest that the Vice President asked him for a soft money contribution.[44]

Similarly, Merv Adelson recalls asking the Vice President to whom should he make his $25,000 contribution payable. Although Adelson does not recall the Vice President's response, he says he would have followed instructions given by the Vice President. Adelson's accountant subsequently wrote a $25,000 check in the amount of $25,000 made payable to the "Democratic National Committee Non-Federal Account C/O Peter Knight." The evidence thus suggest that the Vice President asked Adelson for soft money.

As noted above, the Vice President made a notation on the Johnny Johns call sheet indicating that Johns perceived the Vice President as soliciting a corporate contribution. Johns himself has told us that he in fact thought the Vice President was asking him for a corporate contribution, which is why he told the Vice President that he did not have the authority to commit his corporation to the contribution the Vice President was requesting.

3. The Vice President's Interview

In his November 11, 1997 interview, the Vice President stated that he never asked a prospective donor for a federal contribution during his telephone solicitations, and that he in fact frequently made the "soft" nature of the funds he was soliciting an explicit part of his "pitch." According to the Vice President, he did this because he believed (incorrectly) that the DNC's media campaign was being funded only through soft money contributions, and because he thought it would sometimes be easier for an officer or high-level manager of a large corporation to make a substantial contribution through the corporation rather than with personal funds.

On the other hand, several memos addressed to the Vice President clearly state that the DNC media campaign had to be funded with a split of hard and soft money. At least one of these memos, entitled "DNC Budget Analysis -- 11/21 POTUS PRESENTATION," appears to suggest that the issue of hard money and the media fund was also discussed at a meeting attended by the Vice President. In addition, the February 21, 1996 Bradley Marshall memo, which was attached to the February 22, 1996 memo from Harold Ickes to the President and Vice President, appears to reflect the DNC's practice of splitting contributions.

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[44] However, Hormel recalls no reference to soft money during his conversation with the Vice President.

The Vice President told us that he does not recall the topic of a hard money component for the media fund having been raised at the November 21, 1995 meeting, or on any other occasion in his presence. Moreover, according to the Vice President, he did not read Ickes' DNC-related memos, including Ickes' February 22, 1996 memo which attached the February 21, 1996 Bradley Marshall memo.[45] At least two of the Vice President's assistants have confirmed that he did not read many of the memos that were placed in his in-box. Neither could say, however, whether the Ickes memos were among those ignored.

B. Solicitations That Were Arguably Ambiguous

We have no direct evidence that the Vice President explicitly asked any prospective donor to make a "hard money" contribution in the course of his telephone solicitations. However, several of the Vice President's solicitations, as described by the prospective donors, are arguably susceptible to more than one interpretation. In our view, the more reasonable interpretation of these solicitations is that the Vice President was asking for soft money.[46]

1. Solicitations in Which the Vice President Referred in Passing to His Reelection Campaign While Soliciting Contributions for the DNC's Media Fund

In the course of soliciting Robert Johnson for a contribution to the DNC media fund, the Vice President referred in passing to his reelection campaign. The Vice President told him that he was facing a tough election. However, he did not ask Johnson for a contribution to the Clinton/Gore '96 Committee, but instead asked Johnson to contribute $30,000 to the DNC in order to get the DNC's message out on issues such as health care.

In soliciting Penny Pritzker for a contribution to fund the media campaign, the Vice President reminded her that she had been present in Chicago when the Vice President had shown some sample ads to a group of Democratic party supporters. According to

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[45] The Vice President acknowledged that, had he read these memos, his belief that the media campaign was funded with soft money would have been challenged.

[46] We believe that this interpretation is bolstered by the evidence, summarized above, that in several instances the Vice President clearly asked for soft money in his telephone solicitations on behalf of the DNC. Given this fact, it seems reasonable to infer that, in other fundraising calls made around the same time and as part of the same fundraising effort, the Vice President also asked for soft rather than hard money contributions.

Pritzker, in the course of that presentation, which occurred several weeks prior to the Vice President's telephone solicitation, the Vice President had stated that the issue ads being run by the DNC had been successful in promoting the presidential reelection effort.

Critics of the DNC have complained that the DNC ran its issue ads for the very purpose of circumventing the limitations on contributions to and expenditures by the Clinton/Gore '96 Committee. However, federal election regulations permit national party committees to accept both federal and non-federal donations. See 11 C.F.R. § 102.5. Indeed, in light of the Supreme Court's holding in Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996), it may even be unconstitutional to restrict the DNC's ability to air commercials that do not expressly advocate the election or defeat of particular candidates, even if such commercials incidentally benefit or harm those candidates by shaping public opinion. In short, there is a legitimate distinction between hard and soft contributions rooted in federal election law which results in what has been termed a "soft money loophole."

As described by Johnson and Pritzker, the Vice President was expressly asking them to make contributions to the DNC so that the DNC could keep its issue ads on the air. Moreover, at least with respect to Johnson, the Vice President asked for a large enough donation that a knowledgeable donor must have understood the Vice President to be asking for at least some soft money.[47] The Vice President did not ask either Johnson or Pritzker to make contributions to the Clinton/Gore '96 Committee. To the extent that the Vice President acknowledged that his own campaign might benefit from the DNC's airing of issue ads, that did not, in our view, convert what the evidence suggests was intended and understood to be a soft money solicitation into a hard money solicitation. At most, it was an acknowledgement of the existence of a legal loophole.

2. Solicitations Which Did Not Leave the Prospective Donors With An Understanding of What the Vice President Was Asking For

In several instances, our interviews suggest that individuals who were solicited for money by the Vice President did not have an understanding following the call of whether the Vice President had asked them for federal or non-federal

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[47] As noted above, according to Johnson, he did not realize at the time that the DNC could accept any hard money. Apparently, nothing the Vice President said to Johnson changed Johnson's misunderstanding -- which is consistent with the Vice President's explanation that he was asking only for soft money.

contributions. However, all of the donations received from people in this category were deposited into non-federal accounts, and with respect to each of these calls, we have no evidence from which it could be inferred that the Vice President was soliciting hard money.

Of those who declined to make donations in response to the Vice President's request, the only solicitation which we feel was somewhat ambiguous was that which the Vice President made to Noah Liff. In his call to Liff, the Vice President first thanked him for his support of the Administration's policies and, according to Liff, then said something like: "any help you can give us here, we would appreciate." According to Liff, the Vice President did not mention the DNC or the media fund during the call. On the other hand, he also did not mention any federal campaign or reelection fund. The Vice President also did not state how much money, if any, he was seeking or how the money he might be seeking would be used. Liff recalls nothing more specific than a request to "help them out up there."

Liff, who is from Tennessee, has known the Vice President for several years and has supported him since he began running for public office. Interestingly, while the Vice President, during his interview, characterized Liff as a Republican, Liff considers himself a Democrat.[48] Regardless of his party affiliation, the two spent a considerable amount of time, during their conversation, talking about Liff's general support for the positions taken by the Administration.

Liff's response to the Vice President's request for "help" -- that he had already given the "legal limit" -- seems to indicate that Liff thought the Vice President was requesting support for Clinton/Gore '96. Moreover, the absence of a reference to the DNC during the call appears to set this call apart from most of the other solicitations.

On the other hand, the DNC did prepare a call sheet for the Vice President concerning Liff, and the Vice President called Liff on May 2, 1996, which was during the period that he was making calls for contributions to the DNC media fund. Furthermore, Liff has told us that he may not have understood at the time that he could make a soft money contribution to the DNC. In this context, Liff's reference to his previous contribution of the "legal limit" can most reasonably be interpreted as a nonsequitur born of Liff's misunderstanding of what the Vice President was asking for. Given the fact that we have found no other evidence of the Vice President asking any donors listed on

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[48] The Vice President recalls talking to Noah Liff, but he is not sure if the call was part of the DNC fundraising call program.

DNC call sheets for contributions to the Clinton/Gore '96 Committee, this latter interpretation of the Liff telephone call seems more plausible.

Taking all the evidence of this conversation into account, we conclude that the conversation was between two individuals who had known each other for years, and that after general conversational pleasantries, the Vice President tentatively broached the subject of a contribution to an individual he assumed to be a Republican, and therefore unlikely to contribute to the DNC. Liff in turn, familiar only with hard money contributions, immediately rebuffed the overture, saying he had given his "legal limit," at which point the Vice President dropped the topic. While it appears that Liff assumed that the Vice President was talking about a hard money contribution, based on his description of the conversation that assumption was not based on anything said by the Vice President.

C. The Vice President's Intent

The Vice President has stated that he intended to ask only for soft money, not hard money, contributions to the DNC in the course of his telephone solicitations from his West Wing Office. As noted above, the Vice President has stated that this must have been his intent because he believed (incorrectly) at the time that the DNC's media campaign was being funded only through soft money contributions. In addition, the Vice President told us that he incorrectly believed at the time that individuals were limited to giving only $2,000 in hard money to the DNC per election cycle. The Vice President claims that he was laboring under this misconception of federal election law because he assumed national party committees were subject to the same limitations of $2,000 in federal contributions per election cycle as were the committees he had formed when he had sought election to the House of Representatives and later to the Senate. Thus, according to the Vice President, when he saw suggested solicitation figures of over $20,000 on the DNC call sheets, he assumed that he had to be asking for soft money.

We have developed no evidence to show that the Vice President read Ickes' memos setting forth that the DNC had to raise both hard and soft money in order to keep its issue ads on the air, or that he read Marshall's memo which alluded to the DNC's annual individual hard money limit. Given the very large amounts that the Vice President was being asked to raise, it seems plausible that he would believe he was asking for soft money in his telephone solicitations. We have found no evidence to counter his claim to this effect.

V. CONCLUSION

To summarize, the preliminary investigation has established the following points:

1) There is no evidence that the Vice President knew of the DNC practice of reallocating a portion of large contributions to hard money accounts. Therefore, there is no factual basis on which one could conclude that further investigation is warranted of whether the Vice President may have violated section 607 by making vague or ambiguous solicitations, knowing that a portion of any ensuing contribution would be treated as hard money.

2) There is no evidence that the Vice President expressly asked any of the individuals he contacted directly for funds to support his reelection or the election of any other federal official.

3) There is affirmative evidence that the Vice President asked for support for the DNC media campaign in virtually every call. Such support could, under law, have been either hard or soft.

4) All donors who had an affirmative impression of what was being requested believed it was a solicitation for soft money. Noah Liff, who recalls a response to the Vice President that suggests he interpreted the request as a hard money request ("I've given my legal limit") states that he thinks he may not have been aware at the time that there was any other option available. Given that context, it is not warranted to interpret the general nature of the recalled request made by the Vice President ("Any help would be appreciated") as a request for hard money.

5) In numerous conversations with more sophisticated donors, the discussion explicitly focussed on the fact that the Vice President was soliciting soft money.

6) In the vast majority of the cases, donations resulting from the Vice President's solicitations were handled by the DNC as soft money. In the few cases where they were not, the evidence suggests that this was done without the donors or the Vice President's knowledge.

7) The amounts of the requests being made suggest prima facie that the requests were for soft money. Hard money donations in those amounts would have been unlawful. There is no evidence to suggest that there was ever any discussion or understanding by either the Vice President or any of the donors that a portion of a single donation might be treated as hard money.

Based on these factors, and our additional analysis above, we have concluded there is insufficient evidence that the Vice President may have violated section 607 to warrant further investigation, and we accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel. In order to justify the need for further investigation by an independent counsel here, one would be required to decide the following issues in the following ways:

a) 18 USC § 607 applies to telephone solicitations made from the Vice President's office in the White House to private citizens located outside the White House;

b) There is no Department of Justice policy that such solicitations will not be prosecuted;

c) At least one of the solicitations made here was a call for a contribution within the meaning of the FECA; and

d) That there is not clear and convincing evidence that the Vice President did not intend to solicit such contributions.

Although we would ordinarily attach to this memorandum the necessary paperwork to be filed with the Special Division of the Court of Appeals, we have not done so here so as not to delay, in light of the upcoming holiday, the review of our conclusions. We will immediately begin drafting this paperwork.

ADDENDUM

Persons Solicited by the Vice President -- Resulting Contributions Partially Deposited into a DNC Federal Account

Angelos, Peter
Byrne, E. Blake
Dockser, William
Johnson, Robert
Morse, Andy

Persons Solicited by the Vice President -- Resulting Contributions Deposited into a DNC Non-Federal Account

Adelson, Merv
Black, Scott
Cofrin, David
Dayton, Mark
Getty, Ann
Hormel, James
Jenrette, Richard
Landow, Nathan
May, Peter
Petrocelli, Anthony
Wang, C.J.

Persons Solicited by the Vice President -- No Contributions Given As a Result

Ellison, Lawrence
Johns, Johnny
Pritzker, Penny
Liff, Noah
Becker, Eric
Bendheim, Jack
Stephenson, Byron Rex
Utley, Robert

No Solicitation by the Vice President -- Thank You Call

* Broad, Eli
Casey, Thomas
Chaudary, Rashid
Coleman, Lynn Rogers
Donald, James
Dozeretz, Beth
Edwards, Jim
Gohd, Matthew
Green, Steven

* Leesfield, Ira
* Marcus, George
Manatt, Charles Taylor
O'Neill, Patrick
Pensky, Carol Ann
Rosen, Jacob
Rubin, Robert
Shorenstein, Walter
Shuman, Stanley
Stout, Thomas Philip

* Contributions to DNC partially deposited into federal account

No recall of telephone conversation with the Vice President re: contributions

Adler, Michael
Allaire, Paul
Allard, Nicholas
Allison, Gary
Alix, Jay
Arnold, Truman
Azima, Farhad
Bailey, Ken
Bakke, Dennis
Barrientos, Rene
Bass, Robert Muse
Belfer, Bob
Belz, Gary
Bildner, Allen
Boggs, Thomas
Branson, Frank L.
Bronfman, Edgar Sr.
Callaway, Eli
Casperson, Finn
Catsimatidis, John
Cauthen, Sonny
Cejas, Paul
Chao Chi-Chu, George
Chapman, Joe
Checchi, Alfred
Clayton, James
Cloobeck, Stephen
Clymer, Ray
Cofrin, Gladys
Cogan, Marshall
Connelly, John E.
Cooke, John Frederick
Cooper, Irby
Corzine, Jon S.

Daly, Thomas
Davis, Marvin
Dayton, Ken
Delk, Robert Mitchell
Dell, Michael
Demenil, Dominique
Drummond, Garry Neil
Dunavant, William B.
Dwoskin, Albert James
Eskind, Jane
Eychaner, Fred
Farouki, AbulHuda
Field, Fred
Fisher, Wayne
Flom, Joseph H.
Ford, Gerald J.
Free, James Carlton
Friedenrich, John
Friedkin, Monte Norman
Frost, Phillip
Gallagher, Mike
Garrett, Richard
Geffen, David
Geiger, Keith Brian
Gilman, Howard
Glatfelter, Athur
Greenwald, Stephen
Gupta, Rajendra
Hall, Craig
Haney, Franklin
Hardy, G.P.
Hay, Jess
Hayward, Richard
Hazeltine, William Alan
Hurwitz, Charles
Hyde, Joseph R.
Irani, Ray
Jacobsen, Ken
Jamail, Joseph
Jones, Clark
Jones, Paul Tudor
Jordan, Vernon
Joyce, John
Katz, Lewis
Kelly, Peter G.
Kenmore, Ayse
Krise, Ron L.
Krupnick, Jon E.
Lausell, Miguel Demetrio Marxuach
Lerman, Miles
Lesniak, Raymond
Levin, Susan Bass

Lindner, Carl
Manilow, Lewis
Manilow, Susan
Manning, John Patrick
Masri, Hani
Master, Bernie
Mathews, Harlan
McDonough, Robert
McEntee, Gerald W.
McMillian, John G.
McWherter, Ned Ray
McWhorter, Clayton
Messinger, Alida Rockefeller
Mills, Olan
Mithoff, Richard
Moldaw, Stuart
Mondale, Ted
Montrone, Paul M.
Morey, Maura
Morton, Peter
Neal, Roy
Norton, Peter
Nutt, David
O'Quinn, John
Pearl, Frank
Pincus, Lionel
Podesta, Anthony
Pollin, Abe
Potter, Jonathan
Ramero, Edward
Rapoport, Bernard
Rivera, Dennis Hickey
Robertson, Sanford
Rohatyn, Felix
Roitenberg, Harold
Rudin, Lewis
Rudman, M. B. (Duke)
Russell, Madeleine
Sachs, Marshall
Sauter, Gary
Schoenke, Ray
Scott, Dr. Steven Martin
Sharp, James
Shipley, George Corless
Simon, Bren
Simon, Diana Meyer
Slawson, Richard William
Smith, Raymond William
Sparks, Willard
Sparks, Rita
Stein, Jay
Studley, Julian

Sussman, Donald
Sweeney, Patrick A.
Tagg, George
Thompkins, Susie
Tisch, Jonathan
Tisch, Steven
Tobias, Robert
Torkelson, John
Trauger, Byron
Tully, Daniel
Umphrey, Walter
Vernon, Lillian
Weaver, Delores Barr
West, Jake
Williams, John Eddie
Yokich, Stephen

1994 Calls Made from DNC Offices

Borish, Peter
Bronfman, Edgar Jr.
Dattel, Samuel
Walton, Alice

Unavailable for Interview

Jimenez, Mark
Uribe, Charles
Diller, Barry
Velez, Ruben
Lerach, William
Zappa, Gail
Jenrette, Richard

Refused Interview

Becker, Eric
Coia, Arthur
Fishelson, Julie
Hess, Leon
Lewis, Peter
Rechelbacher, Horst
Robb, Gary
Townsley, William
Zimmerman, Raymond

U.S. Department of Justice

Criminal Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

November 24, 1997

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: The Deputy Attorney General

FROM: Mark M Richard
Deputy Assistant Attorney General
Criminal Division

SUBJECT: Independent Counsel Matter Concerning President Clinton

DISCUSSION: Attached is the Independent Counsel package on President Clinton recommending that no counsel be sought. The recommendation is predicated on the conclusion that there is no specific and credible evidence that the President solicited contributions from any official work space within the White House.

The recommendation is also supported by the conclusion that all of the solicitations by the President were for soft money and therefore not within the ambit of 18 U.S.C. § 607. I am inclined to suggest that the package be amended to reflect that conclusion as an additional or alternative basis for finding that appointment of an Independent Counsel is not justified but I did not want to delay getting this material to you as soon as possible.

One last observation. After you review the complete 607 package which will shortly be transmitted, you may conclude, as some argue, that 607 does not reach the location where the solicitor is located when he or she makes a telephone call but rather occurs "in" the location where the solicitation is received. If you reach such a conclusion that would constitute a third basis for supporting the conclusion that an Independent Counsel appointment is not supportable in this case because all the calls placed by the President were received in nonfederal work places.

Attachment

EXHIBIT 12

DOJ-P-00456

U. S. Department of Justice

Washington, D.C. 20530

NOV 21 1997

MEMORANDUM

TO: Mark M Richard
Acting Assistant Attorney General
Criminal Division

FROM: Lee J. Radek LJR by jcb
Chief
Public Integrity Section
Criminal Division

SUBJECT: Independent Counsel Matter: President of the United States William Jefferson Clinton

As you know, the Public Integrity Section, in conjunction with the FBI, has conducted a preliminary investigation to determine whether the President of the United States, William Jefferson Clinton, a covered person under the Independent Counsel Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have solicited campaign contributions in the Oval Office or other official work space in the White House in potential violation of 18 U.S.C. § 607. As explained below, we have concluded that no further investigation of this allegation is warranted and accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel.[1]

The Attorney General must reach her decision on this matter no later than December 2, 1997, 90 days after the Department of Justice received from a majority of the majority party members of the Committee on the Judiciary of the House of Representatives a written request for the appointment of an independent counsel. See 28 U.S.C. § 592(g). Although we would ordinarily attach to this memorandum the necessary paperwork to be filed with the Special Division of the Court of Appeals, we have not done so here so as not to delay, in light of the upcoming holiday, the review of our conclusions. We will immediately begin drafting this paperwork.

[1] Special Agent Gregory Deegan, the case agent in this matter, has reviewed and verified the facts contained in this memorandum.

INTRODUCTION AND SUMMARY

The Public Integrity Section was asked to open this matter following a published account of testimony given before the Senate Committee on Governmental Affairs by former White House Deputy Chief of Staff Harold M. Ickes. This article, published in the New York Times on September 14, 1997, titled "Aide Said He Prodded President to Complete Fund-Raising Calls," stated that Ickes had testified that on occasion the President had made fund-raising calls on behalf of the Democratic National Committee (DNC), and implied that those calls might have been placed from the Oval Office. (See Attachment A.) This inquiry was opened because it thus appeared that a source in a position to have knowledge of the facts had testified under oath that the President could potentially have violated a federal criminal statute. See 18 U.S.C. § 607.

As required under the Act, we conducted a 30-day initial inquiry to determine whether there was specific and credible evidence that the President may have violated section 607. Based on the FBI's own interview of Harold Ickes and a thorough review of his Senate deposition and testimony, we concluded that the information reported in the New York Times did not amount to specific and credible evidence that a violation of section 607 may have occurred. First, as Ickes stated under oath, he in fact had no specific recollection of any calls actually made by the President and whether they amounted to solicitations or not. Second, and more important, Ickes testified that insofar as he recalled having been with the President on one occasion when calls were made (which could have involved DNC fund-raising), he distinctly recalled making those calls with the President in the President's study on the second floor of the White House residence. Thus, Ickes' recollection did not amount to an allegation of wrongdoing at all, inasmuch as there was no allegation concerning the indispensable requisite of a potential section 607 violation: that the calls had been made from the Oval Office or some other official work space within the White House complex.

We were nevertheless aware, based on documents gathered by the Campaign Financing Task Force, that between 1994 and 1996 repeated attempts had been made to get the President to make specific fund-raising calls on behalf of the DNC. These various requests involved 68 potential donors and several discrete time periods. We undertook to determine with respect to each of those possible calls whether a call was actually ever made and, if so, the nature, circumstances, and location of that call.

At the conclusion of the 30-day initial inquiry, there still was no evidence of a specific occasion on which the President might have placed a fund-raising call from official work space within the White House. We nevertheless recommended to the

Attorney General that she initiate a preliminary investigation under the Act to permit the fullest possible development of the facts prior to making her final determination in the matter. We specifically identified several areas we intended to probe during the preliminary investigation. First, we wanted to complete our interviews of each of the 68 potential donors, and to develop the fullest possible record of any call that was actually made. Second, we wanted to interview the President to probe (1) his recollection of any request to make calls and any calls he may actually have made; and (2) his knowledge of the law and any advice of counsel he may have received. Finally, we wanted to develop complete information concerning the White House telephone system and the availability of call detail records for purposes of establishing whether and from where within the White House complex any calls had been made.

We have now completed this additional investigation.[2] The evidence suggests that on five discrete occasions requests to make telephone fund-raising calls were communicated to the President or his staff by the DNC. These requests were communicated in the form of memoranda or call sheets listing the names, backgrounds, contribution histories, and phone numbers of prospective donors. These five occasions were on October 18, 1994; October 21, 1994; November-December 1995; February 7, 1996; and March 7, 1996.

The only evidence proving that the President actually placed fund-raising calls is supplied by documents relating to October 18, 1994. There is no evidence based on either White House records or donor interviews suggesting that the President actually placed calls on any of the other occasions. With respect to October 18, 1994, the available evidence suggests that the calls were made from the President's study in the White House residence, and there is no evidence suggesting any of the calls were made from the Oval Office or any other official White House work space. We also developed evidence that the President was scheduled to make calls on November 28, 1995, though the evidence suggests that he did not do so. We have no evidence that he actually did. As for the other occasions on which the President was requested to make calls, our investigation has uncovered no proof permitting a reasonable inference that the President called any potential donor. In sum, therefore, our investigation developed no specific and credible evidence that the President may have violated section 607. We accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

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[2] Sixty-four of the 68 donors consented to personal interviews; the remaining four gave attorney proffers (one of whom has also consented to an interview on November 24, 1997).

THE STATUTE

The relevant criminal statute -- 18 U.S.C. § 607 -- raises a number of extremely complex legal issues in relation to its application to the facts at hand. Indeed, as you are aware, even within the Criminal Division, divergent views of the statute's scope and applicability to these facts have emerged, as expressed in connection with our investigation of the similar fund-raising allegations involving the Vice President. We do not believe these issues need to be resolved for purposes of this preliminary investigation, however, because as the facts have developed, even under the broadest possible reading of the statute, there is no specific and credible evidence of a violation by the President. We accordingly assume for purposes of our analysis here that section 607 would cover any telephone call to any person, anywhere, by which the President solicited a contribution of federal funds ("hard money") during a call placed from any of the nonresidential areas of the White House.

In relevant part, section 607 provides as follows:

> (a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

The elements of this statute seem deceptively straightforward. In order to make out a violation of section 607, the government must establish that: (1) "any person," (2) solicited or received, (3) any "contribution" within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 (i.e., any "gift . . . made by any person for the purpose of influencing any election for federal office"), (4) in any room or building occupied in the discharge of official duties, (5) by any person mentioned in 18 U.S.C. § 603.

In the context of the facts at hand, this statute raises numerous complex issues of statutory construction for which there is no unambiguous answer, such as (1) whether Congress intended the President, in light of his unique constitutional responsibilities, to be included as "any person" within the meaning of the statute; (2) whether a solicitation over the phone occurs "in" the room or building in which the solicitor is located, or where the prospective donor is located, or both; (3) whether the purely residential areas of the White House are occupied "in the discharge of official duties"; (4) whether the President is a "person mentioned in section 603"; and (5) whether

the statute applies only if the target of the solicitation is a federal government employee.

Some of these issues were addressed in a 1979 Office of Legal Counsel Memorandum analyzing the predecessor statute to section 607 in the context of political activities engaged in by President Carter at the White House. See Memorandum for Philip Heymann, Assistant Attorney General, Criminal Division, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel (1979) [hereinafter, "OLC Opinion"]. We view that opinion as controlling here. Thus, consistent with the OLC Opinion, we conclude the following: (1) that the President is included within the meaning of the phrase "any person" as set forth in section 607; (2) that the prohibition of the statute would not cover conduct taking place within the private, residential portions of the White House; (3) that the President is a "person mentioned in section 603"; and (4) that section 607's prohibition applies to solicitations of private citizens as well as government employees. In addition, although there is no definitive authority addressing whether a telephone solicitation occurs "in" the room or building in which the solicitor is located, for purposes of this analysis we will assume that a solicitation over the phone could be deemed to have occurred "in" both the location of the caller and the location where the call was received.

The President's private residence consists of the third and fourth floors of the four-story White House mansion. The second floor of the mansion, called the State Floor, includes rooms considered to be part of the residence, but which are used predominantly for official functions, such as state dinners. Although the OLC opinion did not explicitly discuss the President's study, also known as the Treaty Room, the study is located on the third floor of the mansion, within the private residence, and is thus included within the Opinion's bright-line conclusion that section 607 does not apply to any of the "areas within the discrete private residence area" of the White House mansion. The President's study is situated among several bedrooms, and is down the hall from the purely private family dining room.

The room at issue in the OLC Opinion, the so-called Family Dining Room, is located on the State Floor, a mixed-use area within the White House. At the time of the OLC Opinion, the Family Dining Room was used predominantly for official functions. Even so, the Opinion found that section 607 did not apply to this mixed-use area when it was not being used for an official function, i.e., "in the discharge of official duties." Applying the same reasoning here, even if the study was not within the clearly residential area of the White House, section 607 would not apply to the President's calls from that room, because at the

time of the calls, the study was not being used for an official function.

The fact that, according to White House Chief Usher Gary Walters, the President occasionally used the Treaty Room to meet with other heads of state and for official ceremonial purposes does not change this conclusion. The room is within the "discrete private residence area," it is the President's personal study, and it was not being used for an official function at the time of the telephone calls. Therefore, in our view, section 607 does not reach conduct that occurred in the President's study.[3]

DISCUSSION

I. The Investigation Revealed No Specific and Credible Evidence That the President Made Fund-Raising Solicitation Calls from a Nonresidential Area of the White House

A. The Ickes' Allegation

The allegation that precipitated this investigation was a newspaper account of the sworn deposition of former Deputy Chief of Staff Harold M. Ickes in the Special Investigation of the Senate Committee on Governmental Affairs. On September 14, 1997, the New York Times reported in an article titled "Aide Says He Prodded President to Complete Fund-Raising Calls" that Ickes had testified that he had pressed the President to make fund-raising calls from the White House on behalf of the DNC and that on occasion he was "fortunate enough to find out that [the President] had, in fact, made a phone call." Furthermore, the article reported that Ickes had stated that he had consulted White House Counsel Lloyd Cutler, who had said that the President could make calls from the Oval Office, thus implying that the calls were placed from the Oval Office. Based on these statements in the article, it appeared that a source in a position to have knowledge of the facts had testified under oath that the President may have violated a federal criminal statute, and the Attorney General accordingly opened an initial inquiry into the matter under the Act. As we subsequently learned, however, Ickes' testimony, read in context, was considerably vaguer than the newspaper account suggested on the issue of whether calls had actually been made. Further, and more important, Ickes neither stated nor implied that any such calls

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[3] Further, as the evidence discussed below suggests, even if section 607 applied to the President's study, we would in all likelihood conclude that under the clear evidence, the President lacked the requisite intent to violate the statute since he was specifically advised to make the calls from his residence.

had been made from the Oval Office, the sine qua non of a potential section 607 violation here.

Indeed, upon being shown a memorandum from November 1995 referring to potential phone calls by the President, Ickes testified, "my recollection is that I don't think he [the President] made one of these phone calls." Ickes admitted that he had asked the President to make calls and that the President had agreed to do so, but that, "I think in this instance -- I don't know as a fact -- I don't think he made one of them." It was in this context that the following exchange took place:

> Ickes: "[Q]uite frankly, I think it's fair to say, he made few, if any, of the phone calls in '95 and '96, and as I said before, I think in my three years there, I only asked him to make phone calls, two, three, maybe four times at the most."
>
> Counsel: "Did you receive feedback from any of those times that he had made telephone calls?"
>
> Ickes: "Yeah, when I was fortunate enough to find out that he had, in fact, made a phone call. . . .
>
> . . .
>
> Counsel: "So, in the first instance, you would look at the list that went in to make sure that the people were appropriate people to call, and then, if the President said he did call, you would contact [Marvin] Rosen to make sure there was some follow-up so you could actually get the money."
>
> Ickes: "Yes. There wasn't much of the latter."

As this context shows, Ickes testimony was considerably more tentative than the New York Times story suggested, inasmuch as the premise assumed in the question (that the President had made telephone calls) had just been denied by the witness ("I don't think he made one of them"; "few, if any").

During his Senate deposition, Ickes was also shown call sheets from the February 1996 time frame. These were the only other call sheets shown to Ickes during his June deposition. Upon examining these call sheets, Ickes testified, "I have no recollection whether the President made these calls or whether he made any of them, if so, to whom he called, and if so, whether any of them gave money as a result of the calls." Thus, at the end of his two-day deposition in June, Ickes had in fact not testified to any specific recollection of the President having made any fund-raising calls on behalf of the DNC. Although this testimony might be viewed as misleading, careful analysis reveals

that Ickes' subsequent statements on the issue are not inconsistent. Ickes disclaimed any recollection of "these" (emphasis added) calls. He later admitted some recollection of other calls; i.e., the calls relating to the October 1994 call memoranda as distinguished from the 1995 and 1996 call sheets.

Further, Ickes did not testify during that deposition that White House counsel Lloyd Cutler had said that the President could make calls from the Oval Office. Rather, Ickes testified that around the time that the DNC had asked the President to make calls, Ickes had checked with one of the lawyers in the Counsel's office, probably Cheryl Mills, and was told that the President could make telephone calls to solicit money and that White House counsel preferred that any such calls be made from the residence. Significantly, Cheryl Mills had a similar recollection of her conversation with Ickes, as we learned in our own interview of her. Ickes testified that he had no knowledge as to which part of the White House the President had made these calls from, if in fact they had been made at all.

Ickes was recalled by the Senate for another deposition on September 22, 1997. At that time, he clarified his earlier testimony in this respect:

> I do not know whether the President made any phone calls in '95, '96. I do recall his making a small number of telephone calls in 1994 in connection with the health care [sic] to raise money for the -- or to try to raise money for a special media fund that we had established -- or that had been established by the DNC to support the President's health care initiative, but as I think I made clear in my testimony to you the other day or however many weeks or months ago it was, I do not know as a fact that the President made any phone calls in '95 and '96, and my sense was that he did not.

Later in his testimony, as in his interview with us, when Ickes was shown the two October 1994 memoranda, he acknowledged that these may be the calls he remembered the President making in 1994. In our interview, Ickes elaborated that he did not recall any of the specific conversations and stated that the calls might not have been solicitations at all, but could have been thank you calls. Subsequently, in his public testimony before the Senate Committee on Governmental Affairs, Ickes' recollection was somewhat clearer, in that he believed that the calls he recollected making with the President were the calls from the October 1994 DNC call memoranda. Ickes further testified, as he had told us during our interview, that he could recall making calls with the President only once and that he was "pretty damn clear they were in the residence." In fact, as Ickes recalled, the calls were purposefully made from the residence because of the advice from White House counsel.

Although Ickes identified his handwriting on the two October 1994 memoranda, he could not recall the circumstances under which he had made the notations. On the October 18th memorandum, several of the prospective donors have check marks beside their names and several have dollar amounts written in. Alongside the name John Torkelson is the handwritten notation "BC called" and what appears to be the figures "50,000", "25", and "25". Based on Torkelson's interview, we believe that the President did call him in this time frame, and at the time, Torkelson had already paid $50,000 of a $100,000 pledge which he intended to fulfill by making two additional $25,000 contributions. Other notations -- such as "will give" and "will give no specific $" -- appear in Ickes' handwriting on the October 18th memorandum alongside other names. We believe the most natural inference is that these notes were written contemporaneously with the placing of the call by the President. On the October 21st memorandum, Ickes has written "likes BC but will not contribute to DNC" alongside the name Dennis Bakke, and alongside the name Alice Walton is the notation, "she called President this week -- did BC call her back." Again, Ickes did not recall how or from where he got this information, but given the nature of these notes, it seems likelier that they were written in anticipation of calls being made. Thus, Ickes' recollection that he made phone calls with the President only once is consistent with both the notations on the documents and the documentary evidence from other time periods (e.g., the President's November 28, 1995, schedule, discussed infra).

In sum, Ickes' testimony and statements do not amount to specific and credible evidence that the President may have violated section 607. Ickes testified under oath to having no specific recollection of the calls the President made and could not testify to whether they amounted to solicitations for contributions or were mere thank yous. Moreover, and more important, Ickes' remembers having made calls only once, which is consistent with the notations on the documents and, as we elaborate upon below, consistent with the other evidence suggesting the only occasion on which calls were made was on October 18, 1994. Ickes remembers those calls having been made from the residence, which again is consistent with the other evidence discussed below. That fact places any phone calls that Ickes remembers wholly outside the potential scope of section 607.

B. The Other Evidence of Fund-Raising Solicitation Calls by the President

As stated above, we identified five discrete occasions on which requests to make telephone fund-raising calls were communicated to the President or his staff by the DNC. These requests were communicated in the form of memoranda or call sheets listing the prospective donors' names and backgrounds,

contribution histories, and phone numbers. These five occasions were in or on October 18, 1994; October 21, 1994; November-December 1995; February 7, 1996; and March 7, 1996.

The only evidence suggesting the President responded to one of these requests by actually making calls relates to October 18, 1994. We found no evidence, based on either White House records or donor interviews, suggesting that the President made calls on any of the other occasions. Further, with respect to that one occasion on October 18th when the President did make calls, all the available evidence strongly suggests that the calls were made from the President's study in the White House residence. In sum, there is no specific and credible evidence that the President made fund-raising calls from a nonresidential area of the White House.[4]

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[4] The evidence does show that on January 29, 1996, the President called a donor by the name of Robert Meyerhoff, a Maryland real estate developer. In mid-December of the previous year, Vernon Jordan asked the President to call Meyerhoff, indicating Meyerhoff's willingness to give $100,000 to the DNC. A December 22, 1995 memorandum to the President from Nancy Hernreich, the Director of Oval Office Operations, suggests that Jordan envisioned the President "closing the deal" (the memo actually states, "a call from you . . . will clinch the contribution"). The White House Operator's log confirms the President placed the call on January 29, 1996. The President remembered calling Meyerhoff to thank him for his contribution. He stated the call was particularly memorable because he had neglected for some time to make the call and Jordan had to pester him to get it done. Meyerhoff recalled the conversation as a short one in which the President thanked him for his commitment to contribute to the DNC; Meyerhoff stated that, at the time of the call, he had made a pledge, but not actually sent the money. Shortly thereafter, Jordan sent Meyerhoff a note instructing him how to make the contribution. Jordan's letter directed Meyerhoff to earmark the money for the DNC non-federal account, which Meyerhoff did several days later. Although this chronology suggests the President "solicited" the contribution, the evidence also fairly shows that the solicitation was for soft money and therefore outside the scope of section 607.

The evidence also shows that the President called a group of major donors in New York from the Oval Office on October 31, 1995. This call, requested by Terence McAuliffe on behalf of Clinton/Gore '96, was to the "New York Finance Co-Chairs," who were preparing for a major fund-raising "Presidential Gala" in New York City on November 6. The call memorandum advised the President that the New York co-chairs, persons who were major contributors themselves, would be holding a "heavy-lifting" day on October 31, during which they would be making fund-raising

We explain our conclusion that there is no other evidence of the President having solicited contributions in violation of section 607 in more detail below, describing first the availability of records detailing long distance telephone calls placed from the White House complex, and then the evidence with respect to each of the occasions on which fund-raising calls were contemplated, as evidenced by the call sheets and memoranda.

1. White House Phone Records

We have requested White House counsel to produce any and all records pertaining to political fund-raising solicitations by the President and all available call detail records pertaining to any of the persons or telephone numbers listed on any of the call sheets or memoranda for the period October 1, 1994, through December 31, 1996. Based on interviews of White House and GSA personnel, and employees of AT&T and Sprint, we have learned the following with respect to the availability of such records.

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calls on behalf of the President. The memo advised the President to thank the co-chairs for their efforts and to encourage them to raise as much money as possible. We do not believe this call can be properly construed as a solicitation of a contribution within the meaning of section 607. The President was asking these co-chairs, themselves major contributors, to go out and ask their friends, relatives, and colleagues to contribute. Such a request cannot reasonably be understood to fall within the plain meaning of "solicit[ing] or receiv[ing] any contribution within the meaning of . . . the Federal Election Campaign Act." 18 U.S.C. § 607. The ordinary meaning of "solicit" is "to make petition to: entreat . . . to approach with a request or plea." Webster's New Collegiate Dictionary 1106 (1977). Such a definition has been endorsed by the Supreme Court:

> "Solicitation," commonly understood, means "[a]sking" for, or "enticing" to, something, see Black's Law Dictionary 1393 (6th ed. 1990); Webster's Third New International Dictionary 2169 (1981) ("solicit" means "to approach with a request or plea (as in selling or begging)").

Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 223 (1992). Further, regulations promulgated by the Office of Personnel Management (OPM) implementing the legislation regulating political activities of federal employees define "solicit" as "to request expressly of another person that he or she contribute something to a candidate, a campaign, a political party, or partisan political group." 5 C.F.R. § 734.101. By these definitions, the call placed by the President to the New York fund-raisers would not fall within the plain and ordinary meaning of "solicit."

The White House complex is served by three exchanges: 456, 395, and 638. Exchanges 456 and 395 are the "official" phone exchanges, which can be accessed from both the official and residential areas of the White House. The primary long distance carrier for these lines is Sprint FTS 2000. To the extent these lines are full, any additional long distance calls from exchanges 395 and 456 roll over onto AT&T lines. Exchange 638 is the private residential exchange, accessible only in the executive residence.[5] The long distance carrier for the 638 lines is AT&T.

Only limited long distance call detail records are available for the 395 and 456 exchanges. To the extent a long distance call from one of these exchanges is carried by Sprint, the available call detail records will only show the originating exchange (i.e., 395 or 456), and not the specific number within that exchange from which the call was placed, and the area code and exchange to which the call was placed, but again not the specific number. Long distance calls from exchanges 395 and 456 carried on AT&T lines will appear on an AT&T bill, but the available call detail will show only the trunk line the call was carried on, not the specific originating line. Complete long distance call detail records are available only for the 638 lines in the residence.

This limited call detail availability is unlike many other federal agencies. For example, most agencies have the in-house capability to record their own call detail. We understand that the White House has this capability as well, but we have been informed by White House staff, and we have verified through AT&T, that this capability within the White House has never been activated. In addition, we have verified that GSA does not receive monthly tapes of call detail from Sprint as it does for some other federal agencies.

The only other available records of calls placed from the White House are operator logs maintained by the White House operators of all outgoing calls placed by the President with an operator's assistance. White House counsel have searched all such logs for records of calls to any of the numbers or persons listed on the various call sheets and memoranda. No such records exist for calls placed in the approximate time frames of the call sheets and memoranda.

We have also sought information concerning the phone line extensions that are available in the President's study in the residence. We have been advised by AT&T that the President has

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[5] According to White House Chief Usher Gary Walters, these quarters include formal receiving rooms on the second floor of the mansion (first floor of the residence).

two phones in the study. The desk phone has two lines labeled outgoing. These two lines are 456 extensions. A third line on that phone is a 638 extension. The sofa phone has two 456 extensions and two 638 extensions. Thus, a long distance call placed from the study on a 638 exchange could be verified through AT&T call detail records. A long distance call placed from the study on a 456 extension could not be verified, however, except in the limited fashion described above.

2. October 18, 1994

We know from several sources that the President made telephone calls soliciting money on behalf of the DNC on October 18, 1994. First, we have a copy of a memorandum of that date from the DNC to Harold Ickes listing the names of 23 potential donors. This is the memorandum discussed above bearing Ickes' handwritten notations that he cannot recall but which seem to suggest that calls were made. Second, we know from White House phone records for the 638 exchange in the residence that six of the prospective donors on this memorandum were called on that date. Third, each of these six donors recalled having received a phone call from the President either during that time frame or on that date. Finally, Ickes testified that he believed these were the calls he remembered the President placing.

Based on (1) the available 638 exchange call detail, (2) the donor interviews, and (3) Ickes' handwritten notations, it appears that nine of the 23 listed donors were contacted that day. Six of these nine donors were indisputably called from the residence. This is established by the 638 call detail records and is corroborated by the President's annotated schedule for October 18, 1994, which indicates that the President had left the Oval Office and was in the residence during the time that the calls were placed. Because these calls were from the residence, we do not view any of these, regardless of the content of the conversations, to have been in potential violation of section 607.

Although only six donors' telephone numbers appear on the residence phone records, it is probable that three other donors from the October 18, 1994 memo received calls from the President that day: John Connelly; Arthur Coia; and John Torkelson.[6] Coia and Torkelson recalled having received phone calls from the President in 1994. In addition, the handwritten notations alongside their names on the memo suggested they had been called: the notation "80,000" is written next to Coia's name, and

[6] None of the remaining 14 donors listed on the October 18th memorandum recalled having received a solicitation call from the President and those recollections seem consistent with Ickes' handwritten notations on the memorandum itself.

alongside Torkelson are the handwritten notations "BC called," and "50,000 (illegible) 25 25." Connelly does not recall having received a phone call, but "$200,000" is written alongside his name and he in fact contributed $200,000 to the DNC approximately two weeks later. In addition, all three of these names are circled, as are all six of the names known to have been called; none of these circled names reappears on the October 21, 1994 memo prepared three days later, though all but one of the uncircled names does reappear. We believe the most reasonable inference to be drawn from this evidence is that these three persons were also called on October 18, 1994.

We also believe that the only inference supported by the evidence is that these three persons were called from the residence during the same time that the President was making the other six calls. First, all three names are accompanied by notes written by Ickes and Ickes recalled participating in phone calls only once, which was in the residence. Second, Torkelson recalled that when he was called by the President, he was in California, it was late in the morning West Coast time, and the conversation lasted only two to three minutes. According to the President's annotated schedule, he moved to the residence at 2:15 p.m., which is consistent with a late morning call to the West Coast. Third, by all accounts, the President and Ickes moved to the residence specifically to make these calls because of the advice they had received from White House counsel. It seems implausible that they would go to that trouble for only some of the calls. Fourth, based on the President' annotated schedule, he was in the residence for 107 minutes during the time these calls were being made. He used 71.5 minutes to make the six calls reflected in the 638 exchange call detail, leaving 35.5 minutes (less the four minutes it took to get to the residence) for the remaining three calls to be made.

We are in the process of obtaining from Sprint, through the White House counsel's office, records that should at least confirm that on October 18, 1994 a call was placed from the White House to Torkelson's California area code and exchange. The fact that these three calls are not reflected on the 638 phone bill does not mean they were not made from the residence. First, Coia's phone number is local and would not have been reflected on any bill. Moreover, the only phone numbers within the White House that show full call detail are the 638 lines, yet as we point out above, 456 extensions were also available in the President's study. Neither line requires the involvement of a White House operator to place a long distance call (and Ickes recalled that they dialed the numbers themselves). Thus, the absence of a phone call on the bill for the 638 exchange does not mean that the call was not placed from the residence.

Even if the calls to these three donors were placed from the Oval Office, we do not believe that further investigation would

be warranted here, because the evidence suggests these donors were solicited for soft money, which falls outside the scope of section 607. First, there is the ultimate destination of the donations: each of these donors' contributions went into non-federal accounts.[7] Moreover, Connelly, as far as the President would have known at the time of the call memorandum, had already given or pledged approximately $450,000 to the DNC, as set forth in the October 18 memo's contributor history for Connelly. Thus, even if the President understood the DNC to be diverting the first $20,000 of any contribution into a hard money account as early as 1994,[8] he would have had no reason to believe he was soliciting Connelly for a hard money contribution as of October 18th. Second, David Strauss' notes, discussed in more detail infra, suggest that soft money contributions were being solicited. Third, both the President and Ickes stated the view that major donors such as these were soft money sources. The President admitted the DNC could try to turn a soft money contribution into hard money by asking the donor's permission, but that in his own mind these types of major donors gave soft money. Also, in this regard, the President stated that when he spoke to donors he typically did not know whether the donor gave in a corporate or individual capacity (as it was, Torkelson's DNC contributions in 1994 were paid by his company), so that he could not know whether the contribution would be hard or soft. Moreover, the President stated that, to the extent he was involved in raising hard money, it was through the so-called Saxophone Club, not large donors.

In our earlier memorandum, we expressed the concern that the Torkelson call could be construed as a solicitation for hard money because the President asked Torkelson for his "continued support" in the context of a discussion that referred to the upcoming mid-term elections. At the time of the call, Torkelson had already given in the name of his corporation one-half of a $100,000 soft money pledge. Following the call, in November 1994, Torkelson made another $25,000 installment on his pledge. Because Torkelson's previous $50,000 contribution was in his corporate capacity (as was his subsequent $25,000 contribution), in addition to the other reasons set forth above, we do not believe that the mere reference to a federal election would render a solicitation in this context one for a federal

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[7] Torkelson's contributions were in the name of his company, Princeton Venture Research, and were all soft. Coia made a $50,000 soft money contribution following his call, and the $200,000 contribution from Connelly referred to on the October 18 memorandum was also soft money.

[8] According to the evidence, the DNC did not actually begin the practice of splitting contributions between federal and nonfederal accounts until after the 1994 election.

contribution. In light of David Strauss' notes and the President's own statements about major donors, and the fact that Torkelson's contributions were made through his corporation, we believe that even if the President's request for continued "support" was in the nature of a solicitation, and not, as Torkelson recalled, a politician's "thank you," the support being sought was in all likelihood soft money.

3. October 21, 1994

As is set forth above, with only one exception all the uncircled names from the October 18 call sheets are recycled onto a new call memorandum dated three days later. We have developed no evidence suggesting that the President solicited funds over the telephone from these potential donors. None of the donors admitted receiving such a call. The President himself did not remember placing any of these calls. The White House did not produce to us any form of the President's daily schedule suggesting that he made fundraising calls on that date. And Harold Ickes was unable, in his interview with us, to shed any light on whether calls from the October 21 call sheet were made. In sum, the investigation has revealed no evidence at all -- other than the existence of a call memorandum -- indicating that the President made fund-raising calls from any place on this date.

4. November-December 1995

A number of call sheets were prepared for the President by the DNC in late November and early December 1995. We are aware that Ickes requested and received telephone time on the President's schedule for November 28, 1995, presumably for the purpose of fund-raising calls. The entry on the President's daily schedule reflects that he was to make phone calls from 5:00 to 6:00 p.m. and listed the staff contact as Harold Ickes. In addition, an e-mail dated November 24, 1995, reveals that Ickes intended to seek time on the President's schedule for fund-raising calls on Monday, November 27 and Tuesday, November 28. Several of the November-December 1995 call sheets are dated November 28.

We do not believe that the President actually placed any of the proposed calls. Although the President appears to have been scheduled to do so, his annotated schedule shows that he was not moving according to schedule. The President was supposed to host a congressional delegation from 3:45 until 4:45 p.m. and begin phone calls at 5:00 with Ickes. From 6:00 until 7:00, he was scheduled for "Phone/Office Time" in the "Oval Office/Residence." In fact, the President did not begin the congressional meeting until 4:00, and it ran until 5:30. It is unclear where he was from 5:30 until 6:04 (the congressional meeting occurred on the State floor). At 6:04, he returned to the Oval Office.

The President received a call from Dick Morris for a short part of the unaccounted-for time. The President conducted a bill signing between 6:04 and 6:15 p.m., after which he participated in a meeting with a staff member other than Ickes until 6:18. At approximately 6:45, the President moved to the residence. At 7:25, the President and First Lady left the White House for an out-of-town trip. Thus, there appear to be approximately 25 minutes during which the President could have placed calls from the Oval Office. The annotated schedule does not reveal, however, that Ickes ever managed to see the President during this time.

None of the donors from the November-December 1995 call sheets recalls receiving a call making a solicitation from the President during that time frame. One of the potential donors is Arthur Coia, who stated through his attorney that he received a call from the President in 1994. Ickes stated that he does not believe that the President made the 1995 calls (although he was not confronted with the President's annotated schedule). The President himself claimed no recollection of having placed the calls.[9]

We believe the only reasonable inference that can be drawn from these facts is that, although scheduled to do so, the President became unavailable to make the calls and did not make them. In any event, there is no specific and credible evidence that the President made calls on this date; the same is true of other call sheets during this period, for which we do not even have an indication that calling time had been scheduled.

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[9] In light of other documents produced by the White House -- including an e-mail dated November 24, 1995, which indicated that Harold Ickes would be requesting time on the President's schedule to make fund-raising calls the following week -- the White House should have known that the President's schedules for November 27 and 28, 1995, could contain information responsive to our document requests (as well as, presumably, congressional subpoenas). Nonetheless, these were not produced to us until we specifically requested them. Although the schedules are not necessarily responsive on their face -- they do not refer to "fund-raising" phone time -- they do refer specifically to phone time with Harold Ickes as the staff contact. The White House has offered no explanation for this untimely disclosure. Nevertheless, we do not believe our analysis has been affected by this fact inasmuch as the donors themselves deny receiving a call, and the most reasonable view of the schedules as annotated, in conjunction with Secret Service presidential movement logs, is that the President did not have time to make the calls.

5. February 7, 1996

The White House produced to us a memorandum from Ickes to the President dated February 7, 1996, attaching the names of ten potential donors that the DNC believed might respond favorably to a call from the President. The document is stamped with the notation, "The President Has Seen," which is dated May 20, 1996. Most donors are identified by a separate call sheet dated February 6, 1996, although two call sheets appear to have been created in November 1995. In his cover memo, Ickes purported to provide the call sheets at the President's request.[10]

Two of the call sheets, those for donors Gail Zappa and Arthur Goldberg, are marked with a left-handed check mark. None of the remaining sheets is marked in any way. Ickes testified in his Senate deposition that he believed the check marks to have been made by the President, indicating that the President had placed calls to Zappa and Goldberg, though not necessarily indicating that a conversation actually occurred. Later, Ickes clarified his understanding of the check marks' significance by stating that the marks meant at least that the President had seen the call sheets, but not necessarily that he had attempted to call either Zappa or Goldberg.

The FBI conducted a full interview of Zappa, who stated that she has never had a telephone conversation with the President and that the President had never solicited any contribution from her. Likewise, Goldberg stated that the President had never solicited a contribution from him over the telephone. In his affidavit, the President stated that he believed the check marks on the call sheets were his and that, although he does not recall placing the marks there, he believed he would have done so either because he thought he had recently seen these individuals or, for some other reason, thought they had recently made contributions. In his interview, the President stated more definitively that at the time he made the marks he had recently seen these donors and that Goldberg had hosted a fund-raiser on his behalf.

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[10] The White House typed onto the memo, as a substitute for the President's own handwritten note, the following unintelligible note:

H Ickes
At least 2 of these have cons given
~~I talked to -- or not~~ -- who hasn't yet
good time to call ----

In his deposition, Ickes stated that this notation was unintelligible to him. The President agreed that this is what his note says, but could offer no insight on what he meant by it.

In sum, on this record, we cannot infer that the check marks mean a call occurred. Inasmuch as the donors themselves have denied being solicited by the President over the telephone, we do not believe the documents themselves create a contrary inference compelling enough to contradict those statements.

6. March 7, 1996

The White House also produced a facsimile directed to Karen Hancox in the White House from Ann Braziel of the DNC bearing a handwritten notation to "Harold," stating "POTUS CALLS for DNC" and attaching four call sheets, each bearing the date March 7. No other notations appear on the call sheets indicating or suggesting that the calls had actually been made. Harold Ickes, Ann Braziel, and Karen Hancox have all been interviewed and all have said they have no knowledge of the President having made these calls. Further, each of donors has been interviewed by the FBI and none recalled having received a telephone call from the President during which a contribution had been solicited.

II. Summary of Additional Investigation

A. The White House Interviews

In an effort to determine whether White House employees were aware of actual fund-raising phone calls placed by the President from the White House, the FBI interviewed the following personnel: current Chief of Staff, Erskine Bowles; former Chief of Staff, Leon Panetta; former Deputy Chief of Staff Harold Ickes; Assistant to the President and Deputy Counsel Bruce Lindsey; Deputy Counsel to the President Cheryl Mills; Counselor to the President Doug Sosnik (formerly Political Director for the President); former Director of Scheduling, Anne Walley Hawley; Director of Scheduling, Stephanie Street; Deputy Assistant to the President and Director of Oval Office Operations, Nancy Hernreich; Personal Secretary to the President, Betty Currie; former Deputy Political Director Karen Hancox; Presidential Aide (and annotator of the President's daily schedule) David Stephen Goodin; and Chief White House Usher Gary Walters.

In general, with the exception of Ickes, not a single member of the White House staff reported any knowledge -- whether through direct observation or hearsay -- that the President had, in fact, made fund-raising calls from the White House. Lindsey stated that, once the issue became one of public and press interest, the President had repeated to him what the President had said publicly about the matter -- that he had no specific recollection of ever making a fund-raising call, but that he could not rule out the possibility that he had done so.[11]

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[11] We discuss our interview of the President, infra.

Lindsey informed us that the President had offered some explanation for the two call sheets from February 1996 bearing the President's left-handed check mark. Lindsey said the President, upon hearing that some documents bore the check, stated that he did not believe the check marks meant that he had called the donors: instead, the President suggested that the check marks meant only that he had seen the donors at events near the time of his review of the call sheets in 1996 and believed either that they had given already or were likely to give.[12]

Several members of the staff reported that, because they attended campaign strategy meetings with the President and Vice President throughout 1995 and 1996, they knew about a plan for the President and Vice President to make fund-raising calls. Nevertheless, with respect to the President, they all reported that they either did not know or did not believe that the President had ultimately made these calls. We asked these persons whether they had learned in the time since public and press interest in potential presidential calls arose that the President had, in fact, made calls. None had learned from the President or others that calls had, in fact, been made, except to the extent that contemporaneous documents suggested that some calls may have been made and that Ickes had some recollection of phone calls that had been reported in the press. Several persons indicated that they recalled Ickes "grumbling" or "grousing" about the fact that the President was not making calls as he had agreed. In addition, several stated that, at the time of the plan, they never believed that the President would make the calls -- notwithstanding the plan that he would -- because the President did not like to do this sort of thing.

Consistent with Ickes' recollection that he sought some legal guidance on whether it would be permissible for the President to raise funds, Deputy Counsel to the President Cheryl Mills stated that she recalled receiving a call from Ickes in 1994 or 1995, in which Ickes inquired whether the President could make fund-raising calls. Mills said that she did not surmise from this conversation that the President would, in fact, be asked to make calls. She told Ickes that the President was permitted to make fund-raising calls and said that the President should probably do so from the residence.

During our interview, Mills was careful to state that she did not opine that it would be unlawful to make calls from other locations within the White House. She stated that at the time of the Ickes call she knew about the 1979 OLC memorandum and, therefore, understood that the residence was a clearly

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[12] This account is generally consistent with the statements contained in the President's affidavit dated October 10, 1997, as well as his statements during his interview.

permissible venue for a fund-raising solicitation. Therefore, in response to Ickes question, she gave the "easy" answer that the calls should be placed from the residence. Subsequent to the Ickes call, Mills did not render more formal legal advice; although she has done research to determine whether places other than the residence would be permissible, she stated that she did not communicate the results of that research during the time period of the Ickes call.

The staff, including Chief Usher Gary Walters, describe the "residence" as that part of the executive mansion that begins on the second floor from the ground. They further stated that the President's "study" is within the residence. The only calls that Ickes claims to recall occurred in the study. That recollection is somewhat corroborated by the fact that most of the calls that we know about were made from a residence telephone extension.

B. The DNC Interviews

Inasmuch as the call sheets originated at the DNC, we endeavored to interview any DNC personnel connected with the creation and transmission of the call sheets to determine what information, if any, they could tell us about whether the President had in fact made any telephone calls soliciting contributions of hard money.

Virtually everyone we interviewed recalled a plan for the President to make phone call solicitations on behalf of the DNC, but no one recalled ever subsequently learning that the President had in fact made such calls. For example, Richard Sullivan remembered a plan to have the President make calls and recalled that call sheets had been prepared for the President. To Sullivan's recollection, however, the President never made any of the calls he had been asked to make. Donald Fowler recalled that call sheets had been prepared for both the President and the Vice President in the late 1995/early 1996 time frame. Fowler recalled hearing that the Vice President was making his calls, but that the President was not.

With respect to the 1995 and 1996 call sheets, the feedback the DNC personnel did get concerning the President's call sheets suggested the President was not making calls. Jacob "Ari" Swiller, a DNC fund-raiser who participated in preparing some of the President's calls sheets in 1995 and 1996, recalled that the President's call sheets were returned to the DNC in order that they could be regenerated for the Vice President because the President was not making his calls. Ann Braziel, whose immediate supervisor at the DNC was Swiller and who was responsible for, among other things, monitoring the progress of the President's calls and recording the results, also recalled that the President did not make his fund-raising calls.

C. Interview of President Clinton

In our memorandum recommending the initiation of a preliminary investigation, we stated that an interview of the President was appropriate. That interview occurred on November 11 and lasted approximately two hours. As he has stated publicly, the President informed us that he does not specifically recall soliciting campaign contributions over the telephone.

The President recalled that, in the weeks preceding the 1994 mid-term elections, the DNC had been substantially outspent by Republican advertising attacking the Administration's health care initiative and supporting the "Contract with America." He stated that he recalls being enlisted to raise money to support Democratic congressional candidates who were being harmed by these ads and that he did so in several ways. Although he asserted that he had no specific recollection of doing so, he agreed that the documentary record, including call sheets and telephone toll records, indicated that he had done so on October 18, 1994, and that the calls had originated within the White House residence.

The President demonstrated a sophisticated understanding of the distinction between federal and nonfederal contributions, as well as the uses to which the different types of money could be put by the DNC. Specifically, he admitted understanding that the law requires a mix of federal and nonfederal dollars for most party advertising. He admitted that he is personally involved in raising both federal and nonfederal money, but he stated that the target groups of donors are different. He looks to major donors for soft money. For hard money, he focuses on smaller contributors, and he specifically mentioned the Saxophone Club, which is targeted at younger donors. He explained that givers of substantial amounts of money are considered soft money donors simply because the size of particular contributions exceeds the federal money limits.

He stated emphatically that he did not know about a DNC practice of allocating the first $20,000 of a large contribution into federal accounts. He said that he understood that if a DNC fund-raiser wished to make such an allocation once a pledge was made or a donation received, it was up to the fund-raiser to obtain the donor's permission. He admitted that he understood whenever he solicited contributions -- whether on the telephone or in person -- that the DNC might ultimately seek to allocate some portion of a donation into a federal account. Nevertheless, he believed that, both as a matter of law and sound practice in handling substantial givers, the DNC would be required to negotiate with the donor at some later time to accomplish such an allocation. He stated that he would not know whether donors that he solicited had already given the maximum federal amount at the time of a solicitation; nor would he know whether the donor was

giving in a personal or a corporate capacity. Thus, he considers it bad business to place donors from whom the DNC would seek future donations into the awkward position of running afoul of the campaign finance laws without their knowledge or permission. Thus, he always understood that he was seeking soft money from large contributors, unless they had a specific agreement with the DNC to the contrary.

The President recalled receiving advice from some person or persons -- possibly Ickes or a representative of the White House Counsel's office -- that, if he intended to be involved with fund-raising within the White House, then (1) it was preferable that he make phone calls from the residence; and (2) it was preferable that he not host fund-raising events in White House public rooms. He also stated that the person or persons communicating this advice told him that it was not clear that it would be unlawful for the President or Vice President to use official space to solicit campaign contributions; instead, the advice was that use of the residence for such a purpose would be above reproach. He believes, based on the documents proving that he made phone calls in October 1994, that this advice occurred prior to the phone calls and explains the reason for his having made the calls from the residence. In any event, he is certain that he received the advice well before the issue of potential section 607 violations became a matter of public and press interest. He based this certainty on the fact that he had, at one time, been interested in hosting a dinner for major donors and sought counsel on the practice of past presidents. In addition, he said the White House considered this issue in the context of the donor coffees, at which they specifically did not ask for money because these events occurred in public rooms.[13]

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[13] In her interview, Deputy Counsel Cheryl Mills recalled having a conversation with Ickes in 1994 or 1995 and advising him that, should the President make fund-raising solicitations using the telephone, it was preferable that he call from the residence. She stated that, prior to the section 607 issue becoming one of public and press concern, she did not tell the President personally about her conclusion that it was preferable for calls to be placed from the residence. Except insofar as her advice related specifically to telephone fund-raising, we did not ask Mills about any legal advice communicated directly to the President. We did not ask her about advice that she may have given the President on the use of the White House for other types of fund-raising. Therefore, her interview statements should not be construed as inconsistent with the President's recollection that a staff member advised him about the propriety of using the White House for fund-raising events in general. Moreover, Ickes may be the person with whom he spoke about this issue.

With respect to calls requested during the 1996 election cycle, with one exception,[14] the President denied any recollection of making fund-raising calls. He stated that he did not like making the calls, preferring to solicit contributions in person. In 1996, because of the campaign, he spent more time away from Washington than he had previously, and, therefore, expected to see major donors on such trips.

D. The David Strauss Notes

David Strauss, the Vice President's Deputy Chief of Staff, prepared notes during a meeting that appear to state that the President had made fund-raising calls on behalf of the DNC. The notes reflect that Strauss was meeting with Steve Ricchetti and Harold Ickes to discuss the DNC's need to raise money and the idea of doing so through telephone calls by the President, First Lady, and Vice President. Although the notes are undated, Strauss believes the meeting took place in late 1994. Strauss does not recall the meeting and he could not elaborate on the notes other than what they say, but confirms that his notes reflect the statement, "BC made 15-20 calls -- raised $500K."

We believe the most natural inference one could draw from this document is that these notes reflect Ickes' statements in this meeting that the President had already made 15-20 solicitation calls and had raised $500,000 for the DNC. Ickes is probably referring to the October 18 calls described above. Everything else reported in the notes tends to be exculpatory.

For example, Strauss' notes reflect that the solicitor was expressly to suggest a "50K soft money contribution." Further, Strauss' notes reflect the statement, "make calls from residence," though he could not recall whether this was meant as an admonition or a description of past practice.[15] In sum, although the notes tend to corroborate the fact that the President had made some phone calls, to the extent they can be read to reflect not only what the Vice President should do, but also what the President has done, they would tend to suggest that the President had not violated section 607 in the calls he had made.

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[14] The President specifically recalled phoning Robert Meyerhoff, as discussed supra.

[15] According to Strauss, this could either have been a reference to where the President was making his phone calls or an admonition to the Vice President to make his calls from his "residence."

CONCLUSION

As discussed above, we have concluded there is no specific and credible evidence that the President may have violated section 607 warranting further investigation and we accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel. Although we would ordinarily attach to this memorandum the necessary paperwork to be filed with the Special Division of the Court of Appeals, we have not done so here so as not to delay, in light of the upcoming holiday, the review of our conclusions. We will immediately begin drafting this paperwork.

Attachment

The New York Times DATE: 9/14/97 PAGE: A1

Aide Says He Prodded President To Complete Fund-Raising Calls

No White House Secrets Disclosed in Deposition

By DON VAN NATTA Jr.

WASHINGTON, Sept. 13 — Harold M. Ickes found it easy to persuade President Clinton to agree to make a few fund-raising calls from the White House. The hard part was actually getting the President to pick up the telephone, Mr. Ickes, the former deputy chief of staff, recalled that he had to leave the call sheets on Mr. Clinton's desk, where they often sat for weeks, untouched.

"Then I would bug him in a very low-keyed way as to whether he made or was intending to make the phone calls," Mr. Ickes explained in a deposition in June with Republican lawyers for the Senate committee investigating campaign finance abuses. "He always intended to make the calls." Mr. Ickes said that occasionally he would "be fortunate enough to find out that he had, in fact, made a phone call."

In the deposition given to hostile Republican lawyers, a copy of which was obtained by The New York Times, Mr. Ickes described himself as the Clinton campaign's "bottom line guy" and chief cajoler who pressed a reluctant President and a less-reluctant Vice President to make fund-raising calls from the White House. The deposition provides, in his own words, the first glimpse of Mr. Ickes' central role as Mr. Clinton's campaign finance "designee."

Mr. Ickes spoke at length about the Democrats' money needs and the scramble to meet them. That challenge was made even more difficult by the President's popularity, which Mr. Ickes said was responsible for a severe shortage of direct-mail contributions last year because many Democrats assumed Mr. Clinton did not need their help.

"At one point," Mr. Ickes said, "there was a real fall-off in direct mail because the President was doing so well in the polls. We lost 5 million bucks, literally, in a month."

The crisis called for some creative fund-raising measures, and that was clearly part of Mr. Ickes's mandate.

In a clear signal of the type of witness he would be if Senate Republicans choose to call him to testify, Mr. Ickes insisted, almost defiantly, that he had little or no knowledge of the fund-raising excesses that have embarrassed the White House and the Democratic National Committee for nearly a year. Much to the Republicans' chagrin, he provided few new details about such activities as Vice President Al Gore's dialing for donations in his office and the attendance of arms dealers and convicted felons at White House coffees.

Through 10 hours of prying questions over two days, Mr. Ickes described himself as being as perplexed as everyone else about the motives and activities of John Huang, Yah Lin Trie and Johnny Chung, three fund-raisers whose activities have come under intense scrutiny. "I would not know him if he came in here right now and sat on my lap," Mr. Ickes said of Mr. Chung.

Mr. Ickes repeatedly denied the implication in some questions that the excesses were his fault, even indirectly. If he had known that fund-raisers sold admission to White House coffees, seats on Air Force One and overnight stays in the Lincoln Bedroom, Mr. Ickes said, he would have taken immediate action. "Had I known of it, I would have not only disapproved of it, I would have told them to stop doing it," he said. However, Mr. Ickes acknowledged that the coffees "played a role" in the fund-raising effort.

"They were, you know, a mechanism or a device, if you will," he said.

Mr. Ickes's answers also make it clear that he was a driving force behind the aggressive push for contributions for the Clinton-Gore campaign and the telephone solicitations from the White House, the two issues that have combined to confront the Vice President with the most potentially damaging questions of his political career.

Attorney General Janet Reno is now investigating whether 46 phone calls Mr. Gore made to big donors from his White House office may have violated Federal election law. A portion of the money raised from those calls was diverted from the Democratic National Committee to the Clinton-Gore campaign. Ms. Reno will decide whether an independent counsel should be appointed.

There are differing interpretations of the legality of phone call solicitations made from the White House. But Mr. Ickes said that he checked with the White House counsel at the time, Lloyd N. Cutler, who said Mr. Clinton could make calls from the Oval Office. But, inexplicably, Mr. Ickes said he had left it up to the Vice President's staff to research the issue with regard to Mr. Gore.

"I did not deal in that regard with the Vice President," Mr. Ickes said. "He had his own counsel and his own political staff. I left that up to them."

Since the Senate campaign finance hearings began in July, Mr. Ickes' name has been mentioned prominently by several top fund-raising officials, who seemed to suggest that Mr. Ickes possesses the clues to the inquiry's many mysteries. But if he does, he did not tell the Republicans in his deposition.

Mr. Ickes acknowledged that he often disagreed with Donald L. Fowler, the chairman of the Democratic National Committee who testified this week that Mr. Ickes often went around him and dealt with other Democratic finance officials directly. But Mr. Ickes disputed that suggestion.

A copy of the deposition, taken on June 26 and 27 in the Hart Senate Office Building, was obtained by The Times from a Republican staff member in the Senate. Judging by the deposition, Mr. Ickes, a labor lawyer and campaign veteran from New York, is an intelligent and irascible witness who does not pass up an opportunity to criticize the Republicans, pointedly reminding them of their own fund-raising history.

Mr. Ickes dashed any hopes the Senate Republicans may have had that he would try to exact revenge on the President who failed to make him White House chief of staff, a job he badly wanted, late last year.

Answering only the second question posed by Michael J. Madigan, the committee's chief counsel, Mr. Ickes signaled his intentions. Mr. Madigan asked: "I know you have an extensive background, but if you

Cont'd

could, just summarize it prior to 1992, just briefly for the record?"

Mr. Ickes replied: "I was born. I grew up. I went to school."

Indeed, it is not hard to see why the Senate Republicans have postponed his appearance at the hearings, and why they are still not certain whether Mr. Ickes will appear. His answers do not give them much help.

Lawyers for Mr. Ickes suggested earlier this summer that Republicans might be afraid of Mr. Ickes because he is such a wily witness.

His deposition occurred long before the latest round of revelations. For example, Mr. Ickes was not asked about the Democratic National Committee's diversion of at least $2 million in contributions from soft money accounts to the Clinton-Gore campaign. Senators say they plan to take another deposition from Mr. Ickes in the coming days.

According to his testimony and a series of early 1996 memorandums that he wrote, Mr. Ickes paid close attention to the complex balance between two types of donations known in campaign finance parlance as hard money and soft money. Quite simply, the Democrats would not have been able to spend millions of dollars in unrestricted soft money if the campaign did not raise enough individual contributions, which are subject to individual limits and much more difficult to raise.

In Mr. Ickes' memorandums, he said that the first $20,000 of all soft money contributions to the Democratic National Committee would be applied to the hard money accounts directly benefiting the Clinton-Gore campaign. In the memorandums, Mr. Ickes said nothing about asking the donors' permission to allow the Democrats to make the money transfers, which forced at least 62 donors to exceed the legal limit for hard money contributions.

Mr. Ickes declined to comment for this article. But his friends said he expressed outrage when he learned about the diversion this week, because Mr. Ickes told them he had assumed the donors would be told.

Mr. Ickes, whose meticulous memorandums revealed so much about the Democratic campaign, advanced the argument that he left many details to other people.

"I did not pay that much attention, quite frankly, to the dollar amounts put on each event," he told lawyers. But he explained the importance of his now-famous paper trail. "Through me as his designee, I kept the President informed, fully informed, as you can see by reams and reams and reams of documents."

To meet the Democrats' fund-raising goals, Mr. Ickes said he knew that it would require Mr. Clinton and Mr. Gore to ask wealthy donors for contributions. It would also involve their frequent attendance at fund-raising events at the White House and around the country, he said.

Although he could not recall whose idea it was for the President and Vice President to make solicitation calls from the White House, Mr. Ickes acknowledged that he first proposed the telephone solicitations to Mr. Clinton and Mr. Gore in late 1994, not long after the Republicans took control of Congress.

Unlike Mr. Gore, who made phone solicitations from his office on at least 11 days, the President simply did not enjoy asking people for money over the phone, Mr. Ickes said.

On three or four occasions, Mr. Ickes said, he had to remind the President to make the calls. "Typically, I would go to the President and say, 'Look, are you prepared to make some limited calls?' Typically, he would always say yes."

Mr. Clinton has said he could not recall making phone calls soliciting money from the Oval Office, but he left open the possibility that he might have done so.

Mr. Ickes said he asked the Democratic committee to put together a "very discreet list" of people the President could call. When he did hear, on that rare occasion, that Mr. Clinton had made a phone call, he asked Marvin S. Rosen, the chairman of the Democratic finance committee, to follow up and press for the contribution, he said.

Mr. Clinton wrote, in an oft-quoted memorandum in January 1995, to "start the overnights right away," and to begin by inviting $50,000 and $100,000 donors. Mr. Ickes' insisted he could not recall a single substantive discussion with Mr. Clinton about charging for overnight stays at the White House.

"I don't recall any discussions about using those invitations to help raise money," he said. "I do know that money is raised for campaigns. The President was facing a re-election, that he needed to raise money and that you generally treat your contributors well. You don't stick them in the eye."

Mr. Ickes was careful to shield Mr. Clinton from any blame for campaign finance abuses. However, Mr. Ickes repeatedly portrayed the President as "the C.E.O. of the party," who signed off on everything, even the text of television advertisements.

"The President of the United States got his way," Mr. Ickes said. "And you know what? That's the way it ought to be."

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

November 24, 1997

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: The Deputy Attorney General

FROM: Mark M Richard
Acting Assistant Attorney General

SUBJECT: Independent Counsel Recommendation
William Jefferson Clinton

PURPOSE: To recommend against seeking the appointment of an independent counsel to investigate whether the President may have violated 18 U.S.C. § 607 by soliciting campaign contributions from the Oval Office or other official work space in the White House.

TIMETABLE: This determination must be made no later than December 2, 1997.

SYNOPSIS: There is no specific and credible evidence that the President solicited contributions from the Oval Office or other official work space within the White House. We accordingly recommend that the Attorney General not seek the appointment of an independent counsel.

DISCUSSION: A preliminary investigation into whether the President may have violated section 607 by soliciting contributions over the phone on behalf of the Democratic National Committee ("DNC") from the Oval Office or other official work space within the White House has now been completed. The evidence suggests that on five occasions between October 18, 1994, and March 7, 1996, requests to make telephone fund-raising calls were communicated to the President or his staff by the DNC. These requests came in the form of memoranda or call sheets listing the names, backgrounds, donor histories, and telephone numbers of prospective donors. Of a total

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

November 24, 1997

Honorable Janet Reno
The Attorney General
U.S. Department of Justice
Washington, D.C.

Dear Madame Attorney General:

RE: CAMPAIGN CONTRIBUTIONS (CAMPCON)
AND THE INDEPENDENT COUNSEL STATUTE

In May, 1997, I provided you with an overview of the FBI's investigative strategy in Campcon. This document also included an analysis of the related aspects of the Independent Counsel Statute. At the time, the investigative plan focused on three distinct but inter-related matters: (1) a campaign fund-raising strategy executed by a core group of individuals from the DNC and the White House; (2) an allegation of illegal conduct by a myriad of "opportunists"; and, (3) efforts by the PRC and other countries to gain foreign policy influence through illegal contributions. In conjunction with providing you this document, I recommended that you refer the Campcon matter to an Independent Counsel.

Since May, there have been a number of significant developments in each of the above-three areas. In addition, there have been numerous discussions on issues associated with this overall investigation which impact on the Independent Counsel Statute. Today, I am convinced, now more than ever, that this entire matter should be referred to an Independent Counsel.

I have attached a current overview of an evaluation which I requested, and which I believe will clarify my understanding of the Independent Counsel Statute, as well as the investigative focus and direction of the Campcon Task Force.

Per our conversation this afternoon, a copy of the attached document is only being provided to you and to the Deputy Attorney General.

DOJ-FLB-00001

EXHIBIT
13

Honorable Janet Reno

I am available to discuss these matters at your convenience.

Sincerely,

Louis J. Freeh
Director

Enclosure

DOJ-FLB-00002

A. PURPOSE OF THE INDEPENDENT COUNSEL STATUTE

The Independent Counsel Act establishes a system "to investigate and prosecute allegations of criminal wrongdoing by officials who are close to the President. The purpose of this system is to ensure fair and impartial criminal proceedings when an Administration attempts the delicate task of investigating its own top officials."[1] When this legislation was first enacted in 1978, the Senate Governmental Affairs Committee listed a number of reasons for such a system. The top three reasons were:

(1) The Department of Justice has difficulty investigating alleged criminal activity by high-level government officials.

(2) It is too much to ask for any person that he investigate his superior. . . . "[A]s honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential." (quoting former Special Prosecutor Cox)

(3) It is a basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof. This is not a question of the integrity of the individual. . . . The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself.[2]

1 - Attorney General Reno (Copy 1 of 6)
2 - Deputy Attorney General Holder (Copy 2 of 6)
3 - Director Freeh (Copy 3 of 6)
4 - Deputy Director Bryant (Copy 4 of 6)
5 - Mr. Gallagher (Copy 5 of 6)
6 - Mr. Parkinson (Copy 6 of 6)

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[1] S. Rep. No. 123, 100th Cong., 1st Sess. 2 (1987), reprinted in 1987 U.S.C.C.A.N. 2150. To simplify, subsequent citations to legislative history will be cited in this shorthand form: "1987 CAN 2150."

[2] 1978 CAN 4216.

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For nearly a year, the Campcon Task Force has been actively investigating a variety of fundraising activities by a core group of White House and DNC officials (as well as others). The Task Force is examining these activities through a variety of traditional investigative techniques, including the use of grand jury subpoenas and testimony. Because this criminal investigation has taken our investigators into the highest reaches of the White House -- including an examination of many specific actions taken by the President and Vice President -- we have had to assess the potential application of the Independent Counsel statute virtually every step of the way.

B. STRUCTURE OF THE INDEPENDENT COUNSEL STATUTE

1. Mandatory and Discretionary Provisions

The Independent Counsel statute can be triggered in one of two ways. First, the Attorney General shall conduct a preliminary investigation under the so-called "mandatory" or "covered persons" provision in the following circumstances:

> whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any ["covered person"] may have violated any federal criminal law other than [certain minor violations].

28 U.S.C. § 591(a). Second, the Attorney General may conduct a preliminary investigation under the following "discretionary" provision:

> When the Attorney General determines that an investigation or prosecution of a [non-covered] person by the Department of Justice may result in a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person . . . if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than [certain minor violations].

28 U.S.C. § 591(c).[3]

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[3] Section 591(c) was amended in 1994 to give the Attorney General discretionary authority to use the independent counsel process with respect to Members of Congress. It was also reworded for "simplication" purposes, but otherwise made no change from the existing law in the "substantive reach or scope" of the discretionary provision. The Senate bill would have

2. What Triggers the Mandatory Provision?

The independent counsel statute contains three basic requirements for triggering a preliminary investigation under the "mandatory" provision: (a) Specific information, (b) From a credible source, (c) That a covered person may have violated the law.[4]

a. Specific Information. The purpose of the specificity requirement is to weed out "generalized allegations of wrongdoing which contain no factual support [such as] a letter saying that a particular member of the President's cabinet is a 'crook.'" 1982 CAN 3548. Clearly, the specificity threshold is low one, intended simply to weed out "frivolous or totally groundless allegations." Id.; 1978 CAN 4270.

b. From a Credible Source. The credibility requirement was added to the statute in 1983 after Congress concluded that the existing standard (specificity only) was too low. "Public confidence is not served by investigating meritless allegations made by unreliable sources." 1982 CAN 3548. In considering whether a source is credible, the Attorney General is expected to follow "the usual practices of the Department of Justice in determining the reliability of a source." Id.[5]

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authorized the Attorney General to use the independent counsel process to investigate a "matter" as well as a person, but that proposed revision was rejected in conference "because it would in effect substantially lower the threshold for use of the general discretionary provision." 1994 CAN 793.

[4] The statute as originally passed in 1978 required a preliminary inquiry whenever the Attorney General received "specific information that [a covered] person has committed a violation" of federal law. In 1982, Congress decided to add a "credibility" requirement. Unfortunately, instead of simply changing "specific information" to "specific and credible," it replaced "specific information" with "information sufficient to constitute grounds to investigate." To figure out what that means, one must look to § 591(d)(1), which sets forth the specificity and credibility requirements.

[5] One question that has arisen in the course of the Campcon investigation is whether newspaper reports can or should constitute a "credible source." This is a debatable proposition, particularly where reputable news organizations have successfully tracked down witnesses and documents. Early in the investigation, the Public Integrity Section took the position that newspaper articles cannot be a credible source for purposes

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It is important to note that the statute permits the Attorney General to consider only the two factors of "specificity" and "credibility" in determining whether there are grounds to investigate. In 1987, Congress added the word "only" to the statutory language of § 591(d)(1) in an effort to curb the Department's "disturbing practice" of conducting lengthy "threshold inquiries" before deciding whether the statute had been triggered. 1987 CAN 2164.

c. That a Covered Person May Have Violated the Law. The Attorney General must conduct a preliminary inquiry if she receives specific and credible information that a covered person may have violated any federal criminal law. In 1987, Congress changed the statute from "has committed" to "may have violated." The legislative history makes very clear that DOJ's role should be limited:

> It cannot be expected, at this first step in the process, that the Attorney General could or should determine that a criminal act has been committed.

1987 CAN 2164; see also 1982 CAN 3549 ("[I]f facts or suspicious circumstances suggesting that a covered person may have engaged in criminal activity come to the attention of the Department of Justice, these would qualify as 'information sufficient to constitute grounds to investigate,' thus triggering a preliminary investigation.")

Congress amended the statute in 1987 in direct response to what it saw as DOJ's "disturbing practice" of conducting extended "threshold inquiries," often lasting months and involving "elaborate factual and legal analyses." As stated in the Senate Report:

> It is not clear why the Department of Justice has adopted this practice. Some have suggested that the Department is conducting preliminary investigations in all but name to avoid statutory reporting requirements that attach only after a 'preliminary investigation' has taken place. Since these reporting requirements are the primary means of ensuring the Attorney General's accountability for decisions not to proceed

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of the statute. That position appeared to change in early September when the Attorney General announced that DOJ had opened a 30-day inquiry regarding the Vice President's telephone solicitations based upon a Washington Post article by Bob Woodward.

under the statute, Congress intended them to attach in all but frivolous cases.[6]

3. Seeking an Independent Counsel

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[6] According to the 1987 Senate Committee report, DOJ reported processing a total of 36 cases under the independent counsel statute between 1982 and 1987. Of the 36 cases, the Department reported closing 25 prior to conducting a preliminary investigation. It reported closing five of these cases because the allegations did not involve a covered official, and 20 others (which did involve covered persons) because a "threshold inquiry" had determined that the information was insufficient to trigger a preliminary investigation. In the 20 cases involving covered officials, DOJ reported spending an average of approximately 75 days before closing the case. 1987 CAN 2155.

The Senate Committee criticized the Department for failing to clearly articulate why, in the 20 cases on covered persons, it found the information insufficient to trigger a preliminary investigation. The Committee concluded that DOJ had closed 10 cases, despite receiving specific information from a credible source of possible wrongdoing, because it determined that the evidence available did not establish a "crime." In at least five of these 10 cases, the decision appeared to have been based, at least in part, on insufficient evidence of criminal intent. The Committee concluded:

> Thus, contrary to the statutory standard, in 50% of the cases handled by the Justice Department since 1982 in which it declined to conduct a preliminary investigation of a covered official, it relied on factors other than credibility and specificity to evaluate the case. Moreover, in at least half of these cases, the Department of Justice refused to conduct a preliminary investigation into the alleged misconduct, because it had determined there was, at this early stage in the process, insufficient evidence of criminal intent.

Id. at 2155-56.

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Upon completion of a preliminary inquiry,[7] the Attorney General must apply to the court for appointment of an independent counsel if she determines that "there are reasonable grounds to believe that further investigation is warranted." 28 U.S.C. 592(c). In making that determination, she may not conclude that the person under investigation "lacked the state of mind" required for the relevant criminal violation unless there is clear and convincing evidence that the person lacked such state of mind. 28 U.S.C. 592(a)(2)(B)(ii).

If the Attorney General concludes that an independent counsel is required, she must file with the court an application which contains sufficient information to assist the court in (1) selecting an IC, and (2) defining the IC's jurisdiction so that the IC "has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter." 28 U.S.C. 592(d) (emphasis added).

C. COVERED PERSONS BEING INVESTIGATED BY THE TASK FORCE

The Task Force currently has preliminary investigations pending against five "covered persons": (1) President Clinton; (2) Vice President Gore; (3) Former Energy Hazel O'Leary; (4) Interior Secretary Bruce Babbitt; and (5) Alexis Herman. The Task Force has also been investigating a number of activities of a sixth covered person -- Peter Knight, the chairman of the Clinton/Gore campaign. Among other things, Knight coordinated VP Gore's fundraising calls from the White House and was present when the calls were made. The Department has not yet triggered an independent counsel review as to Knight.

It should be noted that, in the current Administration, even the most senior White House staffers (such as former Deputy Chief of Staff Harold Ickes) are not "covered persons" under the statute. The "covered persons" provision includes individuals working at the Executive Office of the President who are paid at or above level II of the Executive Schedule (currently $133,600). Although Congress clearly intended to capture a significant

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[7] After initiating a preliminary inquiry, the Attorney General normally has 90 days to decide whether an independent counsel should be appointed (with the option of one 60-day extension upon a showing of good cause). However, when a preliminary inquiry is begun following a congressional request, the Attorney General must make her decision no later than 90 days after the request is received. Therefore, the Attorney General must resolve the matter of the Vice President's telephone solicitations no later than December 2, 1997, which is 90 days after the House Judiciary Committee's request for appointment of an independent counsel on this matter.

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number of high-level White House officials within the "covered persons" provision, most of the current officials have avoided coverage simply by accepting a salary below level II.[8] While currently authorized by statute to appoint and pay twenty-five persons at level II, President Clinton pays only six persons at that level, none of whom are the focus of the Campcon investigation.[9]

D. OVERVIEW OF THE CAMPCON INVESTIGATION

1. The Investigative Plan

The Campcon investigative plan, which has remained essentially unchanged since it was originally crafted by the FBI investigators in early 1997, has focused on three distinct but interrelated matters:

-- An aggressive campaign fundraising operation developed and executed by a core group of individuals from the DNC and the White House, including the President, the Vice President, and a number of top White House advisors.

-- Allegations of illegal conduct by a myriad of opportunists and other individuals who gained White House access in order to further their personal, business, and political interests.

-- Efforts by the PRC and other countries to gain foreign policy influence by illegally contributing foreign money to U.S. political campaigns and to the DNC through domestic conduits.

The core group investigative plan was based on a theory that most of the alleged campaign abuses flowed, directly or indirectly, from the all-out effort by the White House and the DNC to raise money. It was this consuming quest for campaign

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[8] As originally structured in 1978, the total number of covered Executive Branch positions was approximately 120, with approximately 93 of those positions within the Executive Office of the President (EOP). In 1983, Congress reduced the total coverage of Executive Branch positions to approximately 70, of which approximately 36 were within the EOP. 1982 CAN 3543.

[9] Those six persons, according to the most recent listing provided by the White House Counsel's Office to the FBI's Public Corruption Unit, are the Director and two Deputy Directors of OMB, the Chairman of the Council of Economic Advisors, the U.S. Trade Representative, and the Director of the Office of Science & Technology Policy.

cash, for example, that led to the transfer of John Huang from the Department of Commerce to the DNC to begin the aggressive solicitation of Asian Americans. It led to the ambitious plan for White House coffees, overnights, and other perks for large donors. It led to the telephone solicitations by the President and the Vice President and the attempted merger of the WHODB and DNC databases. In fact, virtually all of the viable Campcon investigative avenues are clearly connected to the core group's initiatives. While that does not mean the core group members necessarily are culpable for the criminal violations the investigation uncovers, neither should they be immune from intensive investigative scrutiny.

While the DOJ prosecutors in charge of the Campcon investigation did not formally object to this investigative plan, they also did not embrace it.[10] From the beginning, there was a fundamental disagreement about how the investigation should proceed. The FBI investigators wanted to focus intently on the core group, on the theory that many of the apparent campaign abuses flowed, directly or indirectly, from the core group's all-out effort to raise money. In contrast, the prosecutors wanted to focus on the opportunists, with a "bottom up" strategy that might or might not lead eventually to the core group.

For the most part, the prosecutors' approach prevailed. Throughout the investigation, the Task Force has focused on building prosecutable cases against individuals such as Charlie Trie, Maria Hsia, and [redacted]. While this approach may be understandable, and is beginning to show promising results, it did neglect some of the larger issues. With the exception of the investigation of the White House fundraising calls, begun belatedly in September 1997, there has never been a concentrated investigation of the core group and its fundraising efforts. In fact, DOJ did not assign a prosecutor specifically to core group activities until July, after Director Freeh ordered an aggressive plan to interview all relevant core group and DNC officials and to become more persistent on subpoena compliance issues.

Even after the September shakeup and expansion of the Task Force, the "bottom up" approach has continued to dominate the investigation. While the Task Force has made significant progress in developing prosecutable cases against several of the opportunists, the activities of the core group -- with the

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[10] The reference to "DOJ prosecutors" is not meant to include the line prosecutors conducting the day-to-day investigation. For the most part, those line prosecutors appeared to be removed from the major decisions about how the investigation would proceed, particularly on issues that potentially involved the independent counsel statute.

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exception of the White House telephone solicitations -- have received comparatively little attention.

2. Cautious Approach to Investigating "Covered Persons"

From the outset, the DOJ attorneys in charge of the Task Force have proceeded very cautiously before authorizing any investigative step that might involve a "covered person." Unlike a normal investigation, where agents and attorneys simply follow all logical investigative leads, the DOJ attorneys have been extremely reluctant to venture into areas that might implicate "covered persons." This reluctance has led to a flawed investigation in several ways.

First, the Task Force has partitioned its investigation, focusing on individual persons and events without effectively analyzing their relationship to the broader fundraising scheme. Second, the Task Force attorneys sometimes have made dispositive factual assumptions without investigating to see if those assumptions are accurate. For example, the attorneys concluded in the spring of 1997 that Vice President Gore's White House fundraising calls were not worth investigating because they all involved solicitation of "soft money" (a factual assumption that turned out to be incorrect). The White House coffees are a second example; until very recently, there still has been no serious investigation of the coffees, primarily because the DOJ attorneys had assumed -- incorrectly -- that they all occurred in "private" White House space. Third, important investigative areas, such as the serious allegations raised by Common Cause, have never been pursued because they have been tied up in lengthy threshold legal analyses within the Department.

The Department has also walled off the day-to-day investigation from much of its Independent Counsel legal analyses. Most decisions regarding IC issues are still being handled by DOJ attorneys who have only limited involvement in the ongoing investigation. While obviously these issues deserve the careful scrutiny of experienced Public Integrity attorneys, the separation between the legal analysts and the front-line investigators (both agents and attorneys) has been unusually rigid. Ironically, this separation became even more pronounced following the September shakeup of the Task Force. Until at least mid-October, the new Task Force heads, Chuck LaBella and Jim DeSarno, had no meaningful role in the Department's handling of Independent Counsel-related matters. As a result, the investigative approach to those matters has suffered from lack of coordination.[11]

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[11] There was also a marked change in how the Independent Counsel issues were discussed. Before the September changes, there had been regular discussions during the weekly Campcon

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E. THE CORE GROUP'S FUNDRAISING SCHEME

1. The Common Cause Allegations

By pursuing its "bottom-up" investigative strategy instead of focusing on the core group, DOJ has failed to adequately address many of the larger campaign financing issues that could and should lead to the appointment of an Independent Counsel. As a starting point, the Campcon Task Force has failed to address an overarching issue: whether the Clinton/Gore campaign (as well as the Dole campaign) engaged in an illegal scheme to circumvent the federal campaign financing laws. This issue was first raised by Common Cause in October 1996, long before the Task Force was even constituted, but it has never been pursued. To this day, there has been no decision on whether the allegations should be investigated by the Task Force or referred to the FEC.

As background, candidates seeking the presidential nomination are eligible to receive public matching funds if they so choose. However, in exchange for the public funds, a candidate is required to limit his overall campaign spending. In 1996, the spending limit was approximately $37 million for the primary campaign and approximately $62 million for the general election. For knowing and willful violations of these limitations, there are criminal penalties set forth in the FECA and the Presidential Primary Matching Payment Account Act and the Presidential Election Campaign Fund Act.

The alleged scheme appears to have been borne in the summer of 1995, in response to a plan by campaign strategist Dick Morris to run an extremely ambitious series of TV ads, primarily in swing-voter states where President Clinton had problems. Morris wrote in his book that the key to Clinton's reelection was this early television advertising, designed to show selected TV viewers from "150 to 160 airings" or "about one every three days for a year and a half." According to published reports, there was an internal debate within the Clinton/Gore campaign about whether to turn down public financing during the primary elections "in order to avoid federal spending limits." In the end, the campaign appears to have designed a scheme to have it both ways -- to receive taxpayer funds and agree to a spending

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meetings about all Task Force matters, including those involving the potential application of the Independent Counsel statute. Beginning in September, however, the nature of the weekly meetings changed markedly, and there no longer was any meaningful discussion of IC-related issues. While the FBI has very recently received several DOJ drafts on pending IC matters, FBI officials have not had any significant role in the deliberative process.

limit, and simultaneously use the DNC to buy millions in advertising above the spending limit. According to Common Cause, the expenditures for the ad campaign totaled at least $34 million.

The heart of the Common Cause allegations is that the Clinton/Gore campaign -- and not the DNC -- fully controlled the advertising campaign, and that the so-called "soft money" funneled through the DNC was a sham. That is, the money was not used for "party building" activities, as "soft money" is supposed to be used, but rather to directly support the President's reelection. As stated in the October 28, 1997, Common Cause letter to the Attorney General: "[T]he presidential campaigns, and not the parties, fully controlled the raising and spending of these funds and designed, targeted and conducted the TV advertising campaigns financed with these funds. While the money was technically deposited into and disbursed out of political party bank accounts, the parties in reality played only a clerical role in serving as a conduit for these funds. In short, these funds were raised and spent by the presidential campaigns "for the purpose of influencing" a federal election, and thus should be treated as within the scope of the federal campaign finance laws."

While the Campcon Task Force has not undertaken any concerted effort to trace the funds used for these advertising campaigns, it has obtained substantial evidence that the President and his key advisors controlled virtually all aspects of the DNC fundraising efforts. There are numerous documents supporting such a conclusion, but none quite so compelling as the 4-17-96 memorandum from Harold Ickes to DNC Chairman Don Fowler:

> This confirms the meeting that you and I and Doug Sosnik had on 15 April 1996 at your office during which it was agreed that all matters dealing with allocation and expenditure of monies involving the Democratic National Committee ("DNC") including, without limitation, the DNC's operating budget, media budget, coordinated campaign budget and any other budget or expenditure, and including expenditures and arrangements in connection with state splits, directed donations and other arrangements whereby monies from fundraising or other events are to be transferred to or otherwise allocated to state parties or other political entities and including any proposed transfer of budgetary items from DNC related budgets to the Democratic National Convention budget, are subject to the prior approval of the White House.

With respect to the ads themselves, Dick Morris and others have stated the President personally reviewed and approved all ads before they ran. As Morris wrote in his book:

> [President Clinton] worked over every script, watched each ad, ordered changes in every visual presentation, and decided which ads would run when and where. He was as involved as any of his media consultants were. The ads became not the slick creations of admen but the work of the president himself. . . . Every line of every ad came under his informed, critical and often meddlesome gaze. Every ad was his ad.

Behind the Oval Office, at 144.

The recently-uncovered White House videotapes bolster the Common Cause allegations. At a DNC luncheon at the Hay Adams Hotel on December 7, 1995, the President stated to his supporters:

> We realized that we could run these ads through the Democratic Party, which meant we could raise money in $20,000 and $50,000 and $100,000 blocks. So we didn't have to do it all in $1000 and run down what I can spend, which is limited by law so that is what we've done.

On that tape and others, the President emphasized that the TV ad campaign was central to his favorable position in the polls. As Common Cause correctly points out, this certainly looks like an intentional scheme to evade the contribution and spending limits by "running these ads through" the DNC.

The Justice Department has weighed in on the legal issue, at least initially concluding that this scheme was simply an act of "coordination" between the Clinton/Gore campaign and the DNC. In her April 14 letter to Congress, the Attorney General stated that the FECA "does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office." The Common Cause response, which appears to be supported by the evidence, is that this is not a case about mere "coordination." Instead, it argues, the case is about a scheme in which President Clinton and his top advisors raised and spent millions in direct support of his candidacy, and used the DNC as a mere conduit.

The circumstances of this case present unprecedented legal issues that have sparked a substantial difference of opinion among various election law experts, particularly on the "hard money vs. soft money" issue. If one thing is certain, it is that the law in this area is unclear and that there are no established enforcement policies either at DOJ or the FEC. See 1982 CAN 3551 ("Any case in which there is no clear policy against prosecution or any arguably exceptional circumstances are present should be sent to a special prosecutor.") DOJ has invited substantial criticism by appearing to resolve these

untested legal issues at the outset of the investigation, before the facts are fully developed.

On their face, the Common Cause letters present serious allegations of potential criminal conduct that deserve to be investigated. Of all the potential campaign violations brought to the attention of the Campcon Task Force, these arguably are the most serious. The allegations were compelling when they first reached the Justice Department in October 1996, and they have become stronger as more and more facts have been uncovered during the investigation. Because the allegations clearly involve the President, they should be investigated by an Independent Counsel. Moreover, the Attorney General should seek the appointment of an Independent Counsel immediately, for two reasons: (1) the Department has had the allegations for more than a year; and (2) there is virtually no chance that the allegations could be resolved in the course of a limited preliminary inquiry.

2. Other Allegations Connected to the Scheme

In addition to allegations of a broad conspiracy to circumvent the campaign contribution and spending limits, many of the other allegations that have arisen in the course of the investigation have a direct connection to the core group's fundraising scheme. For example, the fundraising operation included a $7 million targeting of the Asian-American community. The key player in this effort was John Huang, who was moved from the Department of Commerce to the DNC following the personal intervention of the President. Huang and others involved in carrying out the Asian-American targeting have been implicated in illegal fundraising. Huang is closely tied to the and the Lippo Group, which has substantial connections to the Chinese government.

As this one example illustrates, it is important to keep in mind that virtually all of the various pieces of the Campcon investigation are connected to the overall fundraising scheme. While this is not to suggest that the core group necessarily is culpable for all the fundraising improprieties being uncovered, it does demonstrate the need for an investigative strategy that includes a comprehensive look at the core group's activities.

F. VICE PRESIDENT GORE'S TELEPHONE SOLICITATIONS

1. The Statute

18 U.S.C. § 607 makes it unlawful "for any person to solicit or receive any contribution within the meaning of section 301(8) of the FECA in any room or building occupied in the discharge of official duties by any [officer or employee of the United States]." On its face, this felony prohibition would

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appear to cover Vice President Gore's fundraising calls from his White House office.

2. The Investigation

While Vice President Gore admitted in March 1997 that he had made fundraising calls from his West Wing office at the White House, the Task Force did not undertake any serious investigation of these calls until July. In her April 1997 letter to Chairman Hatch, the Attorney General rejected a call to trigger the Independent Counsel statute for investigation of potential 607 violations. The Attorney General's letter implicitly relied on the argument that because Section 607 applies only to "contributions" as technically defined by the FECA, it would not prohibit the solicitation of "soft money." (VP had originally characterized the calls as soft money solicitations.) When it became apparent in early September that a portion of the monies raised by the Vice President's telephone solicitations had been placed into a "hard money" account by the DNC, the Department initiated a threshold inquiry and later a preliminary investigation under the Independent Counsel Act.

The Task Force has now established that the Vice President made approximately 86 fundraising calls from his West Wing Office and reached at least 43 potential donors. At least five of the persons solicited by the Vice President gave money that was deposited, in part, into a DNC "hard money" account.

3. Legal Issues

At this point, the Attorney General is faced with three questions: (1) Does Section 607 apply to the Vice President's telephone solicitations? (2) Assuming Section 607 does apply, is there an established DOJ policy of non-prosecution of such offenses? (3) Assuming Section 607 applies and there is no established policy of non-prosecution, is further investigation warranted by an Independent Counsel?

In determining whether the statute applies to the Vice President's telephone calls, the Department has focused on three threshold legal questions. First, does the statutory phrase "any person" include the President and Vice President, or are they exempt from the statute's coverage for separation of powers reasons? On this point, there appears to be a consensus that the statute does indeed reach the President and Vice-President. The Office of Legal Counsel reached the same conclusion in 1979 when analyzing a White House political event hosted by President Carter.

Second, because Section 607 was principally designed to prevent government workers from being pressured for contributions in their offices, does the statute apply to solicitation of non-

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federal persons? DOJ has apparently concluded that non-federal persons are protected by the statute.

Third, because the statute prohibits the solicitation or receipt of contributions "in any room or building occupied in the discharge of official duties," does it apply to the Vice President's calls made to persons located on non-federal property? Stated differently, does a telephone "solicitation" occur both where the call was received and where the call was made? The DOJ attorneys who have been analyzing this issue have reached different conclusions, but all agree that it is a close question.

The disagreement on this point stems largely from differing interpretations of the Supreme Court's decision in United States v. Thayer, 209 U.S. 39 (1908), which is one of only four reported decisions (and the only Supreme Court decision) involving a Section 607 prosecution. Thayer involved a prosecution of a private individual who solicited contributions by mail from federal employees working in a post office. The defendant argued that because he had never set foot in the post office, he had not solicited "in" a federal building. In rejecting that argument, the Court stated that "the solicitation was in the place where the letter was received." 209 U.S. at 43-44.

Notwithstanding the broad language of Thayer, the better view is that Section 607 does prohibit telephone calls from a federal office to an outside location. The Court in Thayer was defining the point in time when the offense was complete, and obviously the mailing of a letter involves a time gap. In contrast, a telephone conversation occurs simultaneously at both ends of the line, and a prohibited solicitation would be complete when made.

Assuming the Attorney General resolves the three threshold legal questions in a way that supports a technical violation of Section 607, she must then decide whether there is an established DOJ policy of non-prosecution of such offenses. In determining whether there are "reasonable grounds to believe that further investigation is warranted," the Attorney General is directed by the Independent Counsel Act to comply with "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations." 28 U.S.C. 592(c)(1)(B). Primarily because Section 607 cases are necessarily fact-bound, there is neither a written nor "other established" policy of non-prosecution of these kinds of offenses. While there appears to be a consensus within DOJ that the telephone solicitations at issue here would never be prosecuted even if there was a technical violation, the Department nevertheless must concede that the Independent Counsel

statute does not permit the Attorney General to simply dispose of a case through an exercise of prosecutorial discretion.

With respect to the final issue -- whether further investigation is warranted -- the Attorney must apply to the court for appointment of an Independent Counsel unless she concludes, by clear and convincing evidence, that the Vice President "lacked the state of mind" required for a Section 607 violation. Based on the facts, the Attorney General simply cannot reach such a conclusion. The evidence tends to show that the Vice President was a active participant in the core group fundraising efforts, that he was informed about the distinctions between "hard" and "soft" money, and that he generally understood there were legal restrictions against making telephone solicitations from federal property.

We have received a draft DOJ memorandum dated November 21, 1995, which recommends shutting down the investigation on the ground that there is clear and convincing evidence that the Vice President subjectively intended to ask only for "soft" money. However, the draft memorandum is seriously flawed, relying almost exclusively on the Vice President's own statements to draw inferences favorable to him, even where those statements are contradicted by other reliable evidence. The weak analysis is demonstrated by the following introductory statement:

> There are a few circumstances and a few ambiguous descriptions by donors of their conversation with the Vice President which raise the question of whether the Vice President may have been asking in a handful of cases for contributions that could have been characterized as hard money contributions. However, in each instance, the same evidence can be viewed as leading to the contrary inference that the Vice President was asking the donor in question to make a soft money contribution.

This simply is not close to carrying the burden of demonstrating a lack of intent by "clear and convincing" evidence. In establishing the "clear and convincing" standard, Congress intended to set a high threshold before an Attorney General can close down an investigation involving a "covered person." In the face of compelling evidence that the Vice President was a very active, sophisticated fundraiser who knew exactly what he was doing, his own exculpatory statements must not be given undue weight. If the Attorney General relied primarily on those statements to end this investigation, she would be inviting intense and justified criticism.

4. Conclusion

The Attorney General should seek the appointment of an Independent Counsel with respect to the Vice President's telephone solicitations. Such an appointment is warranted on two levels. The preferable course of action would be to refer this matter as simply one piece of a comprehensive Independent Counsel investigation which focuses on the alleged scheme to circumvent the campaign financing laws, as discussed above in Section E. Viewed in that context, it is essentially immaterial whether the telephone solicitations sought "hard" money or "soft" money, or whether they were made from public space or private space. Because they were a key component of the overall fundraising scheme alleged by Common Cause and others, these solicitations should be referred for further investigation by an Independent Counsel. Such a referral could be made under either the mandatory clause of the statute or as a discretionary matter.

If the Attorney General decides not to seek an Independent Counsel on the broader fundraising scheme, she still should refer the matter of the Vice President's telephone solicitations. Even on the narrowly focused issue presented by the existing preliminary inquiry, there appears to be a technical violation of Section 607. Given the uncertain state of that law and probable difficulty establishing a knowing violation, this may well be an area in which prosecution is unwarranted. However, under the Independent Counsel Act, the Attorney General is not authorized to use prosecutorial discretion to resolve such matters at this stage; those decisions must be left to an Independent Counsel. The Attorney General is free, when requesting appointment of an Independent Counsel, to include "the Department's views of the potential prosecutorial merit of the case." 1994 CAN 766.

G. PRESIDENT CLINTON'S TELEPHONE SOLICITATIONS

The preliminary investigation of President Clinton's telephone solicitations has led the Task Force to the conclusion that, based on the investigation to date, there is no specific and credible evidence of a Section 607 violation. Although the evidence indicates that the President was asked to place fundraising calls on five separate occasions, he appears to have made such calls on a single date: October 18, 1994. The available evidence indicates that the President called nine donors on that date, and that six of the nine definitely were called from the President's study in the White House residence (apparently on the advice of the White House Counsel's office). As to the calls to the remaining three donors (John Connelly, Arthur Coia, and John Torkelson), there is circumstantial evidence that they were also made from the President' study, but that fact has not been conclusively established.

Notwithstanding the conclusion on the narrowly-constructed Section 607 issue, the Attorney General should also

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seek the appointment of an Independent Counsel with respect to the President's telephone solicitations. Like those of Vice President Gore, the President's fundraising calls were part of the alleged scheme to circumvent the campaign financing laws, regardless of where the calls took place or how the money is characterized. While the DOJ memorandum suggests that further investigation would not be warranted even if the calls to the three donors were placed from the Oval Office (because "the evidence suggests these donors were solicited for soft money"), this conclusion is incorrect when considered in connection with the broader scheme. An Independent Counsel should be appointed to investigate this scheme, and the President's solicitations should be part of that investigation. As with the Vice President's calls, such a referral could be made under either the mandatory clause of the statute or as a discretionary matter.

E. FORMER ENERGY SECRETARY HAZEL O'LEARY

The preliminary investigation of Former Energy Secretary Hazel O'Leary has led the Task Force to the conclusion that O'Leary was not personally implicated in the solicitation of the $25,000 Africare donation from Johnny Chung. While there is no reason to challenge this conclusion based on the evidence known to date, it is also clear that the donation was made under extraordinarily suspicious circumstances that are worthy of additional investigation, as stated in the DOJ recommendation. Moreover, the events surrounding the donation and the meetings at the Department of Energy and the Africare event show substantial involvement by DNC officials, including Richard Sullivan and Don Fowler. Consequently, these events should be further investigated by an Independent Counsel as part of an investigation of the broader fundraising scheme of the core group. This course of action is particularly important in light of the various other Chung fundraising matters still under active investigation.

I. OTHER MATTERS IMPLICATING THE IC STATUTE

1. White House Coffees and Overnights

As part of its broad fundraising efforts, the White House/DNC Core Group devised and implemented an ambitious plan to reward big donors with White House coffees, overnight stays, trips on Air Force One, and other types of access to the President and Vice President. All of these activities are being investigated through grand jury subpoenas and other traditional law enforcement methods.

With respect to the coffees, the investigation to date shows that from January 1995 to November 1996, the White House hosted 108 coffees, attended by 1239 DNC and Clinton/Gore supporters. 314 of these supporters made donations within 90

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days of the event (either before or after). 185 gave solely "hard money" contributions, 25 gave only "soft" money, and 91 gave a combination of the two. Within the 90-day windows, the supporters contributed approximately $2.35 million in "hard" money and $5.15 million in "soft" money. According to White House records, President Clinton attended 74 of the coffees and Vice President Gore attended 38 of them.

In her April letter to the Senate Judiciary Committee rejecting an Independent Counsel request, the Attorney General relied primarily on one implied argument: that the events may have taken place in private areas of the White House residence rather than in areas "occupied in the discharge of official duties." That argument has both factual and legal flaws. As a factual matter, the Task Force has learned that the coffees were held in at least eight different locations. While DOJ attorneys have been quick to characterize the "Map Room" (where at least 65 of the coffees were held) as private White House space, there has been virtually nothing to demonstrate that assertion. Even if the "Map Room" turns out to be part of the private living space, there were many other coffees held in other parts of the White House.

DOJ has relied very heavily on a 1979 opinion from the Office of Legal Counsel, but that opinion has only limited reach. The key issue addressed by OLC was whether § 603 (the predecessor to § 607) prohibited an alleged campaign solicitation by President Carter during a luncheon for Democratic Party donors and fundraisers that took place in the Family Dining Room of the White House. After undertaking a fact-specific analysis of how the Family Dining Room was used and how the luncheon was arranged, OLC concluded that the solicitation "probably" fell outside the scope of § 603.

The OLC opinion concluded that rooms in the White House may fall outside the scope of § 603 if used for "personal entertaining where there is a history of such use and where . . . the cost of such use is not charged against an account appropriating funds for official functions." Applying that fact-specific standard, there is little basis to conclude that any of the White House coffees, including those held in the "Map Room," fall outside the scope of the § 607 prohibition.

In addition to determining the character of the rooms used for the coffees, the Task Force must also investigate whether the President or other participants made a "solicitation" within the meaning of Section 607. Although the recently-discovered White House videotapes appear to be of only limited value in determining the full scope of the coffee discussions, the coffees certainly were effective in raising millions of

dollars -- both "hard" and "soft."[12] In any event, the Task Force has subpoenaed White House records and is undertaking a criminal investigation of these activities which involve the President and Vice President.

Because the coffees, overnights, and other White House perks for big donors were simply pieces of the broader fundraising scheme carried out the the White House and DNC, they should be part of a comprehensive Independent Counsel investigation of that scheme.

2. Soliciting Contributions from Foreign Nationals

The Federal Election Campaign Act explicitly prohibits any person from soliciting, accepting, or receiving from a foreign national "any contribution of money or other thing of value . . . in connection with an election to any political office." 2 U.S.C. § 441e. The Campcon investigation has developed substantial evidence that money from foreign nationals flowed into the DNC as a result of the massive fundraising effort coordinated by the DNC and the White House. The DNC has turned back millions of dollars because of apparent improprieties.

The key legal questions are (1) whether "soft money" falls within the scope of the FECA, and (2) whether the foreign gifts to the DNC were in fact "soft money." DOJ has taken the legal position that all soft money falls outside the scope of the FECA -- including § 441e -- because it fails to meet the strict definition of "contribution" in § 431. This interpretation by the election law experts at the Public Integrity Section has been publicly adopted on several occasions by the Attorney General. This position has been greeted with intense criticism from some election law attorneys, who correctly point out that, at the very least, these are uncharted areas of the law. The FECA, after all, neither defines "soft money" nor specifically addresses "soft money" gifts to national parties. The uncertain state of the law invites the question of whether DOJ should be resolving these thorny legal issues, particularly in the face of independent counsel concerns. Certainly there are significant passages in the legislative history of the independent counsel statute that admonish the Department not to undertake such "elaborate legal analyses" when a covered person is involved. 1987 CAN 2158.

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[12] The one coffee for which we have developed significant information shows strong evidence of solicitation. At a 6-18-96 coffee in the Map Room attended by the President, John Huang, Don Fowler, [redacted] two Thai businessmen, and others, Huang directly directly solicited the businessmen -- in the presence of the President -- after Fowler described the upcoming election as the most important since Lincoln.

Even if it is appropriate for DOJ to resolve the threshold question of "soft money" at this stage, it is not at all clear that the suspicious foreign gifts in this case all constitute "soft money." In light of the evidence of nearly absolute control of DNC fundraising efforts by the White House, there is a very real issue about whether the "soft money" argument is largely a sham. The FEC's General Counsel is quoted in the 1-6-97 Legal Times as saying that if money "is used for a candidate's election directly, then there is no question that 441e applies."

At the very least, we need to investigate far more thoroughly before we can comfortably conclude -- as a factual matter -- that the specific gifts at issue were in fact "soft money" donations. In some cases, such as the Hsi Lai Temple fundraiser attended by the Vice President, the evidence points specifically to the solicitation of "hard money contributions."

3. Misuse or Conversion of Government Property

Since early 1997, the Task Force has been investigating whether White House personnel misused or converted government property for political purposes. The most significant example is that of the WHODB database, which appears to have been a high priority for the President and the First Lady. According to a recently-discovered White House memo, the President wanted to integrate the taxpayer-funded database with the DNC database. Despite a January 1994 warning from the White House Counsel's Office not to use WHODB for political purposes, the new memo for Erskine Bowles and Harold Ickes shows an intent to do just that. The memo, written by a former Bowles aide, states:

> Harold and Deborah DeLee want to make sure WHODB is integrated w/DNC database--so we can share--evidently POTUS want this to[o]! Makes sense.

The Task Force obtained database and related White House documents through subpoena and had developed an aggressive investigative strategy to examine its procurement and use (although that investigation appears to faded into the background in recent months). Whether or not the investigation leads to prosecutable offenses, the Task Force again is in the posture of investigating the activities of senior White House officials, including the President. And while it may turn out that the President had no hands-on role in either the development or use of the database, it is difficult to contend that there is "insufficient information to investigate" for purposes of the Independent Counsel statute.

J. THE DISCRETIONARY CLAUSE OF THE IC STATUTE

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least subjects (and potential targets) of the criminal investigation. Beyond the Core Group, the Task Force has focused intense investigative effort toward others who also appear to be close to the President, such as Charles Yah Lin Trie and John Huang. Investigation of such individuals is precisely the kind of circumstance for which the discretionary provision was designed. "This [discretionary] provision could apply, for example, to members of the President's family and lower level campaign and government officials who are perceived to be close to the President." 1987 CAN 2165.

With respect to McLarty and Ickes, it appears that Congress intended to capture within the "covered persons" provision individuals who occupy such high-level White House positions. As presently written, the "covered persons" section includes any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule. § 591(b)(3). Although he is authorized by statute to appoint and pay twenty-five persons at level II, the President currently pays only six persons at that level.

As these numbers show, the White House has avoided mandatory coverage for virtually all of its top level officials by simply paying them below level II. Whether or not this is an intentional effort by the White House to limit the number of "covered" senior officials, it certainly exposes a loophole in the independent counsel statute. In deciding whether or not to exercise her discretion under the statute, the Attorney General should consider whether McLarty and Ickes are among that group of top level officials so close to the President that DOJ investigation of them would "present the most serious conflict of interest of an institutional nature." 1978 CAN 4269.

4. DOJ is Investigating Top Campaign Officials.

Because the Independent Counsel statute arose from the abuses of Watergate, it reserves a unique spot for campaign-related misconduct. Top campaign officers are the only non-government officials to be included as "covered persons" within the mandatory provision of the statute. The reason for including campaign officials is spelled out clearly in the legislative history:

> There are few individuals who are as important to an incumbent President running for re-election or a serious candidate for President than that individual's campaign manager or the chairman of any of his national campaign committee of his or of his party.

1978 CAN 4269.

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The mandatory "covered persons" provision of § 591(b)(6) currently includes "the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President."[13] The Independent Counsel law was originally drafted to cover the chairman of any national campaign committee seeking the election of reelection of the President, but that section was dropped after the Department of Justice expressed concern that it could potentially cover hundreds of campaign committees that spring up during a national campaign, such as "Youth for Carter" or "Doctors for Ford." 1978 CAN 4394.

By its literal terms, the Independent Counsel statute covers only the chairman and treasurer of the Clinton-Gore Committee (Peter S. Knight and Joan Pollit, respectively), along with any officer "of that committee" exercising authority at the national level. It does not by its terms cover senior officers of the Democratic National Committee. However, in deciding whether to exercise her discretionary authority, the Attorney General should consider how the DNC was used during the 1996 election cycle. By essentially commandeering the DNC for the purpose of getting the President re-elected, the White House appears to have erased the traditional lines between the President's own campaign committee and the national party committee. In fact, the DNC was in large part the President's central re-election machine, under the tight control of senior White House advisors. Under the circumstances, it is almost nonsensical that the Independent Counsel statute could be invoked for Peter Knight or Joan Pollit but not for Don Fowler and John Huang.

5. Precedent.

This Attorney General has invoked the discretionary clause in at least three matters: Whitewater, the White House requests for FBI files, and the Bernard Nussbaum perjury allegation. In the Whitewater matter, the Attorney General invoked the political conflict of interest provision because of allegations of criminal conduct by "McDougal and other individuals associated with President and Mrs. Clinton." Similarly, the Attorney General found a conflict of interest in the Nussbaum matter because the investigation would "involve an inquiry into statements allegedly made by a former senior member of the White House staff."

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[13] Section 591(b)(7), which provides that "covered" government officials remain subject to the independent counsel statute for one year after leaving the office or position, does not apply to campaign officials.

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It would certainly be consistent with those precedents to find a political conflict of interest in this case, where there are strong allegations against "individuals associated with" the President. Charles Trie, for one, has been described as a personal friend. Similarly, Thomas (Mack) McLarty, who serves as "Counselor to the President" and is one of the President's closest friends and advisors, has been implicated in the Tamraz matter.

6. National Security Matters.

With respect to the investigation of Chinese government efforts to influence U.S. elections, DOJ and the FBI have conflicting duties to (1) keep the President informed about significant national security matters, and (2) simultaneously keep from the White House certain national security information that may relate to the ongoing criminal investigation. DOJ and the FBI have faced this conflict several times during the course of the investigation, most recently in early November 1997.

Although the appointment of an Independent Counsel certainly would not eliminate the difficulty of deciding which matters should be brought to the attention of the President, it would lessen the perception problem.

7. Appearance of a Conflict.

There is a widespread public perception that the Department of Justice has a conflict of interest in investigating the campaign financing allegations. When testifying before Congress in 1993 in support of the Independent Counsel Reauthorization Act, the Attorney General emphasized the importance of avoiding the appearance of a conflict:

> There is an inherent conflict of interest whenever senior Executive Branch officials are to be investigated by the Department of Justice and its appointed head, the Attorney General. . . .
>
> It is absolutely essential for the public to have confidence in the system and you cannot do that when there is conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. . . . The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level Executive Branch officials and to prevent . . . the actual or perceived conflicts of interests. The Act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters, and to avert even the most subtle influences that may appear in an investigation of highly-placed Executive officials.

Senate Hearing 103-437, at 11-12 (May 14, 1993). These comments are virtually identical to statements appearing throughout the legislative history of the independent counsel statute.

Notwithstanding her statements in 1993, the Attorney General recently took the position (in her letter to Chairman Hatch) that in order to invoke the discretionary provision of the statute, she "must conclude that there is a potential for an actual conflict of interest, rather than merely an appearance of a conflict of interest." This position, based upon a 3-14-97 memorandum from DAAGs Mark Richard and Robert Litt,[14] has been strenously challenged by Chairman Hatch and others.

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[14] The Richard/Litt memorandum relies primarily on legislative history from 1982 and 1994. When it reconsidered the statute in 1982, the Senate passed an amendment allowing the discretionary appointment of an independent counsel "if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest, or the appearance thereof." 1982 CAN 3545. However, Congress eventually adopted the House version of the amendment, which did not contain the "appearance" language underscored above. The floor manager of the House bill, Rep. Hall, stated: "The bill as amended deletes the reference to appearances, and thereby requires the Attorney General to determine that an actual conflict may exist in order to utilize the special prosecutor provisions." Congressional Record, Dec. 13, 1982, at H9507.

In 1994, Congress considered two changes relevant to this issue. First, it rejected a DOJ proposal to allow the Attorney General to seek discretionary appointment of an independent counsel if a conflict existed with respect to a "matter" (in addition to a specific individual), concluding that such an amendment "would in effect substantially lower the threshold for use of the general discretionary provision." 1994 CAN 793. Second, Congress extended coverage of the statute to Members of Congress, in circumstances where the Attorney General concludes that appointment of an independent counsel "would be in the public interest." The legislative history characterizes this as a "broader standard" which enables the Attorney General to consider "a larger range of factors and to exercise greater discretion" in cases involving Members of Congress. "For example, the Attorney General could consider not only whether an actual conflict of interest might result if the Department handled the matter, but also whether an appearance of a conflict of interest might weaken public confidence in the investigation and any prosecution." 1994 CAN 781.

While there certainly is support for the Attorney General's recently-stated position (as set forth in the Richard/Litt memo), it seems contradicted by a host of references in the legislative history. Moreover, it makes little sense conceptually to conclude that appearances can be taken into account for investigating "covered persons" but not other officials. After all, the underlying premise for the mandatory trigger is that there is an actual conflict of interest whenever Attorney General is called upon to investigate a "covered person" (so there is no need to analyze appearances).

On balance, the better argument seems to be that the Attorney General can and should consider the "appearance of a conflict" as one of the factors in deciding to invoke the discretionary clause. And in the circumstances of the Campcon investigation, that factor should weigh heavily.

8. The Chief Investigator Has Concluded That There is a Conflict of Interest.

The chief Campcon investigator, Director Freeh, has concluded that the investigation presents the Department with a political conflict of interest. This by itself does not trigger the independent counsel statute, since the ultimate resolution of the conflict issue rests solely with the Attorney General. However, the Director's view should be a significant factor in the Attorney General's continued analysis of whether to invoke the discretionary provision.

U. S. Department of Justice

Washington, D.C.
20530

NOV 2 5 1997

MEMORANDUM

TO: Robert S. Litt
Principle Associate Deputy Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Recommendation to reject proposed theory relating to a possible criminal conspiracy predicated on the Primary Matching Payment Account Act and the Presidential Election Campaign Fund Act

You have asked that I evaluate a proposal -- articulated in [redacted] draft memorandum dated October 24, 1997 (conspiracy theory memo) -- that the Task Force undertake an investigation of a possible criminal conspiracy to violate the Presidential Primary Matching Payment Account Act and the Presidential Election Campaign Fund Act (public funding statutes). Consistent with our earlier analyses of allegations relating to issue advocacy, I continue to recommend that we formally refer the substantive concerns raised by the proposed conspiracy theory to the Federal Election Commission (FEC). The proposed theory necessarily focuses on the President as a possible coconspirator. Because the allegations underlying the theory have been known to us for over a year, the 30 and 90 day review periods pursuant to the Independent Counsel Act have already expired. Thus, adoption of the proposed theory would require immediate referral to the Special Division of the Court for the appointment of an independent counsel.

As we have discussed on several occasions, I do not believe that the proposed theory provides a predicate for criminal investigation at this time. The theory ignores the general

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complexity of campaign finance laws and fails to account for FEC controlling guidance concerning closely related issues. The FEC notions underlying this guidance are illustrated well in the FEC's Advisory Opinion (AO) 1995-25, addressing the law and regulations governing the allocation between federal and nonfederal money for disbursements made in connection with legislative issue advocacy in the context of both federal and nonfederal elections. This AO critically undermines the proposed interpretation of the public funding statutes. In addition, an FEC publication, "The Presidential Funding Program" (1993), underscores that there is currently no basis for criminal investigation and that FEC review would provide the appropriate forum in which to resolve the substantive issues raised by the proposed theory.[1]

Referral to the FEC now would avoid launching an independent counsel investigation in order merely to develop facts that we are already willing to assume arguendo. Absent an FEC determination, the investigation could not resolve effectively the issue of possible statutory violation. Indeed, without an FEC determination that the alleged activity violates the public funding statutes, it is impossible to articulate a legitimate predicate for the investigation.[2] In addition, to delay referral of the issue as now framed would unnecessarily impede timely resolution by the FEC. As you know, we have received written notification from the FEC to anticipate that if confronted with the need to develop evidence, the FEC would likely request the detailing of Justice Department employees for investigative assistance.

Should the FEC determine that the alleged activities violate the statute, notwithstanding the contrary interpretation strongly suggested by the Commission's previous record, we could then implement the procedures of the Independent Counsel Act. Because an FEC interpretation of possible violation would provide information not now known to us, I believe that we then could trigger the 30 and 90 day reviews under the Act and appropriately consider evidence of intent.

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[1]Copies of the AO and the 1993 publication are attached.

[2]The FEC's input in determining the proper standard to be applied to the media advertising at issue must be a prerequisite to prosecutive evaluation. The responsibility for formulating policy concerning the application of FECA and Chapters 95 and 96 of Title 26 has been specifically entrusted by Congress to the FEC. 2 U.S.C. § 437c(b)(1) (FEC authority to administer the FECA and to formulate policy concerning the application of the Act and the public funding statutes to specific facts); 2 U.S.C. § 437d(a)(8) (FEC duty to promulgate rules and regulations to carry out the Act and Chapters 95 and 96 of Title 26).

Finally, I emphasize that we do not have the alternative of referring the matter to the FEC while the Task Force investigates the allegations. As noted, if we now believe that the matter provides a predicate for criminal investigation even absent an FEC determination of possible statutory violation, we are required immediately to seek appointment of an independent counsel.

Overview of Substantive Statutes

Since the inception of the current statutory structure for public funding of presidential elections in 1976, all major party candidates for the Presidency have chosen to receive public funds for their campaigns. In order to receive funds pursuant to the public funding statutes, candidates and their authorized political campaign committees must agree in writing to monetary limits relating to "qualified campaign expenses." 26 U.S.C. § 9033(b)(1) (Presidential Primary Matching Payment Account Act) and 26 U.S.C. § 9003(b)(1) (Presidential Election Campaign Fund Act). Neither a candidate, his campaign committee, nor their agents may "incur" "qualified campaign expenses" in excess of the statutory spending limits or accept private contributions to the general election campaign.[3]

Candidates accepting public funding under the Primary Matching Payment Account Act who "knowingly incur qualified campaign expenses" in excess of the agreed upon limits are subject to felony prosecution under 26 U.S.C. § 9042(a). Candidates accepting public funding under the Presidential Election Campaign Fund Act who "knowingly and willfully incur qualified campaign expenses" in excess of the amount of the grant and/or accept contributions from private sources are subject to misdemeanor prosecution under 26 U.S.C. §§ 9012(a) and 9012(b).

The Proposed Theory

The proposed conspiracy theory is derived from assertions made by Common Cause in its letter to the Attorney General dated October 9, 1996. The theory posits that a potentially prosecutable conspiracy to violate the criminal provisions of the public funding statutes has occurred. The linchpin of the theory

[3]These public funding statutes principally were designed to address constitutional obstacles -- raised in the Buckley case -- to imposing expenditure limits on campaigns. Buckley recognized that allowing candidates to voluntarily choose to receive public funds and agree to be bound by expenditure limits as a condition precedent to receiving the funds is a constitutionally permissible structure for imposing campaign expenditure limits. A candidate may decide to forgo public funding and remain free from spending limits.

is that the President conspired with the Democratic National Committee (DNC) and state party committees to subvert the public funding programs in the 1996 election cycle.

The gist of the conspiracy argument is that the President conspired with others, including officials of the DNC and his own authorized committee, to breach his promise to hold "qualified campaign expenses" "incurred" by his authorized campaign committee within statutory limits.[4] Because the costs of certain advertising benefitting the President's campaign were paid from DNC and State party committee funds raised outside the requirements of the Federal Election Campaign Act (FECA) -- i.e., nonfederal/soft money, it is theorized that the President and agents of his authorized campaign committee effectively incurred "qualified campaign expenses" in excess of statutory maximums through "conduits" -- the DNC and State party committees -- and filed false reports with the FEC in that they failed to accurately disclose the incurring of these expenses. Because the coordination intentionally was designed to avoid the requirements of the public funding acts, according to the theory, it constituted a conspiracy to defraud the FEC in its administration of the public funding programs.[5]

In brief, the conspiracy theory memo argues that the costs of media advertising selected and directed by the candidate or his authorized campaign committee should be deemed per se qualified campaign expenses "incurred by the candidate." Thus, the alleged coordination with the candidate constituted "a scheme to evade the limitations of a contract voluntarily entered, while keeping its fruits:"

> [The] issue is whether the expenses for the ads were, in fact, incurred by the candidates or their authorized campaign committees either in connection with the primary campaign or to further the election to the office of president, regardless of the content of the ads.[6]

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[4]The President's authorized campaign committee throughout the 1996 election cycle was called "Clinton-Gore '96."

[5]The conspiracy theory memo also encompasses the conduct of the Republican presidential candidate and the Republican National Committee. All relevant issues are common to the allegations involving each presidential candidate.

[6]As noted, a condition precedent to receiving public funds is the candidate's agreement that neither he nor his authorized committee will "incur qualified campaign expenses" above specified quantitative limits. While FEC staffers have informally advised us that the Commission could determine that a candidate "incurred" an expense within the meaning of the public

Conspiracy theory memo at 8-9.

Analysis

We do not challenge the alleged factual underpinnings of the asserted conspiracy.[7] Rather, the dispositive determination is

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financing laws even in the absence of an explicit undertaking of financial liability for the candidate or his authorized committee, it should be noted that a candidate agreeing to receive public funds does not expressly make any commitment on behalf of any individual or entity other than himself and his authorized committee. No express agency relationship existed between the President's authorized campaign committee and the DNC.

Adoption of the proposed theory would require that the veil of plain meaning of the statutory term "incurred" be pierced. The language of the statutes and FEC regulations strongly suggest that "qualified campaign expenses" incurred by extrinsic persons and entities may be levied against limits of candidates accepting public funds only in limited circumstances where the candidate or his authorized campaign committee has specifically authorized the person or entity to incur a cost on its behalf. 26 U.S.C. § 9032(9); 11 C.F.R. § 9032.9(b).

Generally, the focus of authorities defining "to incur" is on the requirement that a person who "incurs" a liability is responsible for the debt. See, e.g., Black v. Secretary of Health and Human Servs., 93 F.3d 781, 785 (Fed. Cir. 1996)("to incur" is "to become liable or subject to," citing Webster's Third New International Dictionary 1146 (1968), "[i]n ordinary usage . . . to 'incur' expenses means to pay or become liable for them; the term does not refer to any and all expenses that may ultimately be traceable to a particular extent.") For a debt to be "incurred", the debtor or his legal representative must have made him liable for the debt. See also, Garner, A Dictionary of Modern Legal Usage 436 (2d ed. 1995) (defining "to incur" as "to bring upon oneself"); Webster's II New Riverside University Dictionary 621 (1984) ("to incur" means "[t]o become liable or subject to, esp. because of one's own actions").

[7] Arguendo we take no issue with the factual predicate underlying the proposed theory:

* The President and the DNC closely coordinated DNC spending to effectively benefit the President's campaign.

* The DNC, pursuant to this close coordination and at the specific direction of the President and officials of his campaign committee, placed and paid for a series of aggressive issue

whether the alleged activity constituted merely a noncriminal agreement to exploit the loopholes of campaign law or a criminal conspiracy to violate the law. Rejection of the criminal conspiracy theory clearly is compelled by: the record of FEC guidance relating to the use of "soft" money to benefit particular candidates; the FEC's explicit recognition that presidential candidates raise money for and coordinate with their national parties in order to directly benefit as effectively as possible from spending by the national parties; and the FEC's publicly disseminated acceptance of practices clearly demonstrating that spending, closely coordinated with the candidate and his authorized committee, is not imputed to the candidate for purposes of enforcing public funding contribution and expenditure limits.

Advisory Opinion 1995-25

The FEC unambiguously has accepted the principle that it is permissible for federally funded presidential candidates to benefit from numerous additional sources of funding beyond public financing, particularly spending by political parties. The noncontroversial premise for the accommodation of such supplemental spending to benefit federal candidates is the recognition that the principal purpose of a political party is to get its candidates elected.[6] The Commission also has long

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advocacy ads designed principally to benefit the President's campaign.

* Many of the advertisements were written by the President and geographically targeted to audiences identified by the President.

* Had President Clinton or his campaign directly placed the subject advertising, the costs would have constituted "qualified campaign expenses" properly paid for with funds provided pursuant to the public funding statutes.

* The President personally and effectively was able to direct and benefit from spending far in excess of the public funds available to him for "qualified campaign expenses."

[6]FECA reflects the basic understanding that the goal of a political party is to win elections in defining "political party" solely in election-related terms:

> The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

recognized that parties have a legitimate nonfederal election influencing component.

Parties accordingly have been permitted to set up separate nonfederal accounts to raise and spend money as allowed under applicable State and local law. For those expenses that relate to both federal and nonfederal elections the Commission has required allocation so that the federal share will be paid for with federally permissible funds. The Commission's allocation rules "serve the dual purposes of curbing the use of money raised outside of the FECA's requirements in federal elections, and of allowing the Commission and the public to monitor compliance with these requirements." 57 Fed. Reg. 8990 (March 13, 1992).

In 1990, the Commission revised its allocation regulations to clarify what expenses need be allocated, what formulas to use, and how to make payments. See Report at 20. The regulations were designed to prevent parties from evading the restrictions enacted by Congress to limit the potentially corrupting influence of certain donors in federal campaigns. See Explanation and Justification, 55 Fed. Reg. 26058 (June 26, 1990).

The regulations require allocation of not only administrative expenses and fundraising expenses where both federal and nonfederal funds are collected, but also "[g]eneric voter drives including voter identification, voter registration, and get-out-the vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. § 106.5(a)(2). For a non-presidential cycle, the federal account of a national party committee must pay at least 60 percent of the costs from federal money; in an election year, the minimum allocation is 65%. 11 C.F.R. § 106.5(b)(2)(ii).

Issue advocacy is at the heart of current FEC concern relating to the allocation regulations. In AO 1995-25, the Commission unanimously held that expenses incurred by national party committees conducting legislative advocacy campaigns and

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2 U.S.C. § 431(16). The courts have similarly noted that "[t]he party's ultimate goal . . . is to obtain control of the levers of government by winning elections . . . ." Nader v. Schaffer, 417 F.Supp. 837, 844 (D.Conn. 1976), aff'd mem., 429 U.S. 989 (1976). See also Rosario v. Rockefeller, 458 F.2d 649, 652 (2d Cir. 1972), aff'd, 410 U.S. 752 (1973)(political party composed of "individuals drawn together to advance certain aims by nominating and electing candidates who will pursue those aims once in office"). See also Statement of Reasons of Commissioners McGarry and Thomas relating to FEC MUR (Matter Under Review) 4246 at 5-7.

promoting the party fell within the types of expenses which the regulations require to be allocated.

The FEC explicitly acknowledged the obviously close link between promoting a legislative agenda and promoting the party and its candidates. The Commission reasoned that because a political party's primary mission is to elect candidates, where a national party committee seeks "to gain popular support for the [party's] position on given legislative measures and to influence the public's positive view of the [party] and their agenda, [the activity] encompasses the related goal of electing [the party's] candidates to Federal office." AO 1995-25 at 12.109. The Commission found that, like other types of party building activity, "[a]dvocacy of the party's legislative agenda is one aspect of building or promoting support for the party that will carry forward to its future election campaigns." Id. The Commission did not prohibit a political party from engaging in legislative advocacy and party promotion intertwined with activity the Commission deemed also designed to benefit specific federal candidates; rather, the Commission simply held that costs for such activity must be paid for, in part, with federal funds pursuant to the regulatory allocation formula.

The conspiracy theory memo ignores the common FEC sanctioned practices whereby a candidate benefits from spending by other than his authorized campaign committee. The allocation formulas set forth at 11 C.F.R. § 106.5(b)(2) clearly reflect the Commission's recognition that the national party committees' primary focus is on presidential and other federal candidates and elections, as well as the Commission's appreciation of the need to accommodate an unfettered range of appropriate party-building activities at state and local levels. Explanation and Justification, 55 Fed. Reg. 26058, 26063 (June 26, 1990). AO 1995-25 demonstrates the Commission's careful attention to the difficult issues raised by the necessary interaction of the federal and nonfederal interests of national political parties. Despite the obvious and necessary intersection of public funding and other FECA expenditure issues, the conspiracy theory memo implicitly regards the FEC's well developed body of FECA interpretation as wholly irrelevant.

"The Presidential Public Funding Program" (1993)

Recently, [redacted] suggested that I review the FEC's 1993 publication entitled "The Presidential Public Funding Program." I agree with [redacted] that the publication is significant evidence of the scope of the specific obligations undertaken

pursuant to a candidate's public funding "contract."[9] Clearly, the Commission does not contemplate that a candidate who agrees to accept public funding waives his right to receive assistance from "private sources," including the use of soft money that he has assisted in raising.

Generally, the publication describes the operation of the public funding statutes and the FEC's role in implementation and enforcement. The Commission candidly describes issues raised by the public funding statutes, discusses points of intersection with other campaign finance statutes, and describes the views of critics of the routine campaign funding practices that have evolved in conformance with the letter of the law but that avoid elements of control and accountability arguably envisioned by the proponents of campaign finance legislation. The publication's discussion of numerous sources of funding -- including the use of soft money -- dispositively undermines the notion of public financing exclusivity that provides the foundation of the proposed conspiracy theory.

The publication's "Executive Summary" emphasizes that significant pending issues are unresolved and that some key issues "ultimately require legislative resolution" to address specific problems of statutory interpretation and practices not clearly anticipated by the original drafters. The Commission specifically notes: "In recent years . . . critics have argued that soft money is being raised and spent in ways that may affect federal candidates, including those running for President." Id. at 2; see also, id. at 32.

The Commission reports its efforts -- stricter allocation regulations[10] and expanded soft money reporting requirements --

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[9]The FEC reiterated almost verbatim virtually the entire relevant text of the 1993 publication in its "Twenty year Report" (April 1995) (Report). See, e.g. Report at 19-20.

[10]The Commission acknowledges:

> Even if soft money is spent according to these regulatory restrictions [During Presidential elections, national party committees must pay at least 65 percent of the costs related to generic party ads with federal funds], some critics believe it will continue to impermissibly influence federal elections, particularly Presidential elections. They contend that soft money spending helps committees conserve federal funds ("hard money") that can later be spent to supplement federal candidates.

to address "the soft money problem" arising from concerns that "Presidential candidates and/or their campaign staff help raise soft money for their party" and that soft money is routinely used to benefit both federal and non-federal candidates, effectively subsidizing federal activity with soft money. Id. at 2; see also, id. at 22-23. Further, the FEC acknowledges that "presidential candidates and their associates" play an "active role" in raising soft money for the party. Id. at 22. Indeed, the Commission notes the view that soft money donors achieve "the very type of access and potential influence that the public funding program was designed to eliminate." Id. Notably, the Commission points to legislative reform as the appropriate avenue to deal with troublesome issues. Id. at 22 ("In light of these concerns, the Commission has asked Congress to consider whether legislation is needed to deal not only with the way soft money is spent, but also with the way it is raised"). See also, Report at 22 ("In adopting its soft money allocation rules, the Commission proceeded as far as its statutory authority would permit, short of barring the combined use of federal and nonfederal funds altogether."). The legislative proposals are particularly relevant to assessing the scope of currently permissible activity:

> . . . The Commission has offered a broad range of specific [legislative] suggestions, including:
>
> * Expanding disclosure of soft money receipts;
> * Prohibiting the use of a federal candidate's name or appearance to raise soft money;
> * Confining soft money fundraising and spending to non-federal election years; and
> * Requiring that all party activity which is not exclusively on behalf of non-federal candidates be paid for with federally permissible funds.

Id. at 2, 23.

The Commission's evaluation of the success of the public funding statutes in accomplishing the objectives of the drafters to reduce the influence of wealthy contributors, reduce the demands of fundraising, and to level the playing field for presidential candidates is also instructive:

> Both sides of the debate [as to whether the current public funding program is desirable or effective] acknowledge that public money is not --nor was it intended to be -- the sole source of funding for Presidential campaigns, even during the general election period. The statutes and regulations

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Id. at 22.

> specifically sanction certain types of private contributions and expenditures during both the primary and general election periods. Funds not subject to federal election law ("soft money") may also play a role in Presidential elections.

Id. at 30. See also, id. at 21 ("the statute specifically permits some types of private spending, which may supplement the general election grants.")

In sum, the substantive content and the tone of the publication confirm that "private contributions and expenditures" are "sanction[ed]" under the public funding statutes if they are consistent with "statutes and regulations." Id. at 22. In fact, in discussing the wide range of permissible private spending available to supplement a candidate's public funding, the Commission explicitly notes:

> State and local parties, for example, may spend unlimited amounts for certain activities that may benefit their Presidential nominee, but do not count against the nominee's spending limit. These activities are "exempt" from the definitions of contribution and expenditure.

Id. fn. 26 at 22. Clearly, a "private" expenditure that is lawful under FECA cannot be the basis of a claim that a candidate has violated the prohibitions of the public funding statutes.[11]

Finally, it is clear that the Commission views the purpose of its audit and enforcement responsibilities relating to the public funding statutes to be ensuring that the public funds are not misused. See, e.g., id. at 4, 7-8, 16-17. Careful review of the publication's thorough exposition of public financing issues yields no evidence of concern that the public funding statutes were intended or have been interpreted to be a vehicle independent of FECA for limiting overall expenditures by national and State campaign committees.[12]

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[11]The conspiracy theory memo concedes that a criminal case cannot be grounded directly on violations of FECA, because of the ambiguity of the critical term "expenditure," First Amendment issues, and other issues identified in previous analyses.

[12]Generally, the FEC presumes that all disbursements by candidates and their authorized campaign committees are "expenditures" under FECA, reasoning that a candidate's authorized campaign committee would not have made them for any purpose other than "for the purpose of influencing" the candidate's election. At least one member of the FEC staff tentatively has opined informally that in theory, however, the

Conclusion

The FEC has sanctioned a wide array of national political party spending practices designed to implicitly and explicitly benefit federal candidates. The Commission has never even remotely suggested the illogical possibility that the very practices that it has carefully analyzed and determined to be appropriate under FECA expenditure regulations nonetheless may be deemed to violate the public funding statutes. Further, there is absolutely no reasonable basis to believe that political parties or their candidates could anticipate inconsistent interpretations of the relevant statutes. It would be nonsensical for the Department to ignore the FEC's own well developed regulatory framework and conclude that the proposed conspiracy theory is viable.

There simply is no basis to conclude that the President and the DNC may have violated any statutory or regulatory standard in connection with practices relating to the public funding statutes. To the contrary, only if the underlining conduct is found by the FEC to be violative of FECA, could the issue even arise. It is almost unimaginable that the Commission's review could establish any basis to believe that a violation occurred with intent to obstruct and impede the FEC.

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concept of "qualified campaign expense" in the public funding statutes would be narrower than the term "expenditure," because not all disbursements by authorized campaign committees that meet the definition of "expenditure" are necessarily sufficiently connected to electing the candidate to have been properly paid from public funds. We are aware of no instance in which this conclusion has been reached, and this possible interpretation suggests only that a qualified campaign expense is a subset of "expenditures." The proposed conspiracy theory requires that the opposite conclusion be drawn.

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

November 25, 1997

MEMORANDUM

TO: THE ATTORNEY GENERAL

THROUGH: Mark Richard
Acting Assistant Attorney General
Criminal Division

FROM: Charles G. La Bella
Supervising Attorney
Campaign Financing Task Force

Re: Common Cause Allegations

I am sending you a copy of [redacted] memo on the Common Cause allegations along with this cover memo. As you know, [redacted] has spent a fair amount of time and a good deal of thought on the issues presented by Common Cause. These issues have also generated a great deal of debate within the Department. It is fair to say that no one, within Public Integrity or the Criminal Division, who has been involved in our discussions of the allegations, supports [redacted] conclusion. However, the reasons for the division are as much a cause of concern to me as is the conclusion that we ultimately reach on the issue.

I have approached the Common Cause allegations with much the same mind set as I did my Section 607 analysis. When I was asked by the Attorney General to head the Task Force, one of the things that she emphasized was that I should not reach any premature decisions on matters within my purview. In addition, I was told not to leave any stone unturned in the pursuit of Task Force investigations. These ground rules have been reiterated during many of our weekly updates over the last two months.

In carrying out the Attorney General's instructions, we have considered all allegations related to the scope of this inquiry, however tangentially. With the Attorney General's knowledge and consent, the FBI has taken the unusual step of investigating some allegations that appear to be within our mandate although they have no reference to any specific criminal statute. One such example is overnight stays by contributors in the Lincoln Bedroom, a clearly

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residential area of the White House. They have also been investigating allegations that have only the most tenuous connection to possible criminal violations e.g., alleged misuse of the White House database or uncompensated travel on Air Force One and Two. The Attorney General has made clear that she is concerned that the failure to pursue even frivolous appearing allegations can result in a situation that can come back to haunt us.

When I assigned the Common Cause allegations to [redacted] I told him that his task was to take a fresh look at their assertions and not to prejudge any aspect of their claim. It is evident to me that he followed my instructions scrupulously.

The allegations presented by Common Cause are arguably the most serious among the plethora of charges concerning campaign financing, because they suggest that our political leaders at the highest level, and in both parties, intentionally and knowingly made a mockery of the political system. The Attorney General is being encouraged to let the FEC decide whether that is so.

At the heart of the problem is the fact that no one can say with certainty if the facts alleged by Common Cause, even if true, present a potential violation of law. Some argue that, like tax avoidance, what happened here was nothing more than some very clever people taking full advantage of loop holes in the election laws. Others argue that, like tax evasion, there was a scheme to circumvent the law and to engage in a series of sham transactions to accomplish that goal.

[redacted] concludes that we cannot say, as a matter of law, that the Common Cause allegations do not set out potential criminal violations under the Presidential Primary Matching Payment Account Act or the Presidential Election Campaign Fund Act. While acknowledging that any potential prosecution would be problematic, [redacted] reasons that there are too many unknown facts to conclude at this stage that prosecution is barred as a matter of law. Since the alleged scheme is one premised on deception, it will be the facts that determine whether a prosecution is warranted.

The FBI, included for the first time in our last meeting on these issues, shares [redacted] view that a review of the allegations is called for at this time. Like [redacted] they believe that absent a factual inquiry, it is premature to close the matter. They would prefer to investigate the matter from the Task Force than from a detail to the FEC.

For my part, I have tried to stay on the side lines and listen to the debate. I have asked at our last two meetings whether the Department was prepared to say that as a matter of law the Common Cause allegations do not present a potential criminal violation. No one has ever suggested that they were prepared to reach such a conclusion. Indeed, the most anyone would say was that they could not make a decision but that the matter should be referred to the FEC in the first instance. The reasoning seems to be that there is

nothing to lose because if, after review, the FEC believes that a potential violation exists, they will refer the matter back to the Department for investigation. This, we were told, is consistent with the MOU that exists between the Department and the FEC.

I believe this analysis is shortsighted and that there is much to lose. Although the proposal sounds reasonable on its face, what troubles me is that everyone in attendance at the meetings has told me, in no uncertain terms, that the FEC is an impotent organization which cannot agree on a course of action with respect to the simplest of matters within its jurisdiction. Indeed, they have told me that the FEC is -- and in all likelihood was intentionally designed to be -- weak and ineffective. And yet, these same people urge that, in the face of extraordinarily serious allegations, the FEC is the "expert" in the field to whom we must, in the first instance, defer for "a preliminary scrub" of the issues.

I think that such a course of action is ill advised for a variety of reasons. On the most practical level, the FEC is not an investigative agency. It is clear from our discussions that whatever factual investigation needs to be conducted in order to determine if there has been a violation of the statutes, cannot be accomplished unless the Department supplies the investigative (and possibly attorney) resources. As I understand the situation, the proposal is to refer the matter to the FEC -- because of its expertise -- and then detail FBI agents (and possibly attorneys) to the agency so that it can accomplish a task that everyone believes it is ill equipped to handle. This seems to me to be a shell game which could reasonably be perceived as being result oriented, i.e., calculated to avoid a preliminary inquiry which might be triggered under the Independent Counsel Act if the Task Force were to pursue the investigation. However, the reality is that the Task Force is in as good a position -- if not better -- than the FEC to handle what will certainly be a complex factual inquiry. If we do not provide resources to the FEC, it is likely that they will never be able to jump start the investigation. If we do provide the resources, what is to be gained? Draining resources from the Task Force will serve only to hamstring the Task Force while we wait, perhaps interminably, for the FEC hierarchy to reach some conclusions. We will not merely be depleted of resources but we will be tiptoeing around issues which we should be investigating. This will be done in the name of an effort not to "interfere" with the FEC, which would inevitably be investigating many of the same things and people that the Task Force is studying.

So what will be accomplished by shuffling this matter off to the FEC? I think that the perception will be that the decision to send the most crucial aspect of this investigation to the FEC -- a weak civil regulatory agency -- was designed to avoid the appointment of an Independent Counsel. As has been noted in our meetings, if the matter stays with the Department, there is a fair chance that any preliminary inquiry will result in the appointment of an IC. On the other hand, if the matter is sent to the FEC, it is unlikely that the matter will see the light of day in our lifetimes plus 99

years.

If, as we originally thought, resolution of the Common Cause allegation depended upon an analysis of the content of the ads, there would be some logic to sending the allegations to the FEC for that purpose. However, this is not the case. As Steve points out in his memo at page 6, there are potential violations which exist without regard to content analysis. Indeed, also at issue in the Common Cause allegations is whether the costs for the ads were in fact incurred "by the candidates or their authorized campaign committees either in connection with the primary campaign or to further election to the office of president, and whether the ads constituted qualified campaign expenses, regardless of" their content. See memo at p. 6 and fn.1. What is missing from the equation at this time is, in part, an investigation of the surrounding facts. See memo at p. 13. While the investigation of these facts may lead to a conclusion that there could not be a wilful violation of the statute (see Public Integrity's Nov. 21 memo on the calls of VPOTUS in which they reach such a conclusion following their factual inquiry), it is premature to foreclose an investigation of the Common Cause charges at this time by referring the matter to the FEC. The likely public perception that this is being done as a matter of political chicanery is the worst possible outcome, both for the country and for the Attorney General personally.

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

November 30, 1997

MEMORANDUM

TO: THE ATTORNEY GENERAL

THROUGH: Mark Richard
Acting Assistant Attorney General
Crimin. Division

FROM: Charles G. La Bella
Supervising Attorney
Campaign Financing Task Force

Re: Independent Counsel Matter
Vice President Albert Gore, Jr.

On November 21, I received the first draft of Public Integrity's memorandum on the VPOTUS calls. This is the first write up I have seen regarding facts developed from Integrity's inquiry. As structured, I have had no role in the preliminary investigation of the Vice President's calls from the White House except for my attendance at his interview on November 11, 1997. Nor have I been provided copies of the key documents referenced in Public Integrity's memorandum. As a result, I must rely upon the description of these key documents -- like the call sheets and the Ickes/Mitchell memoranda -- as they appear in the memorandum. I should also note that while I have been told that the FBI has submitted a separate memorandum on the subject of the Vice President's phone calls from the White House, I have never seen a copy of that memorandum and am unaware of its contents. Thus, my analysis -- such as it is -- and reaction to the Public Integrity memorandum is very limited. I must give deference to the instincts and judgments of the prosecutors and investigators who conducted and participated in the preliminary inquiry.

It is worth noting at the outset that this matter presents several troubling and difficult issues. First, reasonable minds can and do differ as to whether Section 607 applies to solicitation phone calls placed by the Vice President to non-federal employees at non-federal locations. Second, even assuming that Section 607 is applicable, do the facts presented by the calls and the subsequent

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contributions and treatment of these contributions by the DNC, involve a potential violation of that statute by the Vice President?

Underlying these difficult issues is the fact that even assuming a technical violation of Section 607, the likelihood of a prosecution based upon such a violation would be -- at best -- remote in the judgment of any relatively experienced prosecutor. The temptation, of course, is to allow the relatively insignificant nature of a potential violation to color the analysis that is to be applied under the Independent Counsel Act. This is a temptation that everyone has acknowledged but stated that they would resist in an attempt to resolve the matter. With this in mind, I have attempted to review the matter and arrive at a recommendation.

In its memorandum, Public Integrity, assuming the application of Section 607, concludes that

> further investigation of the allegations is not warranted because an Independent Counsel would not be able to demonstrate that the Vice President knowingly solicited any hard money contributions from his White House office.

Memo, p.3. In addition, Public Integrity finds that even if there were a solicitation of hard money, there is "clear and convincing evidence that the Vice President subjectively intended to ask only for soft money." Memo, p.2. Accordingly, Public Integrity recommends against the appointment of an Independent Counsel.

After reviewing Public Integrity's memo, I remain convinced that the Attorney General should seek the appointment of an Independent Counsel in connection with this allegation. It is clear that the likelihood of a prosecution is remote based upon the facts as we now know them. Nonetheless, there exists, in my view, a potential (albeit technical) violation that can be articulated based upon the fair inferences to be drawn from the facts thus far developed. Moreover, the possibility that this may be part of a broader criminal activity cannot be discounted.[1]

My overall concern is that at every point where two inferences could be drawn from a set of facts, the inference consistent with a lack of criminal intent/conduct was always chosen. Although I might personally agree with the inference accepted by Public Integrity as the more compelling or likely inference to be drawn, the fact is that reasonable minds may well draw a contrary

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[1] In a separate memo, I have urged that although it is my belief that Section 607 does not apply to the facts presented by the Vice President's phone calls, the question is not without doubt and, in keeping with the spirit and intent of the Independent Counsel's Act, an Independent Counsel should make this decision.

inference. To give just a few examples:

1. The memorandum notes that Liff's reference on the call sheet to the "legal limit" of what he believed he could give seems to indicate that he thought the Vice President was requesting hard money. This would be especially plausible in light of the absence of a reference to the DNC during the call (Memo p.38). Nonetheless, the memorandum concludes that the "legal limit" comment was simply "a nonsequitor born of Liff's misunderstanding of what the Vice President was asking for" (Ibid.). While this may be true, it is by no means the only inference to be drawn. Indeed, an inference contrary to that urged by Public Integrity would go some distance in undercutting the "Vice President's subjective intent" upon which Integrity's memorandum bases, in part, its conclusion not to seek the appointment of an Independent Counsel.

2. The notation of "soft money" on a few DNC-generated call sheets suggests that the concept of "soft money" was discussed by the Vice-President during those conversations. This is seen as evidence that soft money was discussed in all solicitations (Memo p.36, n.46). However, it is equally plausible -- indeed, it could be argued to be even more plausible -- that the few notations mark the exception rather than the rule. One could argue that it is more common to note an aberration than a pattern. Moreover, the possibility that there were hard money calls gets some corroboration -- and perhaps not insubstantial corroboration -- from the fact that many of these calls were paid for with a Clinton/Gore (hard money) credit card, rather than a DNC (soft money) card. (Memo, p.21, n.25, p.26, n.29).[2] Indeed, the use of a Clinton/Gore credit card could arguably give weight to the Common Cause allegations discussed below. In any event, it would be interesting to know just how many of the Vice President's calls were funded with a Clinton/Gore credit card and the rationale for using it.

3. The call to Penny Pritzker (incidently paid for with a Clinton/Gore credit card) (Memo, p. 26, n.29) could be part of a plan to link the media campaign directly with the reelection effort. Support for such a view comes from the Vice President's appeal to give to the media fund because of its demonstrated effort in promoting the presidential reelection effort (Memo, p.26). If there was such a linkage, it could be argued that the entire episode of phone calls was part of an effort to influence the '96

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[2] The memorandum characterizes the persons to whom "soft money" comments were made as the "most sophisticated" donors (Memo, p.40). There is nothing that I am aware of in the memo to support this characterization. It therefore appears, probably unfairly, as an effort to "explain away" the Vice President's comments. It would seem that if there are facts known to us that would support this conclusion, they should be recited to bolster the proposition.

election (rather than to solicit funds for a media campaign allegedly not associated with the election). Indeed, this is precisely the charge that Common Cause has lodged with respect to the media campaign and solicitation of funds in connection therewith. To segregate the telephone calls from the Common Cause allegation -- never viewing these as a whole or in context -- is in my judgment a dangerous approach which will be viewed by many as an effort to avoid seeing the big picture. (See discussion re Ickes/Marhsall memos, infra.) We cannot simply ignore the Common Cause allegations in our analysis of the Vice President's calls because they were included in a separate submission to the Department. To the contrary, these are significant allegations available to us concerning the media campaign and the Vice President's calls from the White House. It is arguably unfair on the one hand to reach a conclusion as to the Vice President's "subjective intent" in making the solicitation calls from the White House, and on the other hand to ignore the Common Cause allegations which -- some would and have argued -- place these calls and the Vice President's intent in proper perspective.

4. Although the memorandum states that "the four prosecutors who participated in the interview of the Vice President each found him to be credible and forthcoming", this somewhat overstates my own impressions of the interview. While the Vice President did present his case well and plausibly, there were certain answers which seemed somewhat less convincing than others. In particular, the Vice President was quick to explain that he did not likely review the Ickes/Marshall memos (which reference the DNC's splitting of contributions into hard and soft accounts in connection with the media campaign) because these matters were the subject of meetings that he attended. Yet he could not recall the items being discussed at the meetings.

Similarly, the Vice President claimed that his concern -- borne from his Senate experience -- was simply who was paying for the calls, not where they were placed. Yet if this is so, reasonable minds could argue that he would have charged his Senate fundraising calls (as he did his Vice Presidential ones) rather than go to a different location to place them. Again, the memorandum accepts the favorable inference without addressing the alternative.

This is not to say that I found the Vice President to be untruthful. On the contrary, on the whole I too found him to be credible and forthcoming. However, his answers to one or two questions gave me sufficient pause so that I would not rely on his interview as a bulwark for a determination not to appoint an independent counsel. Although Public Integrity tries not to give "undue weight" to the Vice President's statement (Memo, p.5), it appears to be that it does factor in to a not insignificant degree. Finally, I would be interested in the view of the agents who conducted the interview. I have not discussed the topic with them and I did not see their impressions in the memorandum.

Perhaps there are facts known to the prosecutors and investigators that would eliminate my few concerns about the answers that trouble me. If so, they are absent from the memo and I would suggest inserting them in order to support the conclusions reached. Indeed, if it is true that everyone who attended these meetings with the President and Vice President has been interviewed and supports the finding that the DNC allocation of funds and the hard/soft component to the media funds were not discussed, this should be included in the memorandum. If this is not the case, my concerns remain.

5. The call sheet for Jim Hormel was shown to the Vice President at the interview. The call sheet contains a handwritten note "no federal $ '95." During his interview, the Vice President said that he did not recognize the handwriting and did not believe it was on the call sheet when he placed the call. Have we identified the handwriting and, if so, have we interviewed the author? If we have not, is there any evidence to support the conclusion that the handwriting was not on the call sheet when it was given to the Vice President? The Vice President, in response to this document, reaffirmed that he believed he was only asking for soft money in these phone calls and was unaware of any hard money component to the media fund. However, one could draw a contrary inference from this notation.

One of the principal concerns I have with the position of Public Integrity and its recommendation is the treatment of the Ickes/Marshall memos. There are several facts with respect to these memos that are not disputed:

(a) They make it clear that there was a hard and soft money component to the media fund.[3] The memos also could be read to suggest that the DNC was systematically splitting the large contributions solicited by the President and Vice President in their phone calls into hard and soft accounts in connection with the media fund.

(b) The memos were sent to the Vice President and the topics referred to in the memos were discussed at some of the regular meetings attended by the President and Vice President.[4]

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[3] Indeed, Ickes stated his belief that had the Vice President read and understood the memos, he would have known that the DNC needed to raise federal funds in order to keep the media fund afloat (Memo, p.15).

[4] That the media hard money/soft money topic was discussed is, I have been told, evident from notes of the meetings. Since I have not reviewed the documents I must rely on the characterizations in Public Integrity's memo and my recollection of the discussion of these memos during the Vice President's interview.

The Vice-President does not deny seeing the memos; he stated only that he did not recall seeing them. The same inability to recall permeated his response to questions about meetings at which the memos were discussed. The Vice President stated that the reason he did not review the Ickes memos was that he knew he would be in attendance at meetings during which the topic would be fully aired. Moreover, he would wait for these meetings to find out what he needed to know. And yet the Vice-President cannot recall any discussion at these meetings concerning the splitting of funds -- although funding of the media campaign was a major concern at the time.[5] The Vice President did assume, however, that the subject matter of the memoranda would have been discussed in his and the President's presence. See FBI 302 at p.9. In such circumstances, some would argue that the Vice-President's failure of recollection is, at least, curious.[6]

With respect to the memos, Public Integrity concludes that:

> Based on the results of our investigation, it appears very unlikely that the Vice President had any awareness of the DNC's practice. As set out above, he states that he was unaware of it, and that, in fact, he believed that hard money donations to the DNC were severely limited to relatively small sums. Only the Ickes/Marshall memoranda, described in detail below, provide any support even for an inference that he may have known of the allocation practice. Moreover, even if it could be demonstrated that the Vice President read the memoranda, which he denies, this fact, by itself, does not support an inference that the Vice President asked any donor to make a hard money contribution.

(Memo, pp. 10-11). While it is true that the memos by themselves do not lead to a conclusion that the Vice President solicited hard money, they certainly suggest that the Vice President may have been part of an effort to solicit soft money with the understanding that the DNC would split this money for use in the media campaign.[7]

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[5] In fact, this was the heart of the "bad blood" between Ickes and Morris about which the Vice-President was extremely chatty.

[6] The Vice-President denied that he had any understanding that there was a hard money component to the funds used for the media campaign. The President however -- who attended the same meetings -- did understand, as he admitted during his interview. The President said he was unaware that the DNC routinely and systematically split each large contribution. In fact Ickes, himself denies he knew that this was the practice.

[7] The suggestion on p.11, fn.10 that the Task Force is continuing to look at the DNC's allocation practice is somewhat inaccurate. The Task Force investigation was halted at the request

This is certainly the type of inference that a reasonable prosecutor might draw from these facts.

As noted above, I assume that all those at the DNC, the White House, and Clinton/Gore '96 who could shed light on the issues have been interviewed. For example, I must assume that Knight, Utrecht, Strauss, Morris, the Vice President's Chief of Staff (who the Vice President said would alert him to anything he needed to see in the memos) and others have been interviewed and their statements support the notion that the Vice President had no reason to know that (i) there was a hard money component to the media campaign; or (ii) that the DNC routinely split large donations between hard and soft money accounts. I think this should be made clear in the memorandum since it goes a long way to support the Vice President's statements and the other objective facts relied upon by Public Integrity to support its recommendation.

The type of analysis involved in determining whether the Vice President was part of a scheme to solicit soft money knowing that it would be turned to hard money for the media campaign is subjective and open to debate. By routinely embracing the most innocent inference at every turn, even if the inferences are factually defensible, the memorandum creates an appearance that the Department is straining to avoid the appointment of an Independent Counsel and foreclose what many would characterize as an impartial review of the allegations. When you look at the facts,[8] the memos, the meetings, and the DNC practice, it is hard to say, as the memorandum does, that there is only one conclusion to be reached. This is especially so when you factor in the Common Cause

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of Public Integrity because they feared that it might chill those who were talking voluntarily to the POTUS and VPOTUS investigators. The investigation was halted at the time the Task Force was attempting to interview high level DNC employees -- the very people who might have some light to shed on contact with the White House and the essence of the Common Cause allegations. This investigation remains on hold at the request of Public Integrity.

[8] Although every effort was made to gather all facts within the limited time frame, several donors or potential donors were unable to be interviewed (due to illness, travel, etc.) One of those, Mark Jimenez, I learned about only this week when we were told that he is the same person being targeted by the Task Force for conduit contributions. He is also being investigated by three United States Attorney's offices. It is curious to me that Mark Jimenez was able to avoid an interview and yet his attorney (Abbe Lowell) has submitted a 40-page memorandum to Public Integrity outlining why Mark Jimenez's use of conduit contributions in 1996 was not an "intentional" violation of the Election laws. The memo was subsequently sent to the Task Force since it is the Task Force that is conducting the Jimenez investigation.

allegations which have been debated within the Department for the better part of a year and the use of a Clinton/Gore credit card to support at least some of the Vice President's calls. For the reasons I have already set out in the Section 607 memorandum, and the concerns expressed herein, I believe that the wise course is to seek the appointment of an Independent Counsel.[9]

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[9] If the Attorney General chooses not to seek an Independent Counsel, it would, in my view, be better to do so on the ground that Section 607 is inapplicable. Although I recommended in an earlier memorandum that this question too be determined by an IC (because there are plausible arguments on both sides), my own opinion, as stated in that memorandum, is that the better argument is that the statute does not apply.

I have been told repeatedly, however, that it is the Attorney General's obligation to determine if the statute applies. Assuming that to be the case, a determination that the statute is inapplicable is, in my opinion, not only legally correct, but has the incidental benefit of obviating the need to scrutinize and second-guess every act and word of the Vice President. A decision based on the facts in this case is, in my opinion, much more subjective than one on the law. As such, it is better made by an Independent Counsel than the Attorney General.

U. S. Department of Justice

Washington, D.C. 20530

DEC 11 1997

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: Charles G. La Bella
Supervisory Attorney
Campaign Financing Task Force

You have asked for all material supportive of the Common Cause allegation that there was a criminal conspiracy to circumvent the campaign financing laws. Attached is a time line prepared by Task Force FBI agents and most of the supporting documents referred to therein. The incidents referenced are not necessarily exhaustive since there are additional documents to review.

Beyond the items referred to in the time line, there are a few other circumstances which could possibly be relevant. As mentioned in my memorandum of November 30 referring to the applicability of the Independent Counsel statute to Vice President Gore, these include the use of the Clinton/Gore credit card to pay for solicitation phone calls by the Vice President; the reference to "federal $" on the Jim Hormel call sheet; the reference to soft money on several others; and the content of the phone solicitation of Liff. Dick Morris' assertions that the issue ads were fully coordinated with the reelection effort is also a factor to consider as are the Vice President's comments during his press briefing of March 3 (a copy of which is attached hereto). During that briefing he made certain references to raising money for the campaign, although at other points he was careful to say that the money was for the DNC.

In addition, we have learned that some of the issue ads used by the Republicans were later recycled for use by the campaign. This arguably suggests that whatever line can be drawn between issue ads and campaign advertisements was not drawn in certain instances and that the whole distinction was a knowing sham. Finally, as you know, we are in the process of tracking down the purported DNC member who hinted at some impropriety by the DNC when he was (unbeknownst to him) speaking with an AUSA on a recent airplane trip.

DOJ-03463

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These are simply events brought to light as we investigated other allegations. We have not begun to investigate the Common Cause allegations, although we have considered how we would conduct an investigation should one be warranted.

MEMORANDUM

To: Chuck La Bella

From: [redacted] Army Name

1/27/98

Subj: Participation in Campaign Finance Task Force

EXHIBIT 18

Pursuant to the MOU executed at the request of the EOUSA, the period of my on-site participation in the Campaign Finance Task force ends on January 31, 1998. I plan to give notice to the Lansburgh that I will vacate my apartment on that date.

As you know, the substantive matter for which I have been individually responsible is the assessment of the allegations first made by Common Cause in October 1996. For the reasons set out below, I do not believe I have a further role to play in the Department's response, if any, to those allegations. I will continue to assist in whatever way I can the Task Force effort to bring other pending matters to indictment or declination, as appropriate. Further, if any case is later set for trial, I will be glad to play any part in the prosecution which you find helpful.

The Common Cause Allegations

From the beginning, you made it clear to me that the goal of the Task Force was, as expeditiously as possible, to close matters devoid of prosecutorial merit, to bring to indictment those matters with merit, and to recommend appointment of independent counsel when warranted. You have been steadfast in adhering to that goal. As a result, I approached the Common Cause allegations with no preconceptions, and with no predisposition as to how they should be handled. Initially, I attempted to answer the simple-minded questions I always ask when first confronted with allegedly fraudulent conduct (Did something bad/harmful happen? Do we know who is responsible? Is there a criminal remedy for the conduct?).

In fairly short order it became clear that the purpose of the presidential public funding statutes had been corrupted by the two major parties and their candidates, both of whom intentionally spent millions of dollars beyond their voluntarily agree-to spending limits. In addition, the pressure to produce those millions led, I believe, to many, if not most, of the election law violations that permeated political fund raising in 1995-96.

The pool of persons potentially responsible for this corruption is both limited and well known. There are criminal statutes applicable to this conduct, and at this point we simply cannot say that the conduct is not prosecutable, as a matter of law. What we do not know, without investigating, is whether or not we could responsibly initiate criminal prosecutions.

That, to date, we have been unable to investigate the Common Cause allegations in a straightforward way has been a great personal and professional disappointment. But, I believe the public has been most dis-served by the way in which the "whether to investigate" issue has been approached, debated, and resolved. Never did I dream that the Task Force's effort to air this

issue would be met with so much behind-the-scenes maneuvering, personal animosity, distortions of fact, and contortions of law.[1] (It also is my impression that many involved have not read the pertinent cases.) All this, not to forestall an ill-conceived indictment, not to foreclose a report making an independent counsel referral, but to prevent any investigation of a matter involving a potential loss of over $180 million to the federal treasury.

You, of course, are well informed of my views. By no means do I minimize the real impediments to a prosecution. Yet, nearly every day something developed in other investigations comes to our attention, which has significance to the Common Cause allegations. As an example, I have recently been directed to the deposition testimony of Harold Ickes in which he states: that only he and Sosnick had the power to authorize payment of the media consultants' bills [9/22/97 Senate Depo. p. 62]; that he decided whether the DNC or C/G Committees would pay a particular bill [9/22/97 Senate Depo. pp. 64-5]; and that while he thinks that the DNC and C/G Committees signed separate contracts with the media consultants, he's not sure he ever saw them [9/22/97 Senate Depo. pp. 78-9]. Thus, it appears that the President's Deputy Chief of Staff (who was not an employee of the DNC) determined which media ads the DNC paid for, without regard to the DNC's contractual liability, if any.

I realize that I have moved from a neutral position to that of an advocate for investigating the Common Cause allegations. Further, I now believe that the only responsible step, likely to uncover the facts, is a grand jury investigation. That position, coupled with the mutual loss of confidence evident between myself and those outside the Task Force who have weighed in on this issue, leads to the inevitable conclusion that I can no longer play a useful role in the evaluation or pursuit of the Common Cause allegations.

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[1] I will not repeat the details, most of which you already know. While I recognize that there have been legitimate disagreements, some positions urged in support of avoiding any investigation have been so plainly wrong as to be disheartening (e.g., the suggested referral to the FEC, on the misapplication of the MOU with that agency, with the claim that the FEC could refer the case back after it checked out the ad content, but with the unspoken reality that no criminal investigation would ever happen -- certainly not within the three-year statute of limitations; or the contention that an independent counsel referral must be made immediately if any investigation is even authorized).

MEMORANDUM

TO: Robert S. Litt
Principal Associate Deputy Attorney General

Lee Radek
Chief, Public Integrity Section
Criminal Division

FROM: [redacted]
Attorney
Criminal Appellate Section

RE: Response to Points Raised by [redacted]

DATE: January 8, 1998

[redacted] of the Campaign Finance Task Force recently circulated an undated memorandum commenting on my December 2, 1997 memorandum. This memo is intended to clarify my views on the points raised by [redacted]

1. [redacted] contends that my 12/2/97 memo concluded that "no investigation is warranted, principally because the advertisements in question do not contain an 'electioneering message.'" This is incorrect. I have never concluded that the individual ads run by the DNC and the RNC do not contain an "electioneering message." Instead, because the FEC has not provided any clear guidance regarding the "electioneering message" test, I believe that it would be very difficult for DOJ to determine how any of these advertisements would fare under this test. See, e.g., 3/31/97 [redacted] Memorandum at 21 (application of "electioneering message" test to particular advertisements is "unclear"); id. (ads "may or may not be found to contain an 'electioneering message.'"); id. at 29 (proper

EXHIBIT 19

DOJ-02126

characterization of ads is a "judgment call"). See also Clifton v. FEC, 114 F.3d 1309, 1316 (1st Cir. 1997) (noting that FEC brief "does not even pretend to explain what the FEC means by 'electioneering message'.")

2. [redacted] states that [redacted] is "most troubled" by my "repeated reliance on various formulations of the thesis that the FEC requires that ads identify a candidate and contain an electioneering message in order for the related spending to qualify as a FECA expenditure/contribution." In fact, I neither rely on this thesis, nor agree with it. As [redacted] indicates, under FEC AO 1995-25, party spending on "legislative advocacy media advertisements that focus on national legislative activity and promote [the party]" are, in part, "expenditures" under FECA. Nothing in my 12/2/97 Memorandum suggested otherwise. 12/2/97 [redacted] Memorandum at 5 (noting that party can use "some soft money" to pay for such ads); see also 3/31/97 [redacted] Memorandum at 14-15.[1/]

3. [redacted] also contends that my 12/2/97 Memorandum makes certain "premature assumptions" of fact.

a. First, [redacted] contends that I assumed that "the national party committees 'contracted' for the ads in question,"

[1/] Purely for the sake of clarity, I note that FEC Commissioners Elliott and Aikens have recently backed away from this advisory opinion, suggesting that party issue ads that do not "expressly advocate" the election or defeat of a particular candidate do not constitute FECA expenditures. See In the Matter of DNC Services Corporation, FEC MUR 4245 (Soft Money Notebook Tab G). For purposes of my analysis, however, I have always assumed that FEC AO 1995-25 is good law.

and that "there was no written authorization for the national committees to incur the ad expenses." I did make these assumptions. However, [redacted] also made the same, or very similar, assumptions in his own memorandum. See 11/24/97 [redacted] Memorandum at 5 (assuming that "ad campaigns were paid for by the national party committees"); id. at 7 (assuming that "there was no written authorization to the national committee.") We were both justified in making these assumptions because, as [redacted] observed: "[t]here has been no allegation that there was a written authorization to either national party committee to pay these costs. Nor has there been any allegation that a candidate/campaign committee entered a written contract for the ads, or otherwise was legally responsible for payment of the ad cost." 11/24/97 [redacted] Memorandum at 7. In addition, such allegations -- had they been made -- would have been entirely inconsistent with Common Cause's underlying theory i.e., that the candidates used the parties as "conduits" for their ad campaigns. Accordingly, I do not think there is presently any reason to subject these particular assumptions to any factual investigation.

b. Second, [redacted] criticizes my claim that "it is clear from the content of the ads that they were not intended 'in connection with' . . . [a] primary campaign." Nothing in my memorandum turned on this statement -- in fact, as the next paragraph makes clear, my memorandum assumed, in keeping with FEC regulations, that the ads were made in connection with the

primary campaign, notwithstanding the fact that they appear to be aimed at the general election. 12/2/97 [redacted] Memorandum at 11.

c. Finally, [redacted] contends that I assumed that "no ad spending was within the expenditure reporting period for the general election funding statute." In fact, I did not make this assumption. Instead, I simply noted that Common Cause had not alleged that any spending occurred during this period, and that we have no information to suggest that this had occurred. 12/2/97 [redacted] Memorandum at 8-10. Because no one had alleged that the ads violated the General Funding Act, I did not consider how they would be analyzed under that statute.

If some of the ads were in fact purchased during this period, the legal analysis would become more complicated, because the provisions of the General Election Funding Act must also be parsed. Nonetheless, because many of the arguments in my memorandum apply equally to both Acts, see 12/2/97 [redacted] Memorandum at 17-25, my ultimate conclusions would remain the same. I have no opinion as to whether we should do an independent factual investigation into this issue in the absence of any allegation that ads were run during the general election campaign.

4. The last page and a half of [redacted]'s memo does not appear to be responding to my 12/2/97 memorandum, but rather advances a new theory of when a coordinated media ad is made "in connection with" the candidate's campaign under 2 U.S.C. § 441a(d). As my 12/2/97 Memorandum noted, this question was

specifically addressed in the government's Colorado Republican brief to the Supreme Court where we stated: "When a party expenditure is used to finance communicative activities, the Commission has determined that the expenditure will be considered attributable or allocable to a particular campaign only if the communication refers to a 'clearly identified candidate' and contains an 'electioneering message.' AO 1985-14, at 11,185." Brief for the Respondent, Colorado Republican Federal Campaign Committee v. FEC, (S.Ct. No. 95-489), at 3 (emphasis added) ("CRFCC Brief"); see also id. at 18 n.15, 23-24.

ATTY NAME

Notwithstanding this clear statement of the existing law, [redacted] now appears to be arguing that this content-based test is only one way of determining whether a coordinated party media expenditure is made "in connection with" a particular candidate's campaign, and that another test exists that depends on evidence of "actual coordination." See Undated [redacted] Memorandum at 3 ("FEC's content test . . . is a means to attribute FECA expenditures to a particular candidate when the facts regarding coordination are not made known to the FEC.") (emphasis added); id. at 3 ("If a national party committee's ad spending is in fact done at the request of a federal candidate, in connection with his campaign, the spending is a contribution to the candidate . . . and is subject to . . . 441a(d). . . . There is then no need to resort to a content test to determine to which candidate to attribute the spending.") (emphasis added).

ATTY NAME

If this is [redacted] theory, then I strongly disagree with it. Our brief in the Colorado Republican case made clear that the content test was the only test for determining which coordinated media expenditures were allocable to a particular candidate under § 441a(d). Steve's theory that another "actual coordination" test also exists is directly contrary to our position in that brief and has no support in any of the relevant FEC advisory opinions.

[redacted] theory is not assisted by [redacted] citation to 2 U.S.C. § 441a(a)(7)(B). This statute provides that "expenditures made by any person in cooperation, consultation, or concert with" a candidate or his agents "shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). Steve apparently contends that a media ad that does not meet the content test may nonetheless count as a coordinated expenditure under this provision if it meets some (unspecified) test of actual coordination. This theory, however, was expressly disavowed in our Colorado Republican brief where we stated that:

> under the FEC's implementation of the statute, the question of whether a party expenditure is attributable to a particular campaign (and thus constitutes a coordinated party expenditure [under 2 U.S.C. 441a(a)(7)(B)(i)]) turns on the same factors -- depiction of a clearly identified candidate and communication of an electioneering message -- as the question whether the expenditure is made "in connection with" that election.

CRFCC Brief at 18 n.15; see also id. at 2-3, 4-5 & n.6.

Nor does 2 U.S.C. § 441a(a)(7)(B)(ii) support [redacted] claim. This subsection indicates that the cost of disseminating,

distributing or republishing a candidate's "campaign materials" is an "expenditure" under § 441a(a)(7)(B)(i), i.e., the provision on "coordinated expenditures" described above. It seems highly doubtful that a media ad coordinated between the party and candidate would constitute "campaign materials" of the candidate unless it first met the FEC's content test. But assuming arguendo that such ads were deemed to be "campaign materials," party funds expended to disseminate such materials would not be considered "coordinated" expenditures under 2 U.S.C. § 441a(a)(7)(B)(i) unless they first met the content test. CFRCC Brief at 18 n.15, quoted supra at 6-7.

Finally, although it is generally true that, under both FECA and the Presidential Funding Act, the candidate's own disbursements on media ads are considered to be "expenditures" or "qualified campaign expenses" regardless of content, this has no particular bearing on the issue of which party-sponsored ads are attributable to a candidate under § 441a(d). Nor is there any significance to the observation that the FEC applies a different test under § 441a(a)(7)(B)(i) to coordinated expenditures that do not contain communication. Therefore, even if the party's payment of a campaign's rent expense would merit a factual investigation, that does not mean that a similar inquiry is required regarding issue ads. See Undated [redacted] Memorandum at 4.

ATTY NAME

Because I believe that the content test is the only test applied to coordinated party media expenditures, I do not see any need to investigate the "facts and circumstances" relating to the

coordination of these ads. Since neither the subjective intent of the actors nor the degree of coordination are relevant under the content test, no investigation is required. For this reason, my 12/2/97 memorandum simply presumed 1) that the subjective purpose of the ads was to influence the presidential election; and 2) that there was a very high degree of coordination between the parties and the candidates. See 12/2/97 [redacted] Memorandum at 2, n.2; 11/24/97 [redacted] Memorandum at 5.[2/]

ATTY NAME

ATTY NAME

2/ [redacted] tax fraud hypothetical is, I believe, misleading. The question of whether a particular transaction requires a factual investigation depends on the underlying legal standard. If, for example, the law allowed the employer to make a $100,000 "gift" to the employee as long as this transaction was recorded as a "gift" by both parties, it would be a waste of time and money to investigate the "facts and circumstances" surrounding the transaction once we had determined that both parties had so recorded the money.

ATTY NAME

MEMORANDUM

TO: Eric H. Holder, Jr.
Deputy Attorney General

FROM: Larry R. Parkinson LRP
General Counsel, FBI

SUBJECT: Common Cause Allegations

DATE: January 30, 1998

On January 23, 1998, your office provided us with a copy of a draft memorandum for the Attorney General (referred to herein as the "DOJ Memo") relating to the allegations made by Common Cause. As requested, I am setting forth the FBI's position on these important issues.

I. Allegations Under the FECA

A. Attorney General's Letter to Chairman Hatch

As a starting point, it is inappropriate to shut off consideration of potential FECA violations with the conclusory statement that the Attorney General "rejected" the Common Cause theory in her April 14, 1997 letter to Chairman Hatch. First, that characterization of the letter is simply inaccurate. Second, even if the April 14 letter can be so construed, it is essential that we take a fresh and comprehensive look at the Common Cause allegations, and not dismiss a major part of them based upon a single sentence in the letter. We have appropriately reassessed other issues discussed in that letter, particularly when new facts have come to light (most notably the Section 607 issues), and we should be willing to do so again.

The April 14 letter was crafted under substantial time pressures without the benefit of a detailed FECA analysis. In fact, the first written memorandum on the soft money issue was not produced until May 27, six weeks after the Attorney General sent her letter to Senator Hatch. Moreover, while the May 27 memo (from Mark Richard and Robert Litt) questioned the Common Cause theory, it did not "reject" the possibility of FECA violations. Quite the contrary, that memo concluded with the following paragraph:

> It is important to note that this analysis does not imply that the advertisements, and their funding, did not violate the FECA. It only says that, based on the present record, that determination should be made as an initial matter by the FEC rather than by the Department and a grand jury.

During subsequent discussions within the Department, no one has argued that as a matter of law the Common Cause allegations do

EXHIBIT 20

not present a potential violation of the FECA.

It should also be pointed out that the Attorney General's April 14 letter did not respond directly to the Common Cause allegations themselves. Instead, as required by the statute, that letter addressed the formal Senate Judiciary Committee request of March 13, 1997, which made only a brief reference (one clause in a single sentence) to the "coordination" issue in the context of a broader conflict of interest argument. The detailed allegations set forth by Common Cause were neither raised by the Judiciary Committee request nor addressed by the Attorney General's April 14 letter (as Common Cause forcefully pointed out in its April 22, 1997 response to the Attorney General).

B. "Full Control" vs. "Coordination"

The heart of the Common Cause allegation is that the Clinton and Dole campaigns fully controlled all phases of the TV advertising campaigns and used their respective political parties as mere conduits. Because of this total control, the money raised and spent for the advertising was "for the purpose of influencing" a federal election and therefore constituted "hard money" subject to the FECA's contribution and expenditure limits, according to Common Cause.

The Common Cause description of "full control," at least as it relates to the DNC, has been corroborated by the evidence obtained by the Campcon Task Force.[1] That evidence convincingly demonstrates that the President and his key advisors controlled all aspects of the DNC campaign financing efforts; the 4-17-96 memorandum from Harold Ickes to Don Fowler is a particularly compelling example. With respect to the advertising campaign, the President apparently "worked over every script, watched each ad, ordered changes in every visual presentation, and decided which ads would run when and where. . . . Every ad was his ad."[2]

The DOJ memo accepts these facts as a given, at least for purposes of argument, but concludes that they are irrelevant because the "FECA does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office." However, this argument assumes that "total control" is merely a form of "coordination." This is like saying a factory worker is "coordinating" with his foreman.

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[1] This may be an accurate description of the RNC's activities as well, but the Task Force has obtained only limited information about the RNC media campaign.

[2] Dick Morris, Behind the Oval Office, at 144.

It is inappropriate to simply take the Common Cause allegations and force them into the legal box called "coordination." They do not fit. As Common Cause persuasively argued in its April 22 response to the Attorney General, this is not a case about DNC activities conducted "in coordination with" the Clinton campaign. Rather, the DNC was used as a conduit to carry out the advertising campaign being directed and fully controlled by the President and his advisors.

The precedents cited in the DOJ memo are very easily distinguished from our case, and provide little support for the sweeping proposition that "the proper characterization of a particular media expenditure depends not on the degree of coordination, but rather on the content of the message." It is particularly problematic that the DOJ memo (as well as the April 14, 1997 Attorney General letter) relies heavily on FEC Advisory Opinion 1995-25 for that proposition. In fact, that Opinion neither said nor implied anything about whether "the degree of coordination" was a relevant factor. The Opinion addressed an RNC plan to produce and air media advertisements on a series of legislative proposals, and focused on allocation formulas. There was no suggestion whatsoever that the RNC was coordinating its plans with anyone, and therefore no discussion of that issue.[3]

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[3] The Advisory Opinion was one of a series of opinions clarifying the FEC's allocation regulations, which are designed to prevent political committees from using nonfederal "soft money" to subsidize federal election activities. Those regulations require political committees that maintain separate federal and nonfederal accounts to allocate shared expenses according to set formulas. While Advisory Opinion 1995-25 did indicate that the content of the message (i.e., whether or not it contains an "electioneering message") is a relevant factor in deciding how to allocate costs between federal and nonfederal accounts, the Opinion neither stated nor implied that "content" is the only relevant factor.

In fact, Advisory Opinion 1995-25 highlights a need to investigate the DNC money trail. That Opinion emphasizes that even national party spending on "issue ads" -- such as those focused on national legislative initiatives -- are always treated, at least in part, as an FECA-regulated expenditure which must be paid with hard money. Where the ads go further, and contain an "electioneering message" identifying a specific candidate (or are reported as a coordinated expenditure under 2 U.S.C. 441a(d)), all of the costs must be paid with hard money. In the face of compelling evidence that the President and his advisors were trying to get around apparent FECA strictures, the investigation should include an analysis of how the media campaign expenditures were allocated. Instead of investigating such matters, the Task Force has been held back, apparently on

In fact, neither DOJ nor the FEC has ever seen a case like this before, and thus there is no controlling precedent. Therefore, it is important to go back to the fundamental issue: Was the DNC media campaign developed and implemented "for the purpose of influencing" the Presidential election? Obviously, the common sense answer is a resounding "Yes." That conclusion is strongly supported by the President's own statements at various fundraising events, in which he touted the advertising campaign as the key to his reelection strategy. Not only did the advertisements benefit him, he and his advisors controlled and directed every facet of the campaign. Under the circumstances, it would be a fiction to conclude that the DNC was merely "coordinating" with the White House advisors.

C. The "Content" Test

The DOJ memo states that the "content of the message" is the only relevant factor in determining whether advertising expenditures are subject to the FECA limits. We strongly disagree with this proposition, at least in this context, where the candidate is controlling the ad campaign to further his own reelection. However, even if the "content" test is the sole test, that does not mean the Task Force should not undertake an investigation.

To our knowledge, the Task Force has not reviewed a single campaign ad during the course of its investigation. The Attorney General has never said, in her April 14 letter or otherwise, that DOJ is not capable of doing a content analysis. Such an analysis involves two questions: (1) Does the communication refer to a "clearly identified candidate"? (2) Does the communication contain an "electioneering message"? Obviously, the first question would not require substantial expertise. On its face, the second question also does not appear unreasonably difficult. While there has been an unstated assumption that the Task Force would never engage in such an analysis, it is not at all clear why.

There is nothing uncommon about investigators and DOJ lawyers analyzing regulatory provisions in the context of criminal investigations. For example, virtually any time a federal agency is defrauded, it is necessary to analyze and apply pertinent agency regulations, with the assistance of agency

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the assumption that the relevant players must have simply taken advantage of FECA loopholes rather than committed potential crimes. Unfortunately, this is not a conclusion that can be reached without investigating the facts, and under the circumstances known to the Task Force, there is ample predication to warrant an investigation.

officials. And there is no question that in many cases this task would be far more complicated than trying to determine whether a particular campaign advertisement contained an "electioneering message." Not only is there relevant case law and FEC guidance to assist in defining the term, but presumably the FEC staff would be readily available to assist. Under the circumstances, it is difficult to understand why we think the FEC could make such determinations but DOJ (working with the FEC staff) could not.

We are not necessarily advocating an ad-by-ad analysis. Instead, we are objecting to an investigative approach that cuts off an entire line of inquiry based on a threshold assumption that may or may not be accurate. How can we make an informed judgment about the ads if we have never reviewed a single one? Even if it turned out that the Department was truly incapable of making solid conclusions about the content of the ads (a dubious proposition), there may well be evidence that does not require dissection of the ads themselves. For instance, Common Cause alleges that the ads in question were "indistinguishable in approach from other campaign ads run by the Clinton and Dole presidential campaigns." While not dispositive, such evidence would be extremely telling, particularly when combined with an analysis of how the campaign committee treated their own ads for allocation and reporting purposes. Similarly, a focused investigation could well turn up documentary or testimonial evidence that supports the Common Cause theory without necessitating a "content analysis."

D. Referral to the FEC

The DOJ memo glosses over a paramount issue: if neither the Task Force nor an Independent Counsel investigates the Common Cause allegations, they will be left to the FEC. It is definitely an understatement to say that "the FEC lacks the resources of the Task Force and is often hamstrung by political division." (DOJ memo at footnote 15). By its own admission, the FEC is woefully understaffed and incapable of handling the "deluge of complaints" resulting from the 1995-96 election cycle. (Letter to Attorney General Reno from FEC, March 10, 1997.) It sought an additional $5 million from Congress to carry out its investigative plan and received nothing. A recent news article reported that the FEC has only two investigators and 31 attorneys, and highlighted the Commission's inability to obtain necessary resources from Congress.[4] In recognition of its dismal investigative resources, the FEC recently asked DOJ for more than 32 investigative and attorney personnel, office space, equipment, cars, telephones, and pagers. (Lawrence Noble Memorandum to Robert Litt, October 1, 1997.)

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[4] Wall Street Journal, Dec. 15, 1997, at A24.

In fact, a referral to the FEC, particularly at this late date, would be a sure-fire guarantee that there would never be a comprehensive investigation of the Common Cause allegations.

II. Presidential Primary Matching Payment Account Act (PPMPPA)[5]

A. "Qualified Campaign Expenses"

Because they chose to receive public matching funds for the primary election, both President Clinton and Senator Dole were required to limit their "qualified campaign expenses" to the expenditure limits set by the FECA (approximately $37 million for the 1996 primary campaign). Within the Clinton/Gore campaign, there were reportedly internal debates about whether to turn down public financing in order to avoid the federal spending limits. In the end, the campaign appears to have developed a scheme to have it both ways -- to receive taxpayer funds and agree to a spending limit, and simultaneously use the DNC to buy tens of millions of dollars in advertising. Campaign strategist Dick Morris and others developed an extremely ambitious ad campaign, primarily directed at swing-voter states where President Clinton had problems. According to Common Cause, the expenditures for the ad campaign totaled at least $34 million in excess of the spending limit. (The Dole campaign spent at least $14 million in excess of the spending limit, according to Common Cause.)

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[5] Because the legal and investigative issues raised by the Presidential Election Campaign Fund Act (PECFA) are virtually identical, as the DOJ memo points out, we have not done a separate analysis of that Act. As to the threshold question of whether there is a sufficient factual predicate to investigate the media campaigns under PECFA, we do not believe this is a close question. If there is a sufficient basis to investigate the media campaign for purposes of the PPMPAA -- which there clearly is -- it would be ludicrous as an investigative strategy to wall off the PECFA simply because Common Cause has not made a specific reference to the PECFA. (If the Department asked Common Cause whether it believes its allegations were relevant to a potential PECFA violation, there can be little doubt about its likely answer.) Although the Task Force has not focused on the issue, the Clinton and Dole campaigns undoubtedly continued their media advertisements and polling after the August 1996 conventions. Whether or not we have specific evidence that the campaigns may have exceeded the general election spending limits, any comprehensive investigation of the media campaign necessarily would extend beyond the primary season. This is particularly true with respect to the Clinton campaign, which faced no primary challenge and designed the DNC media campaign to influence the general election.

The DOJ memo correctly states that "if the media campaigns constituted 'qualified campaign expenses,' that were knowingly and wilfully 'incurred' by the candidates or their campaign committees during the period covered by either PPMPAA or PECFA, a criminal violation occurred." Criminal violations could also be found if the candidates or their committees "knowingly made false statements by omitting from required reports to the FEC 'qualified campaign expenses' that they had incurred."

1. "Specifically authorized in writing"

The PPMPAA provides that a "qualified campaign expense" must be incurred by a person "specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or committee." For no apparent reason, this "written authorization" requirement appears only in the PPMPAA; there is no similar requirement under the PECFA or the FECA, nor is there such a requirement in the regulations implementing the PPMPAA itself. While we agree that the regulations could not supplant the statute for purposes of a criminal prosecution, the regulations certainly are useful in assessing the intent of the statute. As set forth in those regulations, an expenditure is made on behalf of a candidate if it is made by "any person authorized or requested by the candidate, and authorized committee of the candidate, or an agent of the candidate to make the expenditure." 11 C.F.R. 9032.9(b).

There appears to be a consensus that "written authorization" would not be required of the candidate himself or his committee: "a candidate or campaign committee need not give himself or itself written authority to make expenditures on his or its behalf." DOJ memo at 8, note 5. As discussed, there is strong evidence that the President personally controlled many aspects of the advertising campaign, including the individual ads themselves. The advertising expenditures were made "on his behalf" for the purpose of getting himself reelected. Under the circumstances, it seems clear that the media expenditures -- whether or not paid by DNC check -- were in reality made by President Clinton and/or his campaign committee.

Even if we concluded there must be "written authorization" in this case, there does not appear to be any requirement that the authorization be in any particular form. If the point of this statutory provision is to require some written documentation that the expenditures were duly authorized by a particular candidate or committee, the Task Force certainly has obtained that kind of documentation. In fact, the April 17, 1996 memorandum from Harold Ickes to DNC Chairman Don Fowler says it all: "This confirms the meeting that you and I and Doug Sosnik had on 15 April 1996 at your office during which it was agreed that all matters dealing with allocation and expenditure of monies involving the Democratic National Committee ("DNC")

including, without limitation, the DNC's operating budget, media budget, coordinated campaign budget and any other budget or expenditure . . . are subject to the prior approval of the White House." It would be truly bizarre to conclude that there could be a potential PPMPAA violation if Ickes sent a memo to the DNC with an "authorization" on the bottom, but no potential violation on our known facts where Ickes sent a written message essentially stating that the White House controlled everything and that the DNC could do nothing without White House approval. Under the circumstances, the "written authorization" requirement clearly seems to be satisfied.

Finally, even if the existing "written documentation" did not satisfy the "written authorization" provision, the Task Force has not undertaken any investigation to determine whether a more formal "authorization" exists. While we can speculate about whether or not such a document is likely to exist, we simply do not know. The DOJ memo correctly points out that is "plainly a factual rather than a legal question"; the only way to answer it is to investigate. Finally, there clearly is sufficient predication to investigate, particularly in light of the evidence of White House control that has already been gathered.

2. Expenses "incurred on behalf of" the Candidate

Under the PPMPAA, a "qualified campaign expense" must be "incurred"[6] by an authorized person acting "on behalf of" the candidate or his committee. Although the phrase "on behalf of" is poorly defined in the FEC regulations,[7] it appears designed to

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[6] Although the term "incurred" is not defined by the statute, there is no reason to resort to the dictionary or to non-election law cases. Federal election law is replete with examples of expenditures by third parties being attributed in appropriate circumstances to the candidates themselves. Several of these examples, including 2 U.S.C. 441a(b)(2)(B)(ii) and those mentioned in Buckley v. Valeo, are included in the DOJ memo and need not be repeated here. There is absolutely nothing to suggest that a rigid concept of financial liability should govern in this matter. The far better view, which apparently is shared by FEC staff, is that the term "incur" clearly encompasses those who control and direct the expenses and not simply those who write the checks.

[7] "On behalf of" means:

(1) An authorized committee or any other agent of the candidate for purposes of making an expenditure; (2) Any person authorized or requested by the candidate, and authorized committee of the candidate, or an agent of the candidate to make the expenditure; or (3) A committee which

weep broadly and there is nothing to suggest that it should not be given a common sense interpretation. In this case, because the President and his advisors completely controlled the DNC media campaign, how could the DNC do anything but act "on behalf of" candidate Clinton?

Certainly for any non-advertising expenses, the determination of whether any particular expense is "incurred on behalf of" the candidate is largely a factual question. And in answering that question, nothing would be more important than the degree of control exercised by the candidate. Therefore, if a candidate exercised complete control over items such as supplies or building rent, presumably the FEC would have no difficulty concluding that the expense was "incurred on behalf of" that candidate. The question before us is whether that clearly-understandable approach should be jettisoned when it comes to analyzing advertising expenditures.

What is so unique about advertising expenses that would justify treating them differently from other campaign-related expenses? There are two logical possibilities: (1) they may raise unique First Amendment concerns; and/or (2) the FEC may have already set forth unique rules (regardless of what the statutory language might suggest). With respect to the first possibility, the DOJ memo points out that there is a difference of opinion on whether the application of the "content test" for FECA purposes in based upon First Amendment concerns. While it is difficult to conclude that the "content test" is purely for administrative convenience (notwithstanding the informal opinion offered by the FEC staff), the resolution of that question is not critical here. Whatever First Amendment concerns may apply in the FECA context, they do not apply under PPMPAA, since the candidate voluntarily accepts a limitation on his free speech (i.e., spending) by opting for taxpayer funding under that Act.

The critical issue, then, is whether the FEC has set forth unique rules for advertising expenditures and, if so, whether those unique rules preclude any meaningful investigation of potential PPMPAA violations. As a threshold matter, the DOJ memo correctly states that there is a "complete dearth of case law or relevant FEC decisions" in the PPMPAA context. In searching for the next best thing, there are two options. First, one could apply the rules that ordinarily would apply to other kinds of

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has been requested by the candidate, by an authorized committee of the candidate, or by an agent of the candidate to make the expenditure, even though such committee is not authorized in writing.

11 CFR 9032.9(b).

(non-advertising) campaign expenses. Under this standard, one could easily conclude that advertising expenses directed and controlled by the candidate were expenses "incurred on behalf of" the candidate. The second option is to import the FECA rules and apply them to the PPMPAA. In our view, the first approach is the most sensible and the most consistent with the statutory language. Particularly if the FEC has adopted the "content test" purely for administrative convenience, we should focus on the language and intent of the statute, absent some compelling reason to do otherwise. Since there is no persuasive reason to justify a content analysis under the PPMPAA, "then a factual investigation would be necessary -- either by the Task Force or by an independent counsel -- to determine whether, in fact, the law was violated." DOJ Memo, at 15.

Finally, for the reasons set forth in Part I of this memorandum, even if the "content test" was engrafted onto the PPMPAA, it is not the only available test for analyzing expenditures. "Coordination" has not been eliminated by the "content" test, even in the FECA context. More importantly, there is no reason to even consider the "content" test in the situation presented here, where President Clinton and his key advisors controlled virtually every aspect of the DNC's media campaign.

III. Broader Issues

The DOJ memo correctly states that "the Common Cause allegations are the most serious of those issues raised in connection with the investigation of campaign finance." In a series of extremely well-researched submissions, Common Cause has described a scheme to circumvent the FECA and presidential funding laws on a breathtaking scale. For knowing and willful violations of these laws, Congress provided for criminal penalties.

It has been nearly 16 months since Common Cause first brought these allegations to the attention of DOJ. The Department has on more than one occasion written to Common Cause stating that the Task Force is "reviewing a variety of campaign financing issues arising out of the last national election" and is "examining" the soft money issues raised by Common Cause.[6] In

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[6] Letter from Lee Radek to Ann McBride, March 25, 1997. See also Mark Richard letter to McBride, November 8, 1996 (task force has been created "to fully explore the range of allegations and issues that have been raised" in Common Cause's letters from October 1996); Radek letter to McBride, January 21, 1997 (re: Kanchanalak).

The FBI's concern on this score has been highlighted since

fact, the Task Force has undertaken no actual investigation of these allegations.[9] Consequently, some of the most fundamental questions relating to the 1995-96 presidential campaign remain outstanding:

-- How were the campaign funds raised?

-- How were they spent?

-- How were they allocated and reported for FECA purposes?

-- Who made the fundraising and spending decisions?

While the Task Force has uncovered partial answers to these questions, in particular the last one, it is not because we have addressed them in any systematic investigative fashion. Instead, our information has come primarily from Common Cause, the newspapers, and tangentially from our investigation of other matters.

We must reemphasize that if the Common Cause allegations are not investigated by criminal investigators, it is unlikely that they will ever be investigated by anyone. Referral to the FEC presents two problems. First, how would the Department explain that it waited 16 months and only then decided to refer the matter to the FEC (while the FEC presumably is gearing up for a brand new election cycle)? Second, and more important, the FEC simply cannot handle it. While DOJ may have a policy and practice of referring unresolved campaign financing questions in ordinary cases, this is hardly an ordinary case. If there are violations here, they are violations on a massive scale, far beyond the ability of the FEC to even investigate, let alone resolve. In contrast to the FEC, the Department has assembled a huge Campaign Finance Task Force (apparently many times larger than the entire FEC investigative staff) and has announced to the world the broad scope of its investigative jurisdiction.

The Common Cause allegations need to be investigated. First, they need to be investigated in their own right because

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late October, when Common Cause began sending its communications directly to the FBI Director and to Deputy Assistant Director DeSarno. The FBI has not yet replied to these submissions.

[9] Since the March 25, 1997 representation on behalf of the Task Force includes the many FBI personnel assigned, it is our view that this issue should be promptly decided and the record clarified.

they present serious issues of potential criminal conduct.[10] These allegations were compelling when they first reached the Department in October 1996, and they have become stronger as more and more facts have surfaced. Second, the Common Cause allegations need to be investigated as part of a broader inquiry into campaign fundraising abuses. While the Task Force has had wide range and a variety of targets, it is been partitioned in a way that no ordinary criminal investigation would have been. By pursuing piecemeal investigations of individual subjects, the Task Force may very well be missing the big picture. The conduit contribution and foreign contributor cases are related to the media campaign. In fact, virtually all of the abuses uncovered by the Task Force have resulted, directly or indirectly, from the frenzy to raise millions for the campaign. Yet the Task Force has never undertaken a concentrated look at the core of the money-raising campaign itself; nor has it taken an integrated approach to the investigation as a whole.

Because the Common Cause allegations clearly involve the President, they must be investigated by an Independent Counsel. Moreover, the Attorney General should seek the appointment of an Independent Counsel immediately. Since the Department has had the allegations for nearly 16 months, a preliminary inquiry does not appear to be an option. Finally, we once again would incorporate by reference the FBI's prior written submissions recommending that, independent of the mandatory provision of the Independent Counsel statute, the Attorney General should exercise her discretionary authority pursuant to the political conflict of interest provision.

cc: Director Freeh
Deputy Director Bryant
Principal Associate Deputy Attorney General Litt

[10] The investigation should include, in addition to an examination of the advertising campaign itself, an inquiry into related matters such as polling and consultant services (which would not require any "content analysis" under any standard).

DOJ-02145

TOTAL

U. S. Department of Justice

Office of the Deputy Attorney General

Principal Associate Deputy Attorney General — Washington, D.C. 20530

February 6, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Robert S. Litt

SUBJECT: Common Cause Allegations

In this memorandum I would like to set forth my own views on the issues presented by the Common Cause allegations. The essence of the allegations is that the DNC and RNC media campaigns were so thoroughly controlled by the candidates and their campaigns that the advertisements were in fact advertisements of his campaign even if they were paid for by the parties.

FECA

Both the FBI and [redacted] urge that the Department reconsider the applicability of FECA to the Common Cause allegations. They argue that if the media campaign was completely controlled by the President and his advisers, it was "for the purpose of influencing" the presidential election within the meaning of FECA, and that the advertisements therefore had to be paid for with hard money.

The problem with this theory is not only that there is no law to support it -- both [redacted] memos and the FBI memo are devoid of any citations that support this interpretation of FECA -- but that it is directly contrary to the approach taken both by the FEC and by the Department of Justice. In advisory opinions, in litigation, and in informal conversations with Department lawyers, the FEC has made clear its view that "issue" advertisements can properly be paid for in part with soft money, and that the test of whether an advertisement is an "issue" advertisement or a candidate advertisement depends on the content of the advertisement: does it refer to a clearly identified candidate, and does it contain an electioneering message? The Department took the same position in a brief filed in the Supreme Court in the Colorado Republican case -- just about the time the DNC media campaign commenced. By contrast, there is no support for the theory that advertisements that are "controlled" by a candidate would be treated differently.

00J-02146

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Regardless of whether public policy might be better served by stricter prohibitions, I do not think that we are free at this time to invent out of whole cloth, in the context of a criminal investigation, a new theory of FECA. The analysis in your April 14 letter was cleared with the FEC both before and after your letter; it is an accurate statement of the law.

Presidential Campaign Funding Acts

The question here is purely one of law: what is the legal consequence under the funding acts when advertisements are paid for by the party but controlled by the candidate? I believe that the FBI memo properly frames the issue: are advertisements to be treated the same as other expenditures under these particular laws, or are they to be treated the same as advertisements are under FECA? I believe that there are compelling reasons to conclude the latter.

First, FECA and the presidential campaign funding laws are part of an integrated package of laws governing campaign finance. Ordinarily, one would expect that similar terms and concepts would be treated similarly under those circumstances. Certainly, nothing in the relevant statutes or regulations suggests that they are to be treated differently.

Second, we know that under FECA, advertisements are treated differently than other types of campaign expenditures. That is to say, there is precedent under the campaign finance laws for such different treatment. There is also good reason for it. It is fairly easy to tell whether rent is paid on behalf of a candidate or a party; but some sort of test is required to determine whether advertisements are on behalf of a particular candidate.

Third, immense practical problems would be created if the proper treatment of advertisements under FECA depended on their content, without reference to the extent of coordination or control, while the proper treatment of the same advertisements under the funding laws depended on coordination or control, without reference to content. Campaigns would have to keep two sets of books -- and would have to do so without any guidance from the FEC on when a candidate's control over advertisements rises to such a level that a party's expenditures on advertisements is to be attributed to the candidate.[1] Although

[1] Many factual permutations are possible. What if a candidate and a party simply met to discuss where the party would run advertisements? What if the candidate suggested topics, locations and times, but the party created the advertisements? What if the candidate created the advertisement and the party determined when to run them? Candidates would have absolutely no idea how such expenditures should be treated under the theory

the same spending limits apply under FECA and the funding laws, two different sets of calculations would have to be made to determine whether candidates complied with those laws. And as noted in the main memo, a serious inconsistency might arise in the treatment of coordinated party expenditures: expenditures that are specifically authorized under FECA, would be crimes under PECFA.

There is no indication that Congress intended this result, or that the FEC considers it to be the law. Rather, the far more plausible view is that Congress intended advertising expenditures to be treated identically under the various campaign laws.

"Broader Issues"

Both the FBI and [redacted] argue that even if we cannot say that either FECA or the funding laws may have been violated on the evidence known to us at this time, we should nonetheless investigate. The Public Integrity Section argues to the contrary. I believe that the two positions reflect fundamentally different views of the proper approach to criminal investigation: one view holds that we should conduct a thorough-going criminal investigation even in the absence of evidence that crimes were committed, because we cannot definitively say at this time that they were not, and the other view says we should not investigate without predication to believe that crimes in fact occurred. I believe that -- particularly in this context -- that the Public Integrity Section's approach is the correct one.

As a general matter, of course, we require predication before commencing criminal investigations. The requirement of predication is particularly important in cases involving the political process. We are easily subject to accusations of political favoritism in such cases, and our best protection come from applying consistent standards to each such case. The fact that the Public Integrity Section, which has been charged for many years with enforcement of the election laws, does not believe that there is a sufficient basis to commence a criminal investigation of these matters at this time is to me a compelling reason not to do so.

Moreover, in this particular matter we are cutting close to the core of the First Amendment: political speech. As the Supreme Court's repeated striking down of FEC regulation shows, in this area what is not prohibited is often constitutionally protected. I believe that political campaign speech is a field

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propounded by the FBI and [redacted], yet would be subject to criminal liability if the Department of Justice subsequently decided they guessed wrong.

in which we would be singularly ill-advised to attempt to create new law through the criminal process. Despite the claims in the FBI memo, neither the Department nor the FBI nor a grand jury is well equipped to apply vague and uncertain tests to judge the content of political advertisements. We have never done so in any prior cases, and to my mind there is something redolent of totalitarianism about the idea of having criminal investigators passing judgment on the content of political advertisements.

I have no doubt that if an issue such as this one -- where there is no clear statute or regulation prohibiting the conduct -- had arisen outside the current political environment, we would have deferred to the FEC without hesitation. The FEC is the body that is charged by Congress precisely with evaluating these sorts of matters. The Department has never, ever, investigated anything remotely like this. Our election law prosecutions have involved bright line matters where the law is clearly established, such as corporate, foreign or conduit contributions. It would be far better to follow the established practices of the Department and leave this as an initial matter to the FEC -- knowing that if they find evidence of criminal violations, they can refer it back to us.

We need not actually refer the matter to the FEC. We are aware that the FEC is already investigating it. They are, of course, desperately short of resources: almost a year ago they asked us for help and we have yet to respond. While the FBI is not prepared to provide resources to assist the FEC, JMD indicates that we can find other sources. We should do so immediately, and in our letter telling them we are providing these resources note that we are deferring to them on these issues.

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Finally, the FEC is sharply criticized by [redacted] and the FBI for ineffectiveness. There are two answers to that. First, because this matter affects both parties, there is a greater likelihood that the political division that often prevents effective action by the FEC can be overcome. More fundamentally, this is the system Congress has chosen for enforcement of the election laws. It is unfortunate that the FEC is so weak, but we should not use that as an excuse to disregard well-established concepts of predication and well-established procedures, to conjure up novel legal theories of which political candidates had no notice, and to take on the responsibility of primary regulator of the political process. That is not an appropriate function for the Department of Justice.

U, S. Department of Justice

Office of the Deputy Attorney General

Principal Associate Deputy Attorney General

Washington, D.C. 20530

February 6, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Robert S. Litt
Principal Associate Deputy
Attorney General

SUBJECT: Common Cause Allegations

The purpose of this memorandum is to analyze the allegations made by Common Cause and others concerning use of soft money to fund media campaigns in the 1996 Presidential election cycle. In a letter to the Judiciary Committee dated April 14, 1997 (Tab A, pp. 6-7), you have addressed these allegations insofar as they relate to potential violations of the Federal Election Campaign Act, 2 U.S.C. § 431 et seq. (FECA). This memorandum addresses the possibility that the same conduct may have violated either the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031 et seq. (PPMPAA), or the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 et seq. (PECFA). (The statutes are attached at Tabs B and C). It attempts to summarize and synthesize the analyses contained in the excellent series of memoranda by [redacted] and [redacted] that have previously been provided to you. (Tabs D-G). Memoranda setting forth my own views and those of the FBI are also attached. (Tabs H, I). I will refer to [redacted] and [redacted] in this memorandum for purposes of clarity, and not to assign them personal responsibility for any position.

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Factual Allegations

The following excerpt from Common Cause's letter to you of October 9, 1996, summarizes its allegations:

> During the 1996 presidential primary campaign, the [Clinton/Gore '96 Primary Committee, Inc.] and the [Dole for President Primary Committee, Inc.], and their agents, both spent millions of dollars in excess of the

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overall presidential primary spending limit that applied to each of their campaigns, and in doing so, used millions of dollars in "soft money" contributions that could not legally be used directly to support a presidential campaign.

The Clinton and Dole Committees and their agents made these campaign expenditures through their respective national political parties, using the parties as conduits to run multimillion-dollar TV ad campaigns to support their candidacies. The TV ad campaigns were in each case prepared, directed and controlled by the Clinton and Dole campaigns and their agents. Money used to pay for the ad campaigns was raised by agents of the Clinton and Dole Committees. The ads were targeted to run in presidential battleground states. The ads dealt with President Clinton and Senator Dole by name, and promoted their respective candidacies or criticized their respective opponents.

Thus, the TV ad campaigns, run in the guise of being DNC and RNC ad campaigns, were in fact Clinton and Dole ad campaigns, and accordingly were subject to the contribution and spending limits that apply to presidential campaigns.

For purposes of this memorandum, we will assume that in 1995 President Clinton and his closest advisors agreed upon a media campaign, to be funded by the Democratic National Committee (DNC), and to be paid in part with soft money, in the expectation that this media campaign would help the President's re-election effort. The advertisements were created and their placement directed by the President's closest advisors, but were paid for with DNC funds. Similar allegations have been made against the Dole campaign. Common Cause alleges that these advertising campaigns, while nominally made by the party national committees, were in fact made by the presidential campaigns for the purpose of influencing the presidential elections.

Allegations Under FECA

Under FECA, all contributions and expenditures "for the purpose of influencing any election for federal office" are subject to regulation, including contribution and expenditure limits. 2 U.S.C. §§ 431(9)(A). Common Cause alleged that the media campaigns were for the purpose of influencing the Presidential election, and therefore could not properly have been paid for with "soft money" -- money not subject to the contribution and expenditure limits of FECA.

Your letter to the Senate Judiciary Committee (Tab A) rejected this theory.[1] The letter noted that "FECA does not prohibit the coordination of fundraising or expenditures between a party and its candidates for office," and that "the proper characterization of a particular [media] expenditure depends not on the degree of coordination, but rather on the content of the message." In particular, the letter cited an FEC Advisory Opinion which ruled that party media advertisements that focus on "national legislative activity" and do not contain an "electioneering message" may be paid for in part with soft money. FEC Advisory Op. 1995-25. In light of these principles, you concluded that we had no specific and credible information that the activities of the parties and the candidates in conducting this media campaign may have violated FECA. A fuller analysis of the FECA allegations was contained in a memorandum to you dated May 27, 1997, from Acting Assistant Attorney General Mark M Richard and Deputy Assistant Attorney General Robert S. Litt (Tab J).

[redacted] and the FBI disagree with the foregoing reading of Advisory Op. 1995-25 and with the analysis of FECA set forth in your letter to the Judiciary Committee. They contest the proposition that the FEC will consider communications spending an expenditure/contribution under FECA only if the communication identifies the candidate and contains an electioneering message [redacted] notes that in Advisory Op. 1995-25 the FEC said that "legislative media advertisements that focus on national legislative activity and promote . . . . the Party should be considered as made in connection with both federal and non-federal elections, unless the ads would qualify as coordinated expenditures on behalf of any general election candidates of the Party under 2 U.S.C. 441a(d)." (emphasis supplied). Thus, party spending on "issue ads" is always an FECA expenditure in part (which part must be paid with federal or hard money) and may be an FECA expenditure in toto where the spending is in fact all intended to influence a federal election. Where the FECA expenditure is reported by the party as a Section 441a(d) expenditure coordinated with a particular federal candidate, the total expenditure is a contribution to that candidate. Where the spending is not reported under Section 441a(d), the FEC will nevertheless attribute the expenditure (as a contribution) to a specific candidate for FECA purposes (sections 441a(a)(2) and 441a(d)) where the ad identifies the candidate and contains an electioneering message. In short, the

[1] The FBI argues that this characterization of the April 14 letter is inaccurate, because the letter was hastily drafted without careful analysis, and because the letter did not conclude as a matter of law that no violation occurred. The letter did, however, conclude that there was no "specific and credible evidence suggesting that these activities violated FECA."

FEC's content test is not a standard which must be met to qualify spending as an FECA expenditure; it is a means to attribute FECA expenditures to a particular candidate when the facts are not made known to the FEC.

The FBI similarly argues that the FEC has never suggested, in Advisory Op. 1995-25 or elsewhere, that the content of an advertisement is the only relevant factor in determining how its cost should be allocated, and that there is a difference between "coordination" and the type of complete "control" that is alleged to be at issue here.

This analysis of the FECA, while logically coherent and perhaps worth debating as a matter of public policy, is not supported by any case law, advisory opinion or other authority. Indeed it appears to have been definitively rejected by both the FEC and the Department.

First, in 1995 the Department of Justice and the FEC argued in the Supreme Court:

> Where a party expenditure is used to finance communicative activities, the Commission has determined that the expenditures will be considered attributable or allocable to a particular campaign only if the communication refers to a "clearly identified candidate" and contains an "electioneering message."

Brief for the Respondent, Colorado Republican Federal Campaign Committee v. FEC (S.Ct. No. 95-489), at 3.

Second, in the wake of the Colorado Republican decision,[2] the FEC has made clear that the content test continues to govern the characterization of party media expenditures. 62 Fed. Reg. at 24371 (noting that under rules proposed to implement Colorado Republican, "the Commission's standards for determining whether a communication by a party committee is a coordinated expenditure under 2 U.S.C. § 441a(d) would continue to depend on whether it

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[2] In Colorado Republican Federal Campaign Comm. v. FEC, 116 S.Ct. 2309 (1996), the Supreme Court held that political parties could make independent expenditures in support of congressional and senatorial candidates, and struck down an FEC rule presuming that all such expenditures were coordinated. Thus, after Colorado Republican, before the cost of a party advertisement can be attributed to such a candidate the FEC must show factual coordination as well as the advertisement's content. The Court left open whether the same rule will be applied to party expenditures on behalf of presidential candidates who accept public funding.

contains an electioneering message and mentions a clearly identified candidate.")

Finally, in informal discussions prior to your letter to the Senate Judiciary Committee, the FEC staff confirmed for us that in practice, the content test is used exclusively to determine whether party expenditures were incurred in connection with a particular candidate's campaign. These facts were the basis for the conclusion, in the April 14 letter to the Senate Judiciary Committee, that "[w]ith respect to coordinated media advertisements by political parties . . . the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message."

The FBI further argues that even if the content test is the sole determinant of how advertisements should be paid for, the Department should nonetheless conduct a criminal investigation. It notes that in many circumstances the Department is called upon to interpret and analyze agency regulations, and argues that there is no reason that we could not do so in this case, since there is "relevant case law and FEC guidance to assist in defining the term."

In fact, there appears to be no case law, FEC guidance or any other source interpreting the relevant language. Most recently, in Clifton v. FEC, 114 F.3d 1309, 1316 (1st Cir. 1997), in which the "electioneering message" test was challenged as unconstitutionally vague (a challenge that the First Circuit characterized as "not frivolous" and that is, I believe, still pending), the Court noted with some exasperation that the FEC's brief did not define the term "electioneering message" but only referred to the FEC's own advisory opinion process as a means by which candidates could get clarification. Similarly, in Advisory Op. 1995-25 the FEC expressly refused to offer guidance as to what constitutes an "electioneering message." Nor has the Department or the FBI ever engaged in the kind of content analysis of political advertisements that would be required here.

The Relevant Statutes

Public funding is provided for primary and general elections through PPMPAA and PECFA, respectively. Candidates seeking their party's nomination for president can qualify to receive matching funds under PPMPAA by raising over $5,000 in individual contributions of $250 or less from each of 20 states. 26 U.S.C. § 9033(b)(3) and (4). Eligible candidates may then receive public funds to match the first $250 of each individual contribution. 26 U.S.C. §§ 9034, 9036, 9037. To receive matching funds, primary election candidates must submit a letter of agreement and certification, which constitutes a contract with

the government. 26 U.S.C. § 9033. As part of this contract, the candidates must certify that they and their committees "will not incur qualified campaign expenses in excess of [the expenditure limits applicable under FECA]." 26 U.S.C. § 9033(b)(1); 26 U.S.C. § 9035 (a); 2 U.S.C. § 441a(b)(1)(A). In short, a presidential primary candidate who receive matching funds must agree to limit "qualified campaign expenses" to the expenditure limits under FECA: for the 1996 campaign, this amounted to approximately $37 million. It is undisputed that both President Clinton and Senator Dole received matching funds, and that the amounts expended on their primary elections exceeded the limits if the cost of the media campaigns at issue is included.

Under PECFA, the presidential nominee of each major party may elect to receive public funds (amounting to approximately $62 million for the 1996 election). 26 U.S.C. §§ 9003, 9006. To receive these funds, the candidate must supply a letter agreement and certification to the FEC. Among other things, the candidates must agree that they and their committees "will not incur qualified campaign expenses" in excess of the amount of public funding they receive. 26 U.S.C. § 9003(b)(1). They must also agree not to accept private contributions for the general election campaign. 26 U.S.C. § 9003(b)(2). Both candidates applied for and received public funding in the 1996 general election.

The key term for purposes of this analysis, "qualified campaign expenses," is defined slightly differently under PPMPAA and PECFA. Under PPMPAA a "qualified campaign expense" is

> a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value
>
> (A) incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election . . . .
>
> For purposes of this paragraph, an expense is incurred by a candidate or by an authorized committee if it is incurred by a person specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or the committee.

26 U.S.C. § 9032(9) (emphasis supplied).

Under PECFA, however, a "qualified campaign expense" is

> an expense --
>
> (A) incurred (i) by the candidate of a political party for the office of President to further his election to

> such office or to further the election of such political party for the office of Vice President, or both (ii) by the candidate of a political party for the office of Vice President to further his election to such office or to further the election of the candidate of such political party for the office of President, or both, or (iii) by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both of such candidates to such offices . . .
>
> An expense shall be considered as incurred by a candidate or an authorized committee if it is incurred by a person authorized by such candidate or such committee, as the case may be, to incur such expense on behalf of such candidate or such committee.

2 U.S.C. § 9002(11) (emphasis supplied). The legislative history does not appear to provide any explanation for the difference in definitions.

Under PPMPAA, candidates accepting matching payments who "knowingly incur qualified campaign expenses" in excess of the limits imposed by the agreements commit a felony. 26 U.S.C. § 9042(a). Under PECFA, candidates accepting public funding who "knowingly and wilfully incur qualified campaign expenses" in excess of the amount of the public funding, or who accept contributions from private sources, commit a misdemeanor. 26 U.S.C. § 9012(a)(b). There appears to be agreement that, despite the somewhat different language, the same intent standard applies under PPMPAA and PECFA, and that it is the same standard applied under FECA, namely the conscious violation of a known legal duty. Thus, if the media campaigns constituted "qualified campaign expenses" that were knowingly and wilfully "incur[red]" by the candidates or their campaign committees during the period covered by either PPMPAA or PECFA, a criminal violation occurred. Criminal violations could also be found if the candidates or their committees knowingly made false statements by omitting from required reports to the FEC "qualified campaign expenses" that they had incurred.

The principal question for determination is whether, given the assumption that the media campaigns were totally controlled by the candidates, they constituted "qualified campaign expenses" that were "incurred" by the candidates. Common Cause, and other who argue that there is a basis for a criminal investigation of the media campaigns, focus on the fact that the media campaigns were conceived and directed by the candidates and their politica advisors, and upon the candidates' undeniable subjective intent and expectation that the media campaigns would benefit them. They thus conclude that the media campaigns were qualified

campaign expenses incurred by the candidates. On the other hand, those who argue that there is no basis for a criminal investigation of the media campaigns[3] focus on the fact that the media campaigns were paid for out of party funds, and on the content of the advertisements themselves, to conclude that the advertisements should not be viewed as qualified campaign expenses incurred by the candidate.

PECFA

A preliminary question under PECFA is whether we have a sufficient factual predicate to investigate the media campaigns under PECFA. As applied to advertisements, PECFA applies only if the advertisements were run after the date of the party conventions.[4] Although Common Cause has written to the Department several times, it does not allege that the media campaign in question continued during the period of the general election, or that if it did it was paid for in whole or in part with soft money, although we have not yet done any factual investigation of the issue.

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[3] Of course, as has previously been discussed, the Task Force's criminal investigation of other matters may well touch upon the media campaigns. The issue addressed here is whether there is a basis for investigating whether the media campaigns themselves violated the law, but the resolution of this issue has no impact on the Task Force's ability to inquire into facts surrounding the media campaign as part of its ongoing inquiry.

[4] A "qualified campaign expense" under PECFA must be "incurred within the expenditure report period . . . or incurred before the beginning of that period to the extent such expense is for property, services, or facilities used during such period." 26 U.S.C. § 9002(11)(B). The "expenditure report period" begins on the earlier of September 1 before the election or the date on which the candidate was nominated at a convention. 26 U.S.C. § 9002(12)(A). In 1996, both major party candidates were nominated at conventions in August.

The regulations specifically provide that advertisements that are run only during the primary election period or the general election period are allocable only to that period. 11 C.F.R. 9034.4(e)(5). If advertisements are run during both periods, the production costs are allocated 50/50 between the two periods, and the distribution costs of each run of the advertisement are allocated entirely to the period of the particular run. 11 C.F.R. 9034.4(e)(5).

One view is therefore that, in the absence of any allegation, let alone evidence, of a violation of PECFA, there is no basis to investigate whether PECFA was violated. The contrary view is that, given the possibility of a violation of PPMPAA, we cannot conclude that PECFA was not violated without conducting at least a limited factual investigation to determine whether there is evidence of a violation.

There appears to be a consensus that (with the exception of the question whether an expenditure must be authorized "in writing") the issues under the two statutes are similar. Therefore, it seems likely that if you conclude that there is sufficient basis to investigate under PPMPAA, it would be inappropriate to rule out the possibility of a violation under PECFA.

PPMPAA

There are two issues presented under PPMPAA. First, were the costs of the media campaign "specifically authorized in writing" by the candidates or their committees? Second, were the costs of the media campaign "incurred" by the candidates "in connection with" the presidential primary campaigns?

"Specifically Authorized In Writing"

As noted above, under PPMPAA a "qualified campaign expense" must be "incurred by a person specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or the committee." 26 U.S.C. § 9032(9). The regulations under PPMPAA do not contain any requirement of authorization in writing:

> An expenditure is made on behalf of a candidate . . . if it is made by --
>
> (2) Any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate to make the expenditure.

11 C.F.R. § 9032.9(b). This definition is consistent with FECA and PECFA, neither of which requires authorization in writing. However, all agree that for purposes of a criminal prosecution under PPMPAA we could not rely upon an FEC regulation that contradicts the terms of the statute.

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[redacted] suggests that in the absence of any allegation or evidence of specific written authorization there is insufficient predication to commence a criminal investigation. [redacted] reasons that "because both candidates and the parties

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preferred to view these advertisements as disbursements by the parties, it seems highly unlikely that such written authorization exists." [redacted] notes that "[n]o allegation of Common Cause suggests that either presidential primary candidate/campaign committee gave a written authorization to a national committee to pay for the ads in question, although we could not now rule out that possibility as a matter of fact" but emphasizes that we have done no factual investigation yet to determine whether there was any such written authorization. The FBI cites documents which it contends constitute a sufficient written authorization.

[redacted] further argues that the requirement of written authorization is inapplicable. A candidate or campaign committee need not give himself or itself written authority to make expenditures on his or its own behalf. [redacted] argues that if the President completely controlled the DNC media campaign, as we are assuming, then it may be that the expenditures were made by him or his campaign for purposes of PPMPAA, rather than by the DNC. This is a variant of the argument, discussed infra, that these expenses were incurred by the Clinton/Gore campaign rather than the DNC.

In any event, this issue is a subsidiary one. Even if written authorization is required, whether or not it existed is a purely factual question, and you cannot conclude at this time that there was no written authorization.

Were the Expenses "Incurred" by the Candidate or His Committee "In Connection With" the Presidential Campaign?

This is the most complex and difficult question: Assuming that the media campaigns were completely directed by the candidates, and were intended by the candidates to help them in their election, but were paid for out of party accounts rather than candidate accounts, were they "incurred" by the candidates "in connection with" their campaigns so as to make them "qualified campaign expenses" under PPMPAA? Analysis of this issue is not made easier by the complete dearth of case law or relevant FEC decisions.

As noted above, for purposes of this discussion, the relevant facts are assumed. On the one hand, we assume that the media campaign was actually paid for by the parties, not the candidates; indeed, that is the entire premise of the Common Cause allegation. On the other hand, we assume that the actual development and execution of the DNC media advertisement campaign

was completely controlled from the White House,[5] and that the DNC media campaign was intended at least in part to benefit the President in the Presidential election and was viewed by the President and his advisers as an integral part of his campaign. The question presented is whether, under these circumstances, the costs of the media campaign should be considered as having been "incurred by [the] candidate[s] . . . in connection with [their] campaign[s] for nomination for election."[6]

PPMPAA does not define the term "incur," and one relevant question is whether, for purposes of PPMPAA, an expense is "incurred" by the entity that paid for the media campaign, or whether it can be "incurred" by the entity that directed it. [redacted] argues that when a term is not defined by statute, courts typically rely on the ordinary definition of the term. See, e.g., Bailey v. United States, 116 S.Ct. 501, 506 (1995). Webster's Dictionary defines the term "incur" to mean "to become liable or subject to," and in other contexts courts have held that a person has not "incurred" an expense if he is not responsible for paying it. See, e.g., Black v. Secretary of Health and Human Services, 93 F.3d 781, 785 (Fed. Cir. 1996) (Vaccine Act); SEC v. Comserv Corp., 908 F.2d 1407, 1413-15 (8th Cir. 1990) (Equal Access to Justice Act); United States v. St. Paul Mercury Indemnity Co., 238 F.2d 594, 598 (8th Cir. 1956) (private insurance contract); Town of New Windsor v. Tesa Tuck, Inc., 935 F.Supp. 317, 320 (S.D.N.Y. 1996) (CERCLA) ("the case

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[5] Similar allegations have been made by Common Cause concerning the RNC media campaign.

[redacted] and [redacted] disagree on the interpretation of much of the evidence, but this disagreement is not really relevant at this stage. This memo assumes that the facts would show complete control of the media campaigns by the candidates.

[6] [redacted] notes that, since the President faced no primary challenge and the purpose of the DNC media campaign was to influence the general election, one could question whether the media campaign was "in connection with his campaign for nomination," as required by PPMPAA. Since, however, the FEC regulations are clear that the cost of running advertisements is a "qualified campaign expense" for the primary or general election depending solely on when the advertisement is run, see ___ supra, this could lead to the anomalous situation that advertisements that are intended to influence the general election but run solely during the primary election period were not covered by either PPMPAA or FECFA. Accordingly, [redacted] assumes that the media campaigns run during the primary campaign would be considered "in connection" with the primary election.

law confirms that 'incur' pertains to liability"). Thus the parties, which paid for the media campaigns, "incurred" the cost, regardless of who directed them.

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[redacted] also suggests that equating "incur" with the concept of financial liability is consistent with the overall purpose of PPMPAA. The term "qualified campaign expense" serves not only to identify those expenses which are counted against the spending limit imposed by FECA, but also to identify those expenses which are eligible for reimbursement from matching funds. See 26 U.S.C. § 9042(b) (making it a crime to use matching payments for a purpose other than "to defray qualified campaign expenses" or to repay loans used to defray qualified campaign expenses). It would seem illogical to allow public funds to be paid to a candidate to "defray" expenses that did not deplete the candidate's campaign treasury because they were made by another at his direction. Cf. 26 U.S.C. § 9038(a)(3) (matching payments may be retained for six months "for the liquidation of all obligations to pay qualified campaign expenses").

ATTNY AME

[redacted] and the FBI, on the other hand, note that nothing in PPMPAA or elsewhere in the election laws makes contractual or other legal liability the test for whether a cost was "incurred" by a candidate. Moreover, under FECA an expenditure by a third party who is "authorized or requested by the candidate . . . to make the expenditure" is considered a contribution to, and an expenditure by, the candidate, and is subject to the contribution and expenditure limits of FECA -- i.e. it is "hard money," not soft. 2 U.S.C. § 441a(b)(2)(B)(ii). Indeed, FECA specifically provides that if a third person pays for campaign materials, including advertisements, prepared by the candidate or his authorized agents, the cost is considered a contribution to the candidate subject to the limitations of FECA. 2 U.S.C. § 441a(a)(7)(B)(ii). See also Buckley v. Valeo, 424 U.S. 1, 46-47 n. 53 (1976) (per curiam) ("all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate [are treated] as contributions"). Thus, the federal election laws clearly recognize that expenditures for which a third party pays may be attributed to by the candidate.[7] And, as the Buckley court stated with respect to the general election financing statute's requirements that a candidate pledge not to incur expenses beyond his entitlement, "No separate pledge is required from the candidate's party, but if the party organization is an

ATTNY AME

ATTNY NAME

[7] [redacted] points out that none of the statutes cited by [redacted] and the FBI uses the term "incur," which is used in PPMPAA, and argues that their utility in interpreting that term is therefore limited at best.

'authorized committee' or an 'agent,' expenditures by the party may be attributed to the candidate." 424 U.S. at 89 n. 121.[6]

There is agreement that under FECA certain expenditures by third parties can be attributed to the candidates; it is plausible to assume that the result would be the same under PPMPAA.[7] For example, if a party paid the rent for a candidate's own campaign headquarters, that would likely be a coordinated expenditure on behalf of the candidate under § 441a, and hence treated as both a contribution to the candidate and an expenditure by him; the result would likely be the same in determining whether the cost of the headquarters was a "qualified campaign expense" under PPMPAA. On the other hand, it also appears likely that coordination by itself is not necessarily dispositive. To take a related example, the rent paid out of party funds for a party's own headquarters would presumably not be a contribution to a candidate and an expenditure by him under FECA, nor a "qualified campaign expense" under PPMPAA, even if the candidate chose the location for the party headquarters, decided how it should be furnished and equipped, and personally negotiated the rent. Some test beyond control is therefore necessary to determine which expenditures are "in connection with" the candidate's campaign.

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[6] The Buckley court here cited what was then 18 U.S.C. §§ 608(c)(2)(B) and 608 (b)(4)(A). These provisions are now codified, with some amendment, at 2 U.S.C. §§ 441a(a)(7)(A) and 441a(b)(2)(B). As noted above, the Department and the FEC have taken the position in the Colorado Republican case that "the question of whether a party expenditure is attributable to a particular campaign (and thus constitutes a coordinated part expenditure) turns on the same factors -- depiction of a clearly identified candidate and communication of an electioneering message -- as the question whether the expenditure is made 'in connection with' that election." In other words, despite the broad language referred to by the Buckley court, the FEC has consistently taken the position that advertising expenditures by a party do not fall within § 441a unless they meet the content tests. In other words, Buckley's language does not apply to advertisements, and, [redacted] notes, does not involve the term "incur."

ATTY NAME

[7] In informal discussions with the FEC staff they have indicated their agreement with that proposition. [redacted] notes that this conclusion, while consistent with FEC regulations, is not consistent with the ordinary meaning of the word "incur" and questions, therefore, whether it would be sustained by a court.

ATTY NAME

As noted above, your April 14 letter concluded that under FECA, as applied to advertising by political parties, the test is one based on the content of the advertisements. Advertisements are not considered contributions to a candidate or expenditures by the candidate under §441a unless they meet the content tests established by the FEC.[10] Thus, under FECA, at least, different rules apply to party spending for campaign advertisements than apply to other types of expenditures, and general statements about the effects of coordination of expenditures are not applicable to advertising under FECA. Party media spending is not considered a contribution to a candidate and an expenditure by him unless it meets certain content tests. You must determine whether those content tests determine whether party media spending is a "qualified campaign expense" as well.

ATTY NAME [redacted] and the FBI argue that the content test applied under FECA should not be applied under PPMPAA because the First Amendment considerations applicable under FECA do not apply under PPMPAA. Because PPMPAA offers public funding to a candidate, the candidate can be required to accept limitations on his First Amendment rights to spend money in exchange for public funding. Buckley v. Valeo, supra. Since acceptance of the limitations on spending is voluntary, and a candidate is free to reject the limits and seek unlimited private funding, PPMPAA and FECFA do not violate the First Amendment rights of candidates or supporters. Thus, whatever the legality of the media campaigns may have been under FECA from the parties' point of view, given the fact that the candidates controlled the media campaigns and they were intended to influence the presidential election, they should be considered as qualified campaign expenses incurred by the candidates in connection with their campaigns under PPMPAA.

The FBI further argues that it is more sensible to apply the rules that would apply to non-advertising expenditures under PPMPAA, than to import into PPMPAA the rules that would apply to advertising under FECA. Particularly if the FEC adopted the "content test" merely for administrative convenience, as [redacted] argues (see infra) we should focus on the language and intent of the statute, absent some compelling reason to do otherwise. Since there is no persuasive reason to justify a content analysis under FECA (because the same First Amendment considerations do not apply), the FBI argues that the extensive factual control that is assumed in this case would lead to the

ATTY NAME

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[10] As noted above, [redacted] and the FBI disagree with this proposition. See pp. 3-5 supra.

conclusion that the media campaigns were "qualified campaign expenses" that were "incurred" on behalf of the candidates.[11]

ATTY NAME

[redacted] notes that there is no indication at all that First Amendment considerations are the basis for the FEC's content test for political party advertisement. The content test was not developed as an accommodation of First Amendment rights, but as an effort to draw an administratively workable test to determine when party expenditures should be attributable to a candidate. The President is, after all, the head of the party, and a certain amount of coordination between the party and the candidate is to be expected, even as to expenditures that clearly relate only to the party. There is no reason to assume that the test that the FEC would apply under PPMPAA differs from the test it would apply under FECA.[12]

ATTY NAME

[redacted] also notes that the term "in connection with" appears both in FECA -- as part of the test to determine whether party spending is attributable to a candidate, 2 U.S.C. § 441a(d) -- and in PPMPAA, as part of the definition of "qualified campaign expense." The ordinary rule of statutory construction is that identical words used in related statutes should be interpreted to mean the same thing. Sullivan v. Stroop, 496 U.S. 478, 484 (1990); see also Commissioner v. Lundy, 116 S.Ct. 647, 655 (1996). Indeed, the predecessor to § 441a(d) and the definition of "qualified campaign expense" were passed as part of the 1974 amendments to FECA, P.L. 93-443, 88 Stat. 1265, 1299; it is an even stronger principle that identical words in the same statute should be interpreted identically. Moreover, different definitions would present practical problems for campaigns, which would be required to keep separate sets of books using separate factual tests, and for FEC auditors.

ATTY NAME

[redacted] also notes that the same numerical spending limit applies under FECA and PPMPAA (indeed PPMPAA incorporates

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[11] The FBI also reiterates its argument that the content test is not the exclusive test under FECA. If a candidate's control of advertising expenditures is, as the FBI and [redacted] claim, relevant under FECA, then the arguments advanced by [redacted] as to why the law should be the same under FECA and PPMPAA would militate in favor of opening an investigation under those statutes as well as FECA.

[12] In informal discussions FEC staff have confirmed that the content test under FECA was developed for administrative convenience rather than for First Amendment reasons. Like the other FEC staff opinions noted in this memorandum, these views have not been officially expressed by the FEC in any context.

the FECA spending limit), and it is therefore logical to assume that the same costs would count against both limits. Finally, 2 U.S.C. § 441a(d) specifically permits political parties, notwithstanding any other limitations on contributions or expenditures, to spend substantial sums (in 1996, approximately $12 million) in coordinated expenditures in connection with the Presidential campaigns. Thus, for example, a party can pay for its candidates' advertisements up to the limit imposed by § 441a(d). However, PECFA prohibits candidates who accept public funding from accepting any contributions from any source to defray qualified campaign expenses. 26 U.S.C. § 9012(b)(1). If the FECA rules were not carried forward into the funding statutes, and party expenditures for advertisements could be "qualified campaign expenses" if they are sufficiently directed by the candidate, expenditures which are specifically sanctioned by FECA would appear to be prohibited by PECFA -- a result that seems irrational.

A 1993 FEC publication (The Presidential Public Funding Program) also suggests that the same rules apply under FECA and the public funding acts. This publication notes that even though the major party nominees accept public funding and must limit their campaign spending, "[t]his does not mean . . . that private funds have been totally excluded from the general election process. In fact, the statute specifically permits some types of private spending." It then offers as examples a variety of expenditures permitted by FECA, including coordinated party expenditures under 2 U.S.C. § 441a(d), independent expenditures by third parties, certain expenditures by corporations and labor unions, party spending of soft money that is not intended to influence a particular federal election, party purchases of "general" advertisements that benefit both federal and non-federal candidates and must be allocated between hard and soft money and "other types of private spending . . . specifically sanctioned by the statute [FECA]." This booklet, which we are told was approved by the FEC Commissioners, suggests that private spending in support of presidential candidates, although "criticized" by "[s]ome observers," is "legal" under the funding acts if it is authorized by FECA.[13]

ATTY NAME

[13] [redacted] argues that the FEC booklet's acknowledgement that the presidential campaign funding laws contemplate some types of private spending in addition to public funding in no way constitutes a "sanctioning" of media issue ads such as those in question. It is unquestionably true that the booklet does not address issue ads directly, perhaps in part because the booklet preceded Advisory Op. 1995-25 by two years. However, the booklet does indicate that spending is legal under the public funding acts as long as it is legal under FECA.

Ultimately, in my view this is a question of law, interpreting the PPMPAA, rather than one of fact. For the purposes of this discussion, everyone has assumed virtual total control of the media campaign by the candidates; what is uncertain is whether that degree of control means that the expenses were incurred by the candidates in connection with their campaigns, regardless of the content of the advertisements. As in the FECA context, if the relevant test is content, there is no basis for a criminal investigation at this time. If, on the other hand, you determine that the content of the advertisements is not relevant under PPMPAA, then a factual investigation would be necessary -- either by the Task Force or by an independent counsel -- to determine whether, in fact, the law was violated.[14]

TINY NAME

[redacted] however, believes that this is an issue of fact rather than of law. He notes, and all agree, that a candidate's spending on his own campaign advertisements is a qualified campaign expense, without regard to whether the ads had an electioneering message. Thus, he contends that the key issue is one of fact: was the spending in fact the party's payment for its issue ads, or was the spending in fact payment by the candidate for the candidate's campaign ads? However one characterizes it, the issue presented for you is whether these advertisements would be considered, under the applicable laws, as advertisements of the party or advertisements of the candidate.

Broader Issues

From a public policy point of view, the Common Cause allegations may be the most serious of those raised in connection with the investigation of campaign finance. Indeed, some argue that most of the abuses which the Task Force is investigating arose out of efforts to raise funds for the media campaigns.

ATTNY NAME

[redacted] strongly believes that the Department's decision regarding investigation of the Common Cause allegations should not be limited, at this time, to an analysis only of the public funding statutes; in his view, this would be "not seeing the forest for the trees."

ATTNY NAME

Among the facts which may warrant further investigation, [redacted] cites the apparent payment by the DNC for candidate/campaign committee polling services. He argues that we should distinguish clearly between spending for ads and spending for polling services, because even if, as others argue, the proper treatment of advertisements depends on their content, thi

[14] The implications of such a decision under the Independent Counsel Act are beyond the scope of this memorandum.

would not apply to polling expenses. Moreover, he notes that there is evidence that the payment of polling expenses by the DNC was part of both the primary and general campaign spending about which Common Cause complains. Thus, reliance on the content of the campaign ads in question (none of which has been obtained or viewed in the course of the Task Force investigation) to foreclose an investigation would be misplaced.[15]

Fundamentally, [redacted] argues that facts gleaned by the Task Force in the course of its investigation of other matters point to potentially egregious conduct which may involve violations of criminal statutes in addition to the public funding laws. He points in particular to the allegations that Ickes extensively controlled the payment of media consultant and polling expenses, and that these expenses do not appear to have been related to any particular contract provision or obligation. Thus, he urges, no one knows at this point what entity was paying whose bills. As a result, there is potential fraud against the United States in connection with the government's payments to the candidates for both the primary and the general elections. Criminal provisions regarding false claims, false statements, mail and wire fraud, and conspiracy to defraud the United States may have been violated, regardless of the technicalities of the campaign financing statutes. In [redacted] opinion, even in the absence of a particular allegation of a particular violation by a particular person on a particular day, it would be a disservice to the Department and the public to fail to investigate the Common Cause allegations.

---

[15] As [redacted] notes, this memorandum is merely a synthesis of the memoranda that others have prepared concerning the media campaigns. I have therefore not considered in this memorandum anything relating to polling expenses. No one has yet set forth a coherent set of allegations concerning polling expenses; they were merely mentioned in passing in one of [redacted] later memoranda. The Public Integrity Section reports that FEC staff has informally reported that it encourages candidates to have polling expenses paid for by party committees rather than by candidate committees, so that these expenses will not be reimbursed from the public funds.

I do not mean any criticism of anyone by this observation, but simply find it impossible to deal with polling in the context of this memo. I recommend that if someone believes a criminal investigation of polling expenses is appropriate, they prepare a memorandum specifying what the potential crime is and what basis we have for believing that it was committed; that issue may then be considered separately.

Similarly, the FBI argues that "some of the most fundamental questions relating to the 1995-96 presidential campaign remain outstanding":

- How were the campaign funds raised?
- How were they spent?
- How were they allocated and reported for FECA purposes?
- Who made the fundraising and spending decisions?

The FBI argues that we must investigate these issues.

The Public Integrity Section argues, to the contrary, that it is not the proper role of the Department of Justice to speculate upon what possible violations might exist, and then investigate to search for such violations. It is just as possible that there might be violations in the campaigns of other candidates, but we do not investigate in the absence of predication. Especially in a corruption case, it is important for the Department to investigate only when there is a valid basis, consistent with the principles that the Department has historically applied, for doing so. We should not deviate from our normal practice in a high profile case.

ATTY NAME

Moreover, [redacted] suggestions that there might be violations of the mail fraud or false claims statutes, or other statutes, appear to depend on the premise that these expenditures violated the campaign finance laws in some sense. If they were legal under the campaign finance laws, it is difficult to understand how they violated other laws. In other words, in the absence of a basis to investigate whether there were campaign finance violations, there does not appear to be any basis to investigate whether there were other violations -- or at least no theory has been set forth to justify such an investigation. Similarly, while the FBI identifies factual issues that have not been investigated, it is not a crime to raise or spend campaign funds. It is not the business of the Department of Justice to investigate "fundamental questions" relating to presidential campaigns, but to investigate possible crimes.

Those who believe that there should be no criminal investigation at this time to determine if the two funding statutes have been violated make an additional argument. If the FEC affirmatively allows an expenditure under the FECA, it would be abusive and unprecedented to prosecute someone for making such an expenditure because it may have violated the funding statutes that are also administered by the FEC, especially where there is no notice, fair or otherwise, that the expenditure violated the law. While no affirmative permission for the media campaign was given by the FEC, the fact is that if the ads in question are

generic, then Advisory Opinion 1995-25 authorizes some payment of these expenses to be made from party soft money, and it does so without regard to the PPMPAA or the PECFA.

The FBI also argues that if the Common Cause allegations are not investigated criminally they never will be. Referral to the FEC presents two problems: first, explaining why we have waited 16 months to refer the matter, and second, the FEC cannot handle the referral. It has only two investigators and 31 lawyers on staff; its requests for additional resources have been rebuffed by Congress; and indeed it has requested resources from the Department which the FBI has declined to provide and which we have not yet provided. In contrast, the Department has a large and active Campaign Finance Task Force that is prepared to investigate these matters.

On the other hand, the Public Integrity Section notes that the FEC is the agency charged by Congress with the primary role in interpreting the election laws -- PPMPAA and PECFA as well as FECA. 2 U.S.C. § 437c(b)(1). There is no question that it lacks the resources of the Task Force and is often hamstrung by political division. However, in the absence of a specific and credible allegation of criminal conduct, there is no basis to conduct a criminal investigation, and it would be an abuse of our authority to conduct one simply because we disagree with the actions of Congress in setting up an inadequate election watchdog.

Finally, it bears emphasis that declining to go forward in investigating the Common Cause allegations does not in any way limit the existing investigation. It has already been decided, and reiterated, that the Task Force is free to pursue whatever leads it deems necessary to fully investigate the many matters it now has under investigation. There are no constraints on its full pursuit of those matters.

U. S. Department of Justice

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July 1, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: Charles G. La Bella
Supervising Attorney
Campaign Financing Task Force

SUBJECT: Diamond Walnut

The Senate referred three Teamster-related questions to the Department. Two are being handled by the Task Force:

1. Whether Harold Ickes or any other Administration personnel violated 18 U.S.C. § 607 [sic 600], 5 U.S.C. § 7323 or any other provision of law in connection with the Diamond Walnut matter, the Pony Express matter, the cross-border trucking issue and other measures taken by the White House on behalf of the Teamsters.

2. Whether Administration officials violated federal election laws by using the prerogatives of the White House to entice labor union officials to make political contributions and to participate in Democratic campaigns.

We view the two questions as intertwined, with the second subsumed within the first. In dealing with the first, we have focused on the Diamond Walnut matter almost exclusively. This is so because it involves discreet, and seemingly unusual, action by the Administration and was the main focus of the Senate inquiry into this area.

The information we have to date is as follows:

The Teamsters in 1992, for the first time in years, had endorsed the Democratic candidate for president. This endorsement came after a meeting arranged by Ickes with Teamster President Carey and then-candidate Bill Clinton. Gaining this endorsement was a significant development for candidate Bill Clinton.

EXHIBIT
23

The Teamsters gave substantial sums of money to the DNC in 1992, and continued to give to the Democrats up to and through the 1996 election. However, largely because President Clinton had supported NAFTA, the Teamsters declined to endorse the president in 1996. The money did not dry up, but the endorsement (and everything that goes with it, e.g. getting out the vote, encouraging volunteerism, etc.) was in jeopardy.

We have an undated memo entitled "Teamster Notes". The relevant portions, with the underlining by Ickes, are set out below:

> Carey is up for re-election in 1996.
>
> ***
>
> The Teamsters played an enormous role in the '92 campaign.
>
> ***
>
> When they are plugged in and energized they can be a huge asset. Over the past two years their enthusiasm has died down. They have been almost invisible at the DNC and other party committees for the past two years. Without proclamations on striker replacement, the Team Act ..., Davis-Bacon and the Service Contract Act and our NLRB appointments (very important to Cary) we are in a good position to rekindle the Teamster leadership's enthusiasm for the Administration, but they have some parochial issues that we need to work on.
>
> ***
>
> It is in our best interest to develop a better relationship with Carey We won't always agree on issues and he's a tough, street fighter. But he is well intentioned, hell-bent on reforming the union and trying to root-out the "bad guys." If he doesn't succeed in his effort, the union is likely to fall back into the hands of the "old Teamsters." This would be a huge setback for the entire labor movement. Carey is not a schmoozer -- he wants results on issues he cares about. The Diamond Walnut strike and the organizing effort at Pony Express are two of Carey's biggest problems. We should assist in any way possible. Previous Teamster presidents have met with the POTUS. A meeting would be a good idea and could help Carey.

A March 27, 1995, memorandum from Bill Hamilton, Teamster Political Director, to various persons within the Union, reports that Hamilton and Carey met with several key White House and Administration people, including Ickes. The memo provides that: "Ickes said he met face-to-face with USTR Mickey Kantor last week and that Kantor agreed to use his discretionary authority to try to convince the CEO of that company that they should settle the dispute.

The following month, at a Diamond Walnut Board of Directors meeting, it was reported that the company president, William Cuff, had received a call from Kantor, urging the company to resolve its labor dispute because it was interfering with international trade issues. In an October 27th interview with Time magazine, Ickes admitted that he had called Kantor and told

him "This is something bothering the Teamsters". Kantor told the magazine that he had gotten involved because of his longstanding interest in farm workers.

When interviewed by FBI agents, Cuff said that he has never before or since received a call from such a high level Administration official. (The strike, which began in the fall of 1991 is still unresolved.) According to Cuff, Kantor claimed that foreign leaders and negotiators were raising the Diamond Walnut situation whenever the United States referred to human rights abuses overseas. The essence of Kantor's message to Cuff was that the strike was hindering his international trade negotiations and it would be good if it was resolved.

We also have an undated (we believe 1996 or 1997) memo from Hamilton to Carey advising him that they have a meeting with Agriculture Secretary Dan Glickman which was set up for the Teamsters by the White House after Carey and Hamilton had met with Ickes and others. Hamilton intended to ask the Agriculture Secretary to cut off USDA support for Diamond Walnut, both in the purchase of walnuts for school lunch programs and USDA support to help sell California walnuts abroad.

Finally, Senator Ted Kennedy called CEO Cuff to discuss the strike, although Cuff does not remember the details of that conversation. At this point, we do not know whether the Senator called in response to a request from Ickes or any other member of the Administration. We plan to interview Senator Kennedy on this matter.

Ickes was asked by the Senate Committee what the Administration had done regarding the Diamond Walnut strike. He answered: "Nothing that I know of." This statement has led us to consider, in addition to the questions referred by the Senate, whether a perjury charge might lie against Ickes.

At this point, the potential constellation of violations include 18 U.S.C. §§ 600, 601, 1341, 371, and 1505. The essence of the criminal charge will be that in return for intervention in the Diamond Walnut strike, the Teamsters would financially support the DNC and the re-election effort. In addition, there is the question of perjury.

Copy 1 of 8
3/31/2000

"LA BELLA MEMO"
July 16, 1998

Redacted to delete information the disclosure of which could adversely affect
a pending criminal investigation or prosecution
or would violate Rule 6(e) of the Federal Rules of Criminal Procedure
Redactions completed on March 24, 2000.



JANET Reno

Copy 5 of 7

INTERIM REPORT

FOR

JANET RENO
ATTORNEY GENERAL

AND

LOUIS J. FREEH
DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

PREPARED BY:

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CAMPCON Task Force

July 16, 1998

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DOJ-FLB-00033

INTERIM REPORT

I. Introduction

This report is an effort to piece together the disparate investigations involving allegations of campaign finance abuse being handled by the Task Force, to offer a framework in which to consider the evidence gleaned from these investigations, and to suggest a role to be played by the Department so that the abuses detailed below do not repeat themselves in the next election cycle. Several of the investigations have culminated in criminal prosecutions; others are still active with charges anticipated, and some will be closed. However, there runs through each investigation certain common themes: the desperate need to raise enormous sums of money to finance a media campaign designed to bring the Democratic party back from the brink after the devastating Congressional losses during the 1994 election cycle, and the calculated use of access to the White House and high level officials -- including the President and First Lady -- by the White House, DNC and Clinton/Gore '96, as leverage to extract contributions from individuals who were themselves using access as a means to enhance their business opportunities.

The temptations served up by White House operatives to political fundraisers and contributors cannot be underestimated. The pressure to produce contributions created an environment ripe for abuse. Dick Morris, hired by Clinton/Gore '96 in June 1995 to salvage the President's political future, determined almost immediately that the situation demanded a media blitz which could cost as much as $1 million per week. Harold Ickes, Deputy Chief of Staff to the President, assumed the role of Chief Whip -- relentlessly exhorting party functionaries and fundraisers to bring in the money. Ickes also functioned as the de facto head of the DNC and Clinton/Gore '96, making all key decisions from his post at the White House.

One of the innovations devised to generate the sums needed was a system of escalating perks for donors and fundraisers. Most notably, fundraisers who solicited $100,000 or donors who contributed $50,000, were denominated Managing Trustees of the Democratic party. This entitled them -- and their designated guests -- to a plethora of benefits, the most munificent of which involved opportunities to mingle with the President, Vice-President and First Lady at various party functions. Other important perks included special seating at DNC functions, invitations to White House coffees, opportunities to travel on Air Force One and Two, overnight stays at the White House, complimentary tickets to DNC events, participation in official U.S. sponsored trade missions, membership in DNC committees and related entities (including the Trustee Program, the Democratic Business Leadership Forum and the DNC Finance Board of Directors), as well as invitations to meetings and other events where senior White House personnel were in attendance.

The fundraising was also geared, in a more sophisticated manner than it had been in the past, toward the special interests of various ethnic groups. Asians, a group which believed itself under represented in terms of political influence, were courted much more actively than ever before. Our investigations suggest that key operatives at the White House understood and exploited the fact that, among Asian groups, a "photo op" with the President, Vice President or First Lady was a commodity which could be used to leverage business opportunities overseas. In a market system run amok, where the demand for such photos was insatiable, the cost of a photo opportunity sometimes ran as high as $20,000 or $30,000.

In addition, the opportunity to be part of a small group to have coffee with the President became a major fund raising technique. The price for coffee with the President ranged from

$25,000 to $50,000 per person. The chart, annexed at Tab 1, demonstrates how the frequency of these coffees increased during the time when funds were desperately needed to fund the media campaign. Between 1992 and 1994 there were no similar coffees held at the White House. However, between January 1995 and November 1996, the number of coffees mushroomed to as many as 14 per month. According to the statistics compiled by the Task Force, over 42% of the individuals who attended the coffees contributed $5.05 million hard and $9.81 million in soft money during the 1996 election cycle. This figure does not include donations made by corporations associated with the individual attendees. (Tab 2)

The rush to exchange donations for access provided the perfect environment in which opportunists like Charlie Trie, John Huang, Maria Hsia and others were able to flourish. Given the conditions fixed by the White House, exploitation of the campaign funding process was inevitable.

At the outset, there were discrete responsibilities assigned to the DNC, Clinton/Gore '96 and the White House. As the pressures to finance the media campaign grew, however, and especially as it became clear that the mid-term elections would be disastrous for the Democrats, the lines began to blur and, ultimately, to disappear altogether. All pretense of maintaining discrete areas of responsibility and control were shattered as the need for campaign funds -- driven by the media campaign -- increased. Such blurring of lines is troubling because it triggered an intermingling of funds, resources and personnel that resulted in the circumvention and violation of campaign contribution regulations.

The White House, as the player with the greatest clout, took on the dominant role -- in the person of Harold Ickes -- in decisions concerning strategy, fundraising and the expenditure of

all funds. Ickes assumed the role of Svengali, assuming power -- with the imprimatur of the President -- to authorize DNC and Clinton/Gore expenditures, award media contracts and direct every aspect of the DNC and Clinton/Gore activities related to the reelection effort. For example, the media bills were directed to Ickes who decided when they were to be paid and whether payment for a particular expense came from the coffers of the DNC, Clinton/Gore '96 or the state committees. As is evident from a series of memos to and from Ickes, a small portion of which are detailed below and at Tab 3, Ickes acted as the CEO of the effort to reelect the President. Ickes met with both DNC and Clinton/Gore chiefs almost daily to cement his control of the purse strings of the DNC and Clinton/Gore '96, as well as his direction of policy and strategy for these entities. DNC and Clinton/Gore employees reported to Ickes regularly concerning fundraising efforts, budgets, events and strategy. Although Fowler and Knight were the titular heads of these organizations, it was Ickes who pulled all the key strings. Fowler and Knight fulfilled more ceremonial than substantive roles -- providing the facade behind which Ickes was free to operate.

Dick Morris too straddled the DNC and Clinton/Gore organizations. Morris was paid by both and believed he worked for both.[1] This was not surprising given that the White House itself made no distinction between the DNC and Clinton/Gore. As detailed below, the blurring of the lines extended to the highest levels of the White House. The Vice President used a Clinton/Gore (hard money) credit card when he was ostensibly soliciting "soft money" on behalf of the DNC.

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[1] During the fall of 1994, Morris and the President held weekly strategy meetings. Between August 1994 and May 1995, Morris was paid as a "subcontractor" for the polling firm of Penn and Schoen, which was in turn paid, at least in part, by the DNC. From June 1, 1995 through August 31, 1996, Morris was paid by Clinton/Gore '96. During that same period, he was also paid by the DNC as a member of the November 5 Group, a corporation formed by Squier, Knapp, Penn, Schoen, and Morris.

Thus, Clinton/Gore '96 funded these calls which, according to the Vice President, had nothing to do with the reelection effort but rather were to fund so-called generic "issue ads." In addition, the Vice President received of a series of Ickes memoranda and attended weekly meetings concerning, among other things, the interplay between these so-called "soft money" solicitations and the DNC's hard money accounts. (Curiously, though renowned as a policy wonk, the Vice President claims he did not read the memos and cannot recall the meetings.)

Another simple, but by no means isolated example, of this type of conduct is the involvement of Clinton/Gore '96 employees in raising funds nationwide to fund the so-called generic "issue ads." For example, Laura Hartigan, while employed as Finance Director at Clinton/Gore '96, took charge of a "DNC project" to raise funds for the media campaign. In a memo to Harold Ickes, entitled Clinton/Gore '96 Commitments - Media Fund, Hartigan provided a state by state analysis of the dollars raised and promised by key contributors and solicitors to the DNC. (Tab 4) Like the use of the Clinton/Gore credit card to solicit soft money contributions, the use of a paid Clinton/Gore '96 employee to execute a DNC effort in connection with generic "issue ads" is telling. While some chalk these efforts up to "super coordination," others view them as circumstantial evidence of the true nature of fundraising efforts associated with the media fund.

The intentional conduct and the "willful ignorance" uncovered by our investigations, when combined with the line blurring, resulted in a situation where abuse was rampant, and indeed the norm. At some point the campaign was so corrupted by bloated fundraising and questionable "contributions" that the system became a caricature of itself. It is hoped that this report will place in context the abuses uncovered in our investigation: a system designed to raise money by

whatever means, and from whomever would give it, without meaningful attention to the lawfulness of the contributions or the manner in which the money was spent.

II. Statutory Framework

The Independent Counsel Act, 28 U.S.C. § 591 et seq., (hereinafter "ICA" or "the Act") is at the edge of each of our investigations. The Act can be triggered in one of two ways. First, the mandatory clause provides that the Attorney General shall conduct a preliminary investigation where there is information sufficient to investigate whether any "covered person" may have violated any federal criminal law. 28 U.S.C. § 591(a). Second, the Attorney General may conduct a preliminary investigation under the following "discretionary" provision:

> When the Attorney General determines that an investigation or prosecution of a [non-covered] person by the Department of Justice may result in a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person . . . if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

28 U.S.C. § 591 (c)(1) (emphasis added).

A. Investigative Approach

1. Critical Mass vs. Stovepipe

Since the inception of the Task Force, we have been faced with numerous investigations (30 - 40 at any given time) which present separate vignettes of potential criminal conduct. While there are several key players and themes that run through the Chung, Hsia, Trie, Jimenez, Glicken, and Huang matters, to name a few, each is an investigation unto itself with a principal target. A separate investigative team (prosecutors and agents) is charged with responsibility for each investigation. It is true that each team is acutely aware of the ICA.

However, while a particular investigative team may be aware of some of the activities of the overlapping individuals developed by other investigations, by and large the Task Force has, from its inception, had a stovepipe approach to investigative matters.

On the one hand, it has been said on more than one occasion that the sheer volume of allegations relating to potential campaign finance violations requires a triggering of the Act and the appointment of an Independent Counsel. That is, given the amount of smoke surrounding these allegations, senior White House officials and key DNC and Clinton/Gore officials, there must be a fire somewhere and the Act should be triggered. Granted that this provides an expedient way to unload these matters onto the shoulders of an Independent Counsel, it is not sufficient to discharge the Department's duties and responsibilities.

On the other hand, it cannot be that we are doomed to stovepipe each and every allegation of wrongdoing and view it in isolation. As prosecutors and investigators we are trained to look within the four corners of an investigation in order to make judgments concerning the commencement or conduct of a criminal matter. However, the campaign finance allegations do not present the typical criminal matter. Rather, they present the earmarks of a loose enterprise employing different actors at different levels who share a common goal: bring in the money.

Everyone who has worked on these investigations has noted that the overlaps and crossovers deserve investigation. And yet, the Task Force has never conducted an inquiry or investigation of the entire campaign finance landscape in order to determine if there exists specific information from a credible source that a covered person (or someone within the discretionary clause) may have violated a federal criminal law. Every time this was suggested (e.g., Core Group investigation, Common Cause allegations) it has been rejected on the theory that such an

inquiry can only be conducted pursuant to a preliminary investigation under section 591 of the Act. However, we have been told that we can only commence a preliminary investigation if there exists specific and credible evidence that a potential criminal violation has occurred. That is, you cannot investigate in order to determine if there is information concerning a "covered person," or one who falls within the discretionary provision, sufficient to constitute grounds to investigate. Rather, it seems that this information must just appear.

As a result of this Catch-22 approach, there has been a critical component missing from our investigative strategy. This report will attempt to bring together the bits and pieces of information and evidence that have developed despite the absence of the type of landscape investigative approach outlined above. When viewed in context, various innocent-appearing actions and events develop into a pattern running through the separate investigations. The conduct of certain figures common to several individual investigations, while not sufficiently sinister in any single investigation, takes on a different gloss when combined with the same actors' conduct in several investigations. This is especially true with respect to the conduct of senior White House officials and key DNC and Clinton/Gore officials. These individuals make brief, albeit key, appearances in the individual investigations. While their participation in a single investigation generally falls short of a knowing participation in potential criminal conduct, the sum of their appearances results in a pattern of conduct worthy of investigation.

2. In Search of a Uniform Threshold Under the ICA

Another difficulty has been that the Task Force has been existing in an environment in which there are two different rules of engagement depending on the nature of the investigation. On the one hand, we are bound and determined to investigate thoroughly every lead and

allegation concerning campaign financing. We have often been told to follow all leads and leave no stone unturned. This is as it should be. The Task Force has opened criminal investigations, issued subpoenas, and presented evidence to a Grand Jury, based upon a determination that there is an allegation which, if true, may present a violation of federal law. The low quantum of information necessary to trigger a Task Force investigation has remained constant from the outset. The Task Force's threshold has never been articulated in terms of specific and credible information -- much less evidence -- that a crime has been committed in order to commence an investigation. As a result, more than one criminal investigation has been opened by the Task Force based upon a newspaper article that strings together "allegations" and "facts" suggesting a possible federal violation.[2]

On the other hand, a higher threshold than that employed by the Task Force has been imposed when approaching allegations that may implicate the ICA and White House personnel. The ICA provides that a preliminary inquiry shall be conducted whenever the Attorney General receives information (not evidence) "sufficient to constitute grounds to investigate whether any person . . . may have violated any Federal criminal law . . ." 28 U.S.C. § 591(a) (emphasis added). The only factors to be considered under the ICA in determining whether grounds to

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[2] It has also been the policy of the Task Force to continue to investigate allegations and to decline prosecution and/or further investigation only after each and every allegation has been fully investigated. This is true despite the fact that some allegations approached what a reasonable investigator might characterize as frivolous. For example, the Task Force continued to investigate the overnight stays at the Lincoln bedroom and attendance at White House coffees long after any expectation of a potential violation of law had disappeared. The rationale was that no stone would be left unturned. Thus, even if not unlawful in and of itself, an overnight stay or attendance at a coffee by a contributor might provide context to some of the other activities under investigation or constitute an overt act in an overall criminal conspiracy. The Department has also confirmed that no campaign finance investigation will be closed without conferring with the Director of the FBI.

investigate exist are the specificity of the information received and the credibility of the source of the information. This provision seems simple enough and indeed consistent with the quantum of information necessary to commence a typical Task Force investigation. And yet, in applying § 591(d)(1) of the Act, a good deal has been read into the legislated threshold. The threshold has been raised from consideration of the specificity of the information and credibility of the source, to a determination that there is specific and credible evidence of a federal violation. Evidence suggests something which furnishes proof; information need not be as directed. While the distinction may appear to be subtle, it is significant. [3]

The mechanics of how we address campaign finance matters is also flawed and has contributed to the confusion. If an allegation suggesting a potential federal violation was made, an investigation was commenced and the Task Force pursued it. And yet, whenever the ICA was arguably implicated, the Public Integrity Section was called in to consider if a preliminary investigation should be commenced, to conduct and direct the investigation, and, thereafter, to recommend if a further investigation was warranted. While these actions were generally taken in loose coordination with the Task Force, a peculiar investigative phenomenon resulted. The

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[3] We received a briefing for the Attorney General prepared by the Public Integrity Section in connection with the Attorney's General's July 15th testimony. Under the heading "Why AG Has Not Recommended Appointment of IC" is the following statement:

> I. The Independent Counsel Act
> • The Statutory standard under the Independent Counsel Act requires:
> (1) Specific evidence from a credible source that a crime may have been committed, **and** either ...

In the pages that follow concerning specific topics like "Allegations Relating to Chinese Government Influence," we see the constant refrain: "There is no evidence ..." However, the statute refers to information and not to evidence. The reference to "specific and credible evidence" is just wrong. (Tab 5) (emphasis added)

Department would not investigate covered White House personnel nor open a preliminary inquiry unless there was a critical mass of specific and credible evidence of a federal violation. (It is not accidental that everyone generally refers to the standard as requiring specific and credible evidence rather than information. Indeed, the phrase "specific and credible evidence" has become so much a part of our lexicon that it has even found its way into high-level briefings on the Act to explain why the Department has done what it has done-- see fn 3.) And yet, the Task Force has commenced criminal investigations of non-covered persons based only on a wisp of information. The failure to distinguish between information and evidence as we attempt to apply the Act, as well as the employment of two distinct thresholds in connection with the commencement of criminal investigations, impacts on the conclusions reached in these matters.[4]

The Task Force's threshold concerning the commencement and conduct of criminal investigations has been publicly endorsed by the Department in the numerous correspondence sent to Congress as well as in the testimony of the Attorney General before the Senate. As such, this threshold constitutes a written or other established policy of the Department within the meaning of the ICA. See 28 U.S.C. § 592(c)(1). The implications that flow from such an established policy in the area of campaign financing are significant.

The standard for triggering a preliminary investigation under the ICA should be identical to the threshold employed when deciding to open a Task Force investigation. If the Task Force

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[4] Even among the ICA investigations conducted to date, there appears to be a very different approach taken when the allegation involves the President, Vice President or Senior White House Officials. The Babbitt and Herman matters illustrate the very low quantum of information deemed necessary to trigger the ICA and the need to conduct further investigation. And yet, although matters involving covered persons and White House personnel outlined in this report present specific information from credible sources well beyond that present in these other investigations, the Act has not been called into play.

issues subpoenas, elicits (and at times compels) sworn testimony, and employs the other investigative techniques available during a criminal investigation, this should satisfy the investigative threshold in the ICA as well. This assures that covered persons under the ICA are treated neither more harshly nor more leniently than others in less powerful positions. This was certainly the standard envisioned by Congress when it determined that "whenever the Attorney General received information sufficient to constitute grounds to investigate" a covered person or one who falls within the discretionary provision, a preliminary investigation should be conducted. See Legislative History of the ICA, infra. The reference to "the specificity of the information and the credibility of the source for the information" was intended to limit the Attorney General in determining whether sufficient grounds to investigate exist by eliminating other factors the Attorney General could rely upon to avoid commencing a preliminary investigation. (Tab 6) However, these factors are now being advanced as somehow creating a higher threshold than that which the Attorney General employs in deciding to commence a criminal investigation which does not implicate the ICA.

Likewise, the standard for the conduct of a campaign financing investigation -- including a determination that further investigation is warranted -- should be consistent, regardless of whether the ICA is implicated. Thus, following a preliminary investigation under the Act, the decision as to whether further investigation is warranted, should parallel the standard employed by the Task Force in conducting, and closing, investigations. Under the Act itself, a decision concerning the need for further investigation is governed by the Department's written or established policy. In the area of campaign financing investigations, that policy embraces the "leave no stone unturned" approach employed by the Task Force. See Footnote 2, supra

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The question thus becomes whether the Task Force standard or the ICA standard -- as currently applied to campaign financing investigations involving White House personnel -- should be the benchmark. While some have argued that the Task Force's "pursue every lead and leave no stone unturned" approach presents a somewhat relaxed predication requirement,[5] the Department has articulated several compelling reasons why this approach is the appropriate policy in connection with campaign finance investigations: the shortened statute of limitations for election violations; the rash of potential illegal activities presented during the 1996 election cycle and the resulting political crisis; the apparent injection of foreign money into our political system; the widespread circumvention of existing election law restrictions; the exposure of gaps in the law which permitted wholesale circumvention of federal election laws; and the possible participation -- or willful blindness -- of public officials, and high level party officials in connection with these activities. Perhaps most importantly, the public cynicism and apathy engendered by reporting (much accurate, some not) of the campaign abuses, compels an exceptionally thorough investigation, so that there is not even the appearance, let alone the reality, that leads have not been pursued.

We were not participants in the application of the Act by the Department prior to September 1997. However, as a prosecutor and investigator who have observed its application

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[5] The standard for the commencement of a criminal investigation, as set forth in the U.S. Attorney's Manual, is consistent with the Task Force's approach and the Department's stated policy. The Manual provides:

> The grand jury may be utilized by the U.S. Attorney to investigate alleged or suspected violations of federal law.

United States Attorney's Manual § 9-2.010

over the past ten months, it seems evident that, for whatever reason, there has been unnecessary complication in applying the standards set forth in the ICA concerning the commencement and conduct of investigations. This is especially so where the President and White House personnel are involved. Indeed, the continuing and often heated debate involving the so-called Common Cause allegations is an apt example. If these allegations involved anyone other than the President, Vice President, senior White House, or DNC and Clinton/Gore '96 officials, an appropriate investigation would have commenced months ago without hesitation. However, simply because the subjects of the investigation are covered persons, a heated debated has raged within the Department as to whether to investigate at all. The allegations remain unaddressed.

When you juxtapose the Common Cause allegations against the Loral allegations, for example, there is no acceptable explanation as to why one is the subject of a full criminal inquiry and the other is, and remains, in an investigative limbo. The fact is that Loral has been, and remains, a front page story whereas the Common Cause allegations never grabbed the public attention. The tone, tenor, and tempo of the debates on Common Cause and Loral seemed to flow from this. The debates appear to have been result orientated from the outset. In each case the desired result was to keep the matter out of the reach of the ICA. In Common Cause (outlined below at pages 36-41), this was accomplished by never reaching the issue. The contortions that the Department has gone through to avoid investigating these allegations are apparent. For example, it was suggested that these allegations be sent to the understaffed and investigatively impotent Federal Election Commission ("FEC") for an initial review to determine if the FEC believes that potential criminal charges exist. In Loral (outlined below at pages 75-79) avoidance of an ICA was accomplished by constructing an investigation which ignored the

President of the United States -- the only real target of these allegations. It is time to approach these issues head on, rather than beginning with a desired result and reasoning backwards.

While the Common Cause and Loral matters are discussed more fully below, it is important to note that these anomalies exist and the time has come to address them based upon the information received and developed by the Task Force. In the context of campaign financing allegations, the Department's established policies are, and should be, those that the Task Force has employed from its inception: whether the allegations, if true, present a potential violation of federal law. This is also the appropriate standard to be applied under the ICA in the context of potential campaign finance violations.

B. Legislative History of the ICA

The above statutory framework analysis is based upon a plain and fair reading of the ICA. However, a review of the legislative history of the 1978, 1983, 1987 and 1994 amendments to the ICA, and its predecessor, support this analysis and yield two factors which are particularly germane to our discussion.

First, in connection with the commencement and conduct of criminal investigations, Congress intended to achieve an equilibrium between those covered by the Act and those who are not. If there is sufficient information for a criminal investigation to be commenced in connection with John Q. Public, this same quantum of information is sufficient to trigger an investigation under the ICA. The amendments of 1987 and 1994 make it clear that those covered by the Act are intended to be in the same position as non-covered citizens when it comes to whether an investigation is commenced and, if commenced, whether a further investigation is warranted. For this reason the Department's "established policies" were legislatively grafted onto the Act.

Second, the legislative history accompanying these amendments is riddled with comments suggesting that in the past, the Department's literal, hyper-technical, parochial, or professorial reading and application of the ICA has proved to be the catalyst for several amendments. It seems that the more the Department has resisted a common sense reading and application of the ICA, the more it has invited Congressional action. And, on more than one occasion, Congressional action has further restricted the Department's discretion in the application of the Act. For example, in discussing the 1987 amendments, the Senate report notes that in several cases the Department had declined to conduct a preliminary inquiry despite the fact that it had received:

> . . . specific information from a credible source of possible wrongdoing, because it determined that the evidence available did not establish a 'crime.' In at least 5 of these 10 cases, this decision appears to be based, in whole or in part, upon a finding that there was insufficient evidence of a subject's criminal intent and therefore, no 'crime' to investigate.
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> Thus, contrary to the statutory standard, . . . [the Department] relied on factors other than credibility and specificity to evaluate the case. Moreover, in at least half of these cases, the Department of Justice refused to conduct a preliminary investigation into the alleged misconduct, because it had determined there was, at this early stage in the process, insufficient evidence of criminal intent.

S.Rep. No. 100-123, at 7 (1987), reprinted in 1987 U.S.C.C.A.N. 2150, 2156 (hereinafter collectively referred to by year followed by "U.S.C.C.A.N.") (emphasis added).

In the same report, it was noted that "[s]ome of the most serious implementation problems identified by the Committee concern the Justice Department's procedures for handling cases under the statute." 1987 U.S.C.C.A.N. at 2158. The most serious problem chronicled by the Committee was the Department's practice of conducting "threshold inquiries" of incredible length

involving "elaborate factual and legal analysis" in order to determine if certain information was sufficient to trigger a preliminary investigation.[6] The Judiciary Committee noted:

> It is not clear why the Department of Justice has adopted this practice. Some have suggested that the Department is conducting preliminary investigations in all but name to avoid statutory reporting requirements that attach only after a 'preliminary investigation' has taken place. Since these reporting requirements are the primary means of ensuring the Attorney General's accountability for decisions not to proceed under the statute, Congress intended them to attach in all but frivolous cases.

1987 U.S.C.C.A.N. at 2158 (emphasis added). The clear mandate is that a preliminary investigation should be triggered in all but frivolous cases. As detailed below, the Task Force has uncovered a variety of non-frivolous allegations involving covered and discretionary persons under the ICA.

Finally, the Department was criticized for its interpretation and application of the Act in determining whether further investigation was warranted following a preliminary investigation. The Committee noted that the Department had substituted its own "reasonable prospect of conviction" threshold for the statute's "reasonable grounds to believe that further investigation or prosecution is warranted" threshold.[7] See 1987 U.S.C.C.A.N. at 2160. In doing so the

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[6]One could argue that this is precisely what the Department is doing now by employing two thresholds for criminal investigations: one for the commencement of campaign finance investigations not implicating the ICA, and another for the commencement of a preliminary investigation under the Act.

[7] This is much like the substitution we have adopted in connection with the Common Cause allegations. These allegations -- and the potential criminal violations -- are outlined below. Suffice it to say that the Department appears to moving towards its own threshold in determining that the Common Cause allegations do not, as a matter of law, present a potential violation of federal law without conducting any inquiry or investigation whatsoever. Instead, it is suggested that the allegations be referred to the FEC which in turn can then advise the Department if a potential criminal charge is presented.

Department ignored Congress' intent in establishing the preliminary investigation and substituted its own judgment:

> The purpose of allowing the Justice Department to conduct a preliminary investigation is to allow an opportunity for frivolous or totally groundless allegations to be weeded out. . . . On the other hand, as soon as there is any indication whatsoever that the allegations . . . involving a high-level official may be serious or have any potential chance of substantiation, a Special Prosecutor should be appointed to take over the investigation.

1978 U.S.C.C.A.N. at 4270 (emphasis added).

As a result, Congress amended the ICA: (a) to prevent the Department's "disturbing practice" of conducting "threshold inquires" to determine if a preliminary investigation is warranted; (b) to limit the Attorney General to consideration only of the specificity of the information and credibility of the source in determining whether a preliminary investigation should be triggered; (c) to impose a reporting requirement upon the Department following a preliminary investigation; and (d) to remove reference to "prosecution" in determining if a further inquiry is warranted. 1987 U.S.C.C.A.N. at 2163-64.

The ICA is far from a model piece of legislation. Because of this, some within the Department tend to resist its application, while others adopt a creative reading to provide a more sensible enforcement mechanism. People have been reading things in and out of the Act in order to avoid what is perceived as an impermissibly low threshold for triggering the Act and warranting further investigation. However well intentioned these efforts may be, it is clear that Congress intended the ICA to embrace this low threshold. The perception that the Department is skirting the Act certainly will evoke heightened Congressional scrutiny and possibly additional legislative fixes calculated to restrict further the Department's ability to navigate in these difficult waters. If

we have concerns about the ICA in its current incarnation, and we do, the Department should propose appropriate amendments. If we believe that the Act should be triggered only if there is specific and credible evidence of wrongdoing, or that the Department should be given more leeway in connection with preliminary investigations, we should advocate such amendments. The campaign finance investigations certainly provide an appropriate platform upon which to launch proposed changes to the Act. However, if we are seen as part of the problem, as we were in connection with the 1987 amendments, our views and concerns may well be lost when it comes time to draft appropriate fixes to the ICA. A legislative fix without significant input from the Department would likely result in an even more cumbersome legislative framework within which to work. For this reason also, it is incumbent upon us to engage in a fair and common sense reading and application of the ICA regardless of our feelings concerning the wisdom of the Act as currently drafted.

In the end, you may conclude that our statutory analysis is incorrect and determine that the Department has consistently applied the appropriate standard concerning the commencement and conduct of a criminal investigation under the Act. However, even under what we believe to be a higher threshold, this does not alter our conclusions in the following section of this report. That is, the information developed in the areas outlined below is sufficient to trigger a preliminary investigation. In addition, given the amount of information developed, this information is sufficient to support a determination that further investigation is warranted in each of these areas.

III. Information That We Believe Is Sufficient To Trigger A Preliminary Investigation And Support A Determination That Further Investigation Is Warranted Under the ICA

There are several individual areas which we believe present information sufficient to trigger a preliminary investigation and support a determination that further investigation is warranted under the ICA. They fall both within the mandatory and discretionary provisions of the Act. These areas are outlined below.

A. Harold Ickes

We understand that Public Integrity, in another investigation, determined that Harold Ickes is not a "covered person" and therefore does not fall within the mandatory clause of the ICA. (Tab 7) The facts we have developed in the context of this case, however, suggest that a different conclusion is now appropriate.

The Chair of Clinton/Gore '96 is a covered person under the Act as is any officer of that committee "exercising authority at the national level." 28 U.S.C. § 591(b)(6). The evidence developed by the Task Force establishes that Harold Ickes operated as the de facto Chairman of Clinton/Gore '96. In addition, Ickes functioned on a daily basis as a de facto officer of that committee exercising absolute authority at the national level. As such, it is our belief that Ickes falls within the mandatory provision of the Act.[8]

[8]Annexed at Tabs 8 and 9 respectively, are the lists of covered personnel in the Bush and Clinton Administrations. Although the President is authorized by statute to appoint and pay twenty-five persons at Level II, thus including them as covered personnel, President Clinton currently pays only six persons at that level. As is evident, the Clinton Administration, by reducing the salary structure of certain senior White House officials, has removed these individuals from the covered list. While these senior White House officials -- like Ickes -- perform largely the same function as their Bush Administration predecessors, they fall outside of the ICA by forgoing certain modest compensation. Whether this was the intent of the salary cap, or only an incidental benefit, is irrelevant. It is clear that the position occupied by Harold Ickes,

In a separate matter, Public Integrity analyzed whether Terence McAuliffe -- who served as the Finance Chair of Clinton/Gore and later as "Honorary Campaign Co-Chair" of Clinton/Gore -- was a covered person under Section 591(b)(6) of the Act. This is the same section of the ICA within which we believe Ickes falls. Public Integrity produced two memos on the subject, dated March 13, 1996 and September 30, 1997, which are annexed at Tabs 10 and 11 respectively. In analyzing McAuliffe's status under § 591(b)(6) of the Act, Public Integrity concluded that the Act "establishes a two-part test, relying on title and function, for determining whether an officer other than the chairman and treasurer is a covered person." (Tab 10 at p. 2) Since neither McAuliffe's title (Finance Chair and Honorary Campaign Co-Chair) nor function (glorified fundraiser) satisfied the elements of § 591(b)(6) of the Act, Public Integrity concluded that McAuliffe was not a covered person. This type of analysis, looking at the reality of the position rather than its trappings, leads to a very different conclusion when applied to Ickes' role during the 1996 campaign.[9]

Unlike McAuliffe, Ickes had no official title at Clinton/Gore '96. However, it is clear that Ickes functioned as the de facto Chairman of Clinton/Gore '96 as well as Chief Executive Officer of that committee exercising authority at the national level. We believe that Ickes' de facto title, which follows from his de facto function, establishes his place as a covered person under the ICA.

Deputy Chief of Staff to the President, has traditionally been a covered position for purposes of the ICA. See Tab 8 at Page 111 (Sununu, Duberstein and Baker).

[9]The support for this analysis is predicated upon a November 19, 1986 memorandum from William Weld, Assistant Attorney General, Criminal Division, to Arnold I. Burns, Acting Attorney, which is referenced at Tab 10, Page 2, Note 1.

Ickes' prominence in this regard dates back to September 1994 when he began to send memos to the President regarding the need to raise millions in connection with the media campaign the White House anticipated waging over the next few years:

> The purpose of the breakfast would be for you to express your appreciation for all they (Vernon Jordon, Bernard Schwartz and Jay Rockefeller) have done to support the Administration, to impress them with the need to raise $3,000,000 within the next two weeks for generic media for the DNC and to ask them if they, in turn, would undertake to raise that amount of money.

See Tab 12 (emphasis in original).

Ickes' efforts in this regard were relentless. In January 1995, he wrote to President Clinton that "[w]e should meet at your earliest convenience, perhaps including Chairman Dodd and Chairman Fowler and Terry McAuliffe, to discuss when and how to begin the fundraising effort for the Committee to Re-elect as well as the DNC." (Tab 13) Less than one month later, at the same time the White House coffees began as a fundraising tool (inspired by an Ickes memo to POTUS),[10] the regular Wednesday night meetings at the White House began. There were separate money and issue meetings held on Wednesday nights all geared to the fundraising and strategic efforts to be employed by the DNC and reelection committees. While the attendees were generally different at each meeting, Ickes regularly attended both the money and issue meetings.

Ickes also memorialized his position with regard to the DNC in an April 17, 1996, memo to Fowler in which he, in effect, confirmed himself to be the Chief Executive Officer of the DNC:

> [A]ll matters dealing with allocation and expenditure of monies involving the Democratic National Committee ("DNC") including, without limitation, the DNC's operating budget, media budget, coordinated campaign budget and any other budget or expenditure, and including expenditures and arrangements in

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[10] With regard to the coffees, it was Ickes who determined in January 1995 that the DNC would pay for the coffees. (Tab 14)

> connection with state splits, directed donations and other arrangements whereby monies from fundraising or other events are to be transferred to or otherwise allocated to state parties or other political entities and including any proposed transfer of budgetary items from DNC related budgets to the Democratic National Convention budget, are subject to the prior approval of the White House.

(Tab 15) (emphasis in original).

Morris has stated that this memo simply memorialized what had been the accepted practice from the outset. In August 1995, Morris hired media consultants to do polling and TV ads. At Ickes' direction, the bills were sent to Ickes at the White House and it was Ickes who determined how much of a particular bill was to be paid by the DNC, by Clinton/Gore '96, or the State Committees. This practice continued right up to the 1996 election. (Tab 16)

Morris also confirmed that Ickes was the sole person charged with making financial decisions for the White House, DNC and the reelection effort. Morris stated that Ickes controlled every aspect of DNC and Clinton/Gore fundraising and that Ickes was brought in by the President to run the reelection effort. Ickes himself reaffirmed his position all through the 1996 election cycle in numerous memos, at meetings and by virtue of his conduct toward Clinton/Gore '96. In fact, Ickes went so far as to pen some of his memos to the President, Vice President and others on Clinton/Gore '96 letterhead. These memos addressed substantive issues like the Penn and Schoen polling budget for 10/95 through 8/96 and reporting on paid media spots. (Tab 17)

Ickes also regularly sent memos to Bobby Watson, Chief of Staff at DNC, directing Watson to pay outstanding balances owed to media consultants "immediately" with copies to Clinton/Gore officials. And Ickes wrote directly to Peter Knight and others at Clinton/Gore in this same vein. (Tab 18) In fact, in an April 10, 1996 memo, Ickes (at the request of the President) directed that all those who attend DNC and political coffees at the White House be

added to the Clinton/Gore '96 database. (Tab 19) Both Clinton/Gore and the DNC complied and the database was expanded.[11]

It is not simply that Ickes perceived himself to be in charge. Those at the DNC and Clinton/Gore clearly recognized this to be the case. For example, in an August 8, 1995 memo to Ickes, Scott Pastrick, National Treasurer for the DNC, wrote: "It has been brought to my attention that you are considering a decision to disallow the DNC Finance Division from formally packaging corporate and individual donor benefits and activities at the 1996 convention..." (Tab 20) Similarly, Clinton/Gore officials sent Ickes "proposed weekly budget reports" seeking his input, (Tab 21) as well as reports on the money raised for the media campaign. (Tab 22)

Quite apart from this paper trail, Leon Panetta acknowledged in an FBI interview that he did not have the experience to run a national presidential campaign and therefore relied heavily on Ickes to handle all issues relating to the President's reelection. Panetta confirmed that he relied on and trusted Ickes to handle the multiple tasks and issues regarding the organization and operation of the President's reelection efforts.[12] According to Panetta, Ickes ran the re-election effort from the outset and took the lead concerning DNC matters as well.

In the course of the Task Force's investigations, the presence of Harold Ickes is the common denominator. It would be impossible to address each of the memos from or to Harold

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[11] Ickes also was the chief negotiator on behalf of Clinton/Gore in services of the November 5 Group. This group, which included Dick Morris and the Penn/Schoen firm, was used to coordinate the entire media campaign.

[12] In fact, in his interview Panetta stated that he was aware of only two telephones in the White House that were paid for by funds from Clinton/Gore '96. One of these phones was in Ickes' office, thus underscoring Ickes' involvement with the reelection effort and Clinton/Gore '96.

Ickes that demonstrates his position as a senior White House official, Clinton/Gore Campaign Operative and CEO of the DNC. Instead, we have annexed a detailed time line of important Ickes memos and meetings which chronicle these positions and his absolute control over White House, DNC and Clinton/Gore operations. See Tab 23. When viewed in context, this time line makes clear that Harold Ickes is the very type of senior White House official and Clinton/Gore functionary contemplated in section 591(b)(6) of the Act.

Ickes also falls squarely within the discretionary provision of the Act. This provision, calculated to function as a "catchall" provision, was intended to include "members of the President's family and lower level campaign and government officials who are perceived to be close to the President. 1987 U.S.C.C.A.N. at 2165 (emphasis added).[13] Given Ickes' role in the reelection effort, his intimacy with the President, his status at the White House, and his control over the DNC and Clinton/Gore, Ickes presents the type of political conflict contemplated under the Act. Indeed, Ickes' relationship with the White House continues even today. According to a statement made by Ickes on the Today show on June 22, 1998, he is now working with the White House to help "get the message out" to the press on matters relating to Kenneth Starr. Ickes' involvement with the White House and the President on this sensitive issue raises the specter of a political conflict of interest should Ickes be the subject of a criminal investigation.

Whether you consider Harold Ickes as a covered person, or someone who is within the discretionary provision of the Act, there is sufficient information concerning his activities to

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[13] In establishing this provision, Congress recognized that "there may be situations in which conflicts of interest become apparent at a later stage of an investigation. For example, during an investigation conducted by the Department of Justice, additional facts may surface concerning a person close to the President. . . which could give rise to a conflict of interest." 1982 U.S.C.C.A.N. 3537, 3545-3546. Such is the case here.

commence and conduct an investigation based upon the Department's established policies relating to Task Force matters.

1. Aiding And Abetting Conduit Contributions, False Statements And A Scheme To Defraud

First, there is an allegation that Ickes knowingly permitted the DNC and Clinton/Gore '96 to accept conduit contributions collected by Charlie Trie and to file false and misleading reports with the FEC. The specific information from credible sources is as follows:

On March 21, 1996, Trie approached Michael Cardozo, the Executive Director and Trustee of The Presidential Legal Expense Trust ("PLET"). PLET was a trust established by the President and Mrs. Clinton to meet their mounting personal legal expenses. The June 28, 1994 Press Release concerning the establishment of the trust, its purpose and rules and regulations relating to contributions and contributors, provided in pertinent part:

> Under the terms of the trust, contributions will be accepted only from individual citizens other than federal government employees, not from corporations, labor unions, partnerships, political action committees or other entities. Individual contributions will be limited to a maximum of $1,000 per year. The trustees will periodically publish the names of all contributors. The trust will also publish periodic reports on its receipts and expenditures. (Tab 24)

When Trie approached Cardozo, he offered Cardozo a bag which contained $460,000 in checks and money orders of individual "donors."[14] In a recent interview, Mark Middleton acknowledged that Trie showed him the checks shortly before they were presented to Cardozo. According to Middleton -- a former White House employee -- he advised Trie not to submit the

[14] At the time Trie proffered these contributions, he was adamant that he not be associated with the donations since he expected to be appointed to an undisclosed Commission by the President in the near future. In fact, on April 22, 1996, just weeks after the PLET "donations" were tendered by Trie, President Clinton appointed Trie -- the former Little Rock restaurant owner -- to the Commission on U.S. Trade and Investment Policy.

checks to PLET because they looked "foreign." Despite Middleton's warning, Trie brought the bag of checks to PLET.[15]

Trie assured Cardozo that all the "contributions" were from U.S. citizens. Cardozo returned $70,000 later that same day to Trie because, according to Cardozo, the checks were "defective on their face." The remaining $390,000 was deposited into the PLET account, although Cardozo was still uneasy about the Trie money. Based upon his concern, Cardozo decided to scrutinize the Trie "contributions" and to advise the White House of the situation.

A PLET administrator conducted a brief review of the Trie checks that were retained by PLET. As a result, PLET determined that many of the checks were comprised of bundled money orders which were sequentially numbered, though often signed by people in different cities. There were also many third party checks and the word "Presidential" was uniformly misspelled (as "presidenseal") on several of the checks.[16] The preliminary review also suggested that some of

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[15] The Task Force conducted a search of Trie's Watergate apartment in October of last year and found a copy of the June 28, 1994, PLET Press Release, including contribution and contributor restrictions. A fax cover sheet was also seized indicating that the release was faxed by Mark Middleton to Antonio Pan (Trie's codefendant in the pending indictment) at Trie's Watergate apartment on March 7, 1996. (Tab 25) This was just two weeks before Trie tendered the bag full of checks to Cardozo. Pan's role in the PLET contributions is unclear at this point. (Pan's role in the conduit schemes charged in the Trie indictment was that Pan, on behalf of Trie, helped structure the repayment of conduits from foreign sources. It is interesting to note that at some point in the conduit scheme charged in the Indictment, Pan had contact with John Huang concerning the structured checks. Huang's involvement with an effort by to structure checks "contributed" in connection with a White House coffee is also outlined below).

[16] Clinton/Gore '96 apparently did not apply the same level of diligence to scrutiny of contributions as did the PLET and Middleton. Clinton/Gore apparently never discovered that ten conduit checks gathered by Maria Hsia for a September 1996 fundraiser all had the payee written with a uniform misspelling in one cursive handwriting as "Clienton Gore 96." Ten other conduit checks for the same fundraising event had the payee in block letters as "CLIEN TON-GORE 96."

the "donors" might have been coerced into giving the checks by a Taiwanese-based Buddhist cult of which they -- and Trie -- were members.

On April 4, 1996, Cardozo went to the White House to alert Harold Ickes and the First Lady about the Trie contributions and his concerns. (Ickes had no formal role or position with PLET. Therefore, we must assume that he was present as the President's representative.) Based upon Cardozo's expressed concerns, the First Lady told Cardozo to be very diligent in determining the eligibility of the contributions. Ickes' notes from the meeting reflect a "public relations" concern about reporting the return of contributions on the Trust's disclosure statement. Ickes' note reads: "Don't report names if $ are returned."[17] (Tab 26) Given Ickes' role in the reelection effort, it is not surprising that he would be concerned about the political fallout of a wholesale return of "foreign looking" contributions gathered by the President's good friend Charlie Trie.

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[17] When Cardozo was asked in his Senate testimony about Harold Ickes' participation in the meeting, he said "I have no recollection of Mr. Ickes saying anything at the meeting. He was buried in his notes." In reviewing the unredacted Ickes calendars we received recently from the White House, we discovered a meeting scheduled between Ickes and Terry Lenzner, the Chairman and CEO of The Investigative Group, Inc. ("IGI"), the day before the April 4th Cardozo briefing of Mrs. Clinton and Ickes. Lenzner and IGI were hired by PLET to investigate the Trie "contributions." While the formal engagement of IGI appears to have occurred after the briefing of April 4th, the Lenzner/Ickes meeting of April 3rd suggests that IGI may have been involved in the matter -- albeit informally -- before the April 4th briefing. In a recent interview, however, Lenzner denied this and claimed he was at the White House on an entirely separate matter. Indeed, he recalled that although he was waved into the White House and waited for almost two hours, he did not meet with Ickes at all on April 3rd because the White House had just learned that the plane transporting Ron Brown had crashed. Neither Lenzner nor Ickes disclosed the April 3rd meeting during the course of their testimony to the Senate about the Trie contributions. It is interesting to note that the Ickes/Lenzner meeting had previously been redacted by the White House in connection with production of Ickes calendars as "non-responsive." The Task Force is still negotiating to obtain unfettered access to the calendars of Panetta.

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Based upon its initial review, and after consultation with its attorneys and trustees, PLET formally hired Terry Lenzner and IGI -- a Washington-based investigative firm -- to investigate the Trie "donations." Apparently the sole restriction placed on Lenzner and IGI in conducting the investigation was that they were not to talk to Trie. Two days after IGI was formally retained, Trie brought another $179,000 in checks to PLET. These checks were immediately rejected by PLET and Trie was told not to bring any more "donations" to the Trust.[18]

In early May, Cardozo returned to the White House for a second briefing. On this occasion, Cardozo briefed Harold Ickes about the IGI findings. In addition to Ickes, the briefing was attended by Jack Quinn (White House Counsel), Maggie Williams (Chief of Staff to the First Lady), Bruce Lindsey (Deputy White House Counsel), Evelyn Lieberman (Deputy White House Chief of Staff) and Cheryl Mills (Deputy White House Counsel). The IGI investigation confirmed the findings of the PLET's internal investigation and added that the checks were bundled in a likely attempt to buy influence. No one from either the DNC or Clinton/Gore '96 - except Ickes - was present at this briefing. And yet, during this meeting Bruce Lindsey, after hearing Trie's name, commented that he knew Trie from Little Rock and that Trie was involved with the Democratic Party. (In fact, Trie was a Managing Director of the DNC at that time.)

Just three days after this May briefing, Trie donated -- and the DNC accepted -- $10,000. The following day Trie attended an event and sat at the President's table after having donated another $5,000 to the DNC. Two days later PLET received IGI's draft report reiterating the causes for concern outlined in the briefing. Receipt of the report prompted Cardozo to advise

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[18] Cheryl Mills, Deputy White House Counsel, admitted in her Senate testimony that she was aware of the delivery and rejection of this second batch of Trie checks.

White House Counsel that PLET would return all the "donations" gathered by Trie. Cardozo was later told that the President and Mrs. Clinton concurred in the decision of the trustees.[19]

In June 1996, shortly after the return of the Trie "donations," PLET altered its own reporting requirements so that the return of the Trie money would not have to be disclosed. It appears that this decision was reached by PLET in consultation with White House officials -- including Ickes, Mills and Quinn. In previous PLET reports, any returned contributions were clearly reflected. The failure to do so is consistent with Ickes' April 4th notes reflecting his concerns surrounding the disclosure of the return of the Trie "contributions." See Tab 26. This change in policy appears to be inconsistent with the PLET regulations concerning the publication of the names of all contributors as well as publication of all receipts and expenditures. Since the contributions were accepted by PLET, and thereafter returned from its account, the Trie "contributions" were either a receipt or an expenditure of funds. In any event, in their Senate testimony, both Quinn and Mills denied any participation in the decision to alter the PLET accounting methods. Cardozo stated that the reporting change was one recommended by the

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[19] In his prepared statement to the Senate, Cardozo enumerated the reasons why the Trie "contributions" were returned:

> One, the unique circumstances under which the funds were delivered to the Trust; Two, the fact that it now appeared that most if not all of these contributions were raised at meetings of a religious organization, the Ching Hai -- Buddhist sect which according to IGI had been described by some as a "cult" and which raised concerns about peer pressure and coercion; and Three, concern over the ultimate source of some of the contributions due to what appeared to be the advancement of funds by the Ching Hai organization to some contributors.

Trust's accountants (the same accounting firm retained by the DNC) and the timing of the change was fortuitous vis-a-vis the Trie "donations."

On August 12, 1996, Cardozo sent a letter to Cheryl Mills with an enclosure asking her to circulate it by hand to Mrs. Clinton, Jack Quinn, Harold Ickes, Bruce Lindsey, Evelyn Lieberman and Maggie Williams. (Tab 27) The enclosure was a July 5, 1996 letter from David Lawrence (a member of the Taiwanese sect that was the source of the Trie "contributions") to the PLET trustees. In his letter, Lawrence thanked PLET for the return of his $1,000 "donation" (which was included in those checks bundled by Trie) and advised the Trust that the funds were raised by requesting donations from members of The Ching Hai sect and that none of the rules or regulations of PLET had been explained to them. In addition, the promise of reimbursement by the organization was known to the so-called contributors. In fact, Lawrence had opted to have the organization reimburse him for $500 of his $1,000 "donation."

The Lawrence letter made clear that which had been discovered by PLET's internal review and confirmed by the IGI investigation: the "donations" were from members of the Ching Hai International Association; when they were solicited, the members were not advised of the rules and regulations of donation (including that the Trust would file periodic reports identifying donors); and the organization made it clear that those who "contributed" could be reimbursed by the organization if they chose.

Mills testified that no action was taken by the White House in response to the Lawrence letter. Neither the DNC nor Clinton/Gore was advised by Ickes, the President, the First Lady, White House Counsel, or anyone else at the White House about the problems surrounding Trie's PLET "donations." This is true despite: (a) Ickes' role as the de facto head of the DNC and

Clinton/Gore '96; (b) Ickes' weekly meetings with Peter Knight, head of Clinton/Gore '96; (c) regular budget and fundraising meetings at the White House which included, among others, Ickes, Gore, Panetta, Lieberman, Sosnik, Ron Klain (VPOTUS Chief of Staff), Peter Knight, Terry McAuliffe (Clinton/Gore Finance Chair), Laura Hartigan (DNC and Clinton/Gore '96 employee), Don Fowler (DNC), Chris Dodd (DNC), Marvin Rosen (DNC), Richard Sullivan (DNC), Scott Pastrick (DNC) and B.J. Thornberry (DNC); (d) the President's active role in the affairs of the DNC and the reelection effort; and (e) Ickes' White House briefings detailing the concerns surrounding Trie's PLET "donations."

In short, no one who was briefed on the problems with the Trie "donations" lifted a finger to advise the DNC or Clinton/Gore '96 about the situation despite numerous opportunities to do so.[20] Fowler and Knight first learned about the tainted Trie contributions when the story broke in the press. Because of their ignorance, Trie continued to attend dinners with the President, enter the White House, and function as a major solicitor and fundraiser through election day.

In August of 1996 -- not two months after PLET returned the Trie donations -- the DNC accepted $110,000 solicited by Trie in connection with the Presidential Birthday Gala.[21] We have

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[20] In October 1996, after the fundraising controversy had broken in the press, Ickes was asked by Thornberry at DNC about John Huang. Ickes responded that if the DNC was going to look at John Huang, Thornberry should look at Trie as well. No particulars were provided at that time by Ickes as to why Trie should also be looked at in connection with campaign contributions. The comment, however cryptic, speaks volumes about Ickes' knowledge concerning Trie.

[21] Interestingly, John Huang is listed on the DNC check tracing forms as the DNC contact. (Tab 28) This group of solicited funds is featured as an overt act in the Trie indictment. Since it was foreign soft money, we chose not to charge this as criminal conduct. Since the filing of the Trie indictment, however, the Department has taken the position that such contributions are violative of FECA.

confirmed that $100,000 of these solicited funds were conduit contributions.[22] (Trie also gave additional, albeit smaller, amounts to the DNC following the PLET incident).

Trie was invited back to the White House in December for the DNC Trustee Christmas party. To that point no one at the White House, PLET or IGI made any effort to question Trie about these so-called "contributions" -- which were all returned -- or whether any of the other Trie "contributions" or solicitations suffered from the same defects. In fact, Trie's December White House appearance came after IGI issued its final report in which it detailed "donor" after "donor" who said they were reimbursed for their "contributions," and after the other questionable conduct about Trie's fund raising efforts were a matter of public record. [23] All indications are that this conduct was calculated to consciously avoid learning the truth.

It is true that we have uncovered no document that establishes directly that Ickes knew that Trie was a regular DNC/Clinton Gore solicitor/contributor. The reports sent to Ickes generally addressed financial needs and gross receipts. However, to conclude that Ickes was not aware that Trie was a significant solicitor/contributor and close friend of the President, is absurd.

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[22] In light of statements made by Chung in his debriefing concerning Trie acting as a conduit for PRC money into the Presidential election, this transfer in August of 1996 -- like the other Trie "donations" and solicitations -- takes on greater significance as does the true source of the Trie PLET "contributions."

[23] If that weren't enough, it was at this same DNC Christmas event that Trie secured a bogus driver's license for an Asian man who he brought into the White House to meet President Clinton. The man who entered with Trie was photographed with Trie and the President. The photo depicts Trie apparently introducing him to the President. To date, the White House has been unable to identify this individual other than under the bogus name that appears on the WAVES records. The photo was also supplied to counsel to the President but apparently the President cannot assist with an identification. This unknown Asian man may or may not have some connection with the Trie "contributions" to PLET or to the conduit donations solicited for the Presidential gala. It is just one more avenue that warrants further investigation.

Ickes himself advised DNC's Thornberry (after the scandal began to break) that if the DNC had questions about Huang, it should also look into Trie as well.

In addition, it was common knowledge among those at the DNC, Clinton/Gore and the White House, that Trie was a big contributor/solicitor and a close friend of the President from Little Rock. Lindsey acknowledged as much during Cardozo's second White House briefing on the Trie "donations," at which Ickes was present. Similarly, when Middleton faxed a letter to the White House from Trie to the President on the very day Trie brought the first bag full of checks to Cardozo, Trie was identified in the fax cover sheet as a "personal friend of the President from LR ... [and] a major supporter." (Tab 29) In fact, Trie's personal friendship with the President was one of the very reasons offered by Cardozo in his Senate testimony to explain why no one ever bothered to ask Trie for an explanation concerning the source of these "donations." Indeed, no one wanted to "offend" a friend of the President by confronting him with pointed questions concerning hundreds of thousands of dollars of "contributions" collected by him for the personal benefit of the President and First Lady. Instead, IGI was hired by PLET, and paid nearly $15,000 in fees, to find out what Trie could have confirmed in a simple and candid interview following the delivery of the checks.

Based upon the foregoing, it is evident that Ickes, while occupying a de facto position as a principal in DNC and Clinton/Gore, concealed the Trie problem from these entities. This concealment is especially troubling in light of Ickes' concern -- evident in his notes of the April 4th briefing by Cardozo -- about the effect of reporting the return of the Trie money. See Tab 26.

Ickes was also aware that the DNC and Clinton/Gore needed funds right through the election in order to keep the media campaign going. Trie was a regular source of funds for the DNC and Clinton/Gore as a contributor and fundraiser. White House calendars indicate that during the Spring and Summer of 1996, Ickes, Fowler and Knight were meeting regularly at the White House. (Tab 23) And yet, despite his proclivity for memo writing generally and taking charge of DNC and Clinton/Gore matters, Ickes was strangely silent on the Trie "donations" problem. He failed to pen one word on the subject or to mention one word of concern to either Fowler or Knight.

Did the failure to disclose to the public or to advise the DNC or Clinton/Gore '96, aid and abet Trie in the conduit scheme charged in the indictment filed against him? PLET itself advised Trie (after rejection of the second bag of checks) not to bring any more "contributions" to the Trust. However, by keeping the DNC and Clinton/Gore in the dark about Trie's PLET donations, Ickes enabled Trie to continue to solicit and to contribute. Ickes also enabled DNC and Clinton/Gore to continue to accept funds "solicited" by Trie. Perhaps Ickes did not inform DNC or Clinton/Gore so as not to burden these entities with the knowledge and the duty to check Trie's earlier contributions and to vet carefully all future solicited or donated funds. At best, Ickes engineered an effort to consciously avoid learning the truth about Trie. At worst, Ickes' failure to act was intended to conceal the truth from those who could have protected the DNC and Clinton/Gore from Trie's illegal solicitations/contributions. In any event, DNC and Clinton/Gore blissfully continued to accept tainted contributions from Trie.

The PLET allegations are not new. They were initially reviewed before we joined the Task Force. At that time it was concluded that since the FEC and FECA did not govern the

PLET or its filings, there was no potential criminal violation. (We are not aware of a formal declination of this matter.) In reviewing the information gathered by the Task Force from its inception and applying to it additional recent information developed concerning Ickes, Trie and Senior White House Officials, it is clear to us that this matter should now be reopened and pursued as a conspiracy, mail fraud, wire fraud and false statements investigation. Moreover, in light of Ickes' status under the ICA, a preliminary investigation should be triggered and a decision be made promptly that further investigation is warranted.

2. Common Cause Allegations And Conspiracy To Violate Soft Money Regulations

Ickes' participation in the so-called Common Cause allegations, is similarly troubling. Much has been made of the fact that the Department is unsure whether the applicable statutes (outlined in the Litt, [redacted] memoranda previously circulated), present a potential violation of federal law. To be sure, Litt, advocating that the Department not even commence an investigation, concluded in May 1997:

ATTNY NAMES

> For all of these reasons, it is appropriate under established Department of Justice policy to refer to the FEC the issue of whether party advertising campaigns during the 1996 presidential election were properly paid for. It is important to note that this analysis does not imply that the advertisements, and their funding, did not violate FECA. It only says that, based on the present record, that determination should be made as an initial matter by the FEC rather than by the Department and a grand jury. In any event, the activities of the party committees may be relevant to other matters under investigation, and will be examined to that extent. Moreover, if at any time we uncover evidence demonstrating that there were knowing and willful violations of FECA, this conclusion could change.

See, Litt Memo dated May 28, 1997 (emphasis in original).

Nearly one year later, Bob reached a similar conclusion:

> We need not actually refer the matter to the FEC. We are aware that the FEC is already investigating it. They are, of course, desperately short of resources: almost a year ago they asked us for help and we have yet to respond. While the FBI is not prepared to provide resources to assist the FEC, JMD indicates that we can find other sources. We should do so immediately, and in our letter telling them we are providing these resources note that we are deferring to them on these issues. . . . It is unfortunate that the FEC is so weak, but we should not use that as an excuse to disregard well-established concepts of predication and well-established procedures, to conjure up novel legal theories of which political candidates had no notice, and to take on the responsibility of primary regulator of the political process. That is not an appropriate function of the Department of Justice.

See, Litt Memo dated February 6, 1998.

To date, the Department has not determined whether the Common Cause allegations implicate a potential federal violation. Even Litt, in arguing that an investigation should not be commenced, concluded that the question remains open. It may be that some day a court will determine that the standards set out in the applicable statutes are too vague or infringe unconstitutionally upon the First Amendment and cannot be enforced. It may be that a prosecutor, based upon a fully developed factual record, will exercise his/her discretion and decline to bring charges even if a technical violation presents itself. However, to substitute our judgment -- as a matter of law -- at this early stage of the process is a mistake. The potential violations exist, and therefore it is a matter that warrants investigation under the Department policies -- outlined above -- which have been established for alleged campaign finance violations.

The alternative approach -- a parochial and professorial application of the ICA -- is the very approach that has gotten the Department into trouble in the past. It is the same type of maneuvering and practice that triggered the 1987 Amendments to the ICA and the sharp criticism

of the Department that accompanied these amendments. Indeed, one could argue that the Department's treatment of the Common Cause allegations has been marked by gamesmanship rather than an even-handed analysis of the issues. That is to say, since a decision to investigate would inevitably lead to a triggering of the ICA, those who are hostile to the triggering of the Act had to find a theory upon which we could avoid conducting an investigation. However, in light of the Task Force's actions in non-ICA related matters, this position is untenable. Any objective review of the Common Cause debate and the Task Force's threshold in other investigations makes this clear.

Finally, the alternative approach, while avoiding application of the ICA, virtually ignores the possibility that there exists a section 371 conspiracy to defraud the United States by violating the civil regulatory framework set out in FECA. When asked to research this point, an attorney in Criminal Appeals concluded that such a prosecution was indeed viable. The memo, attached to this report at Tab 30, presents a well reasoned theory upon which a potential criminal violation may be predicated. It is not -- as suggested by Bob Litt -- a Merlin-like legal theory conjured up to ensnare unwitting participants in the political process. Rather, it is an established legal theory applied to the novel conduct conjured up by sophisticated political operatives to circumvent and to violate the law. [24]

As is evident from the annexed memorandum, the Supreme Court has held that a conspiracy to defraud the United States reaches "any conspiracy for the purpose of impairing,

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[24] The legal analysis is analogous to the Section 371 theory that was found to be viable in connection with John Huang's scheme to conceal his fundraising activities while he was at the Department of Commerce. See pages 63-70 and Tab 46. There, the regulatory system involved is the Hatch Act and its prohibitions against political fundraising by Government employees.

obstructing or defeating the lawful function of any department of Government." Dennis v. United States, 384 U.S. 855, 861 (1966). In fact, while a conspiracy to defraud the United States may allege a violation of a specific statute (civil or criminal), "the impairment or obstruction of a governmental function contemplated by Section 371's ban on conspiracies to defraud need not involve the violation of [any] statute at all." United States v. Rosengarten, 857 F.2d 76, 78 (2d Cir. 1988), cert. denied, 488 U.S. 1011 (1989) (emphasis added). Quite apart from the Common Cause debate and questions involving "issue advocacy" and the First Amendment, section 371 provides an independent predicate upon which to base a potential violation of Federal law. To date, we have been so caught up in determining whether violations of the Presidential Primary Matching Payment Account Act (PPMPAA) and the Presidential Election Campaign Fund Act (PECFA) are criminal acts, and paralyzed by the suggestion that any investigation in this area is tantamount to a totalitarian attack upon the First Amendment, that we have not focused on the possibility that mere civil violations may form the predicate for a § 371 conspiracy. We dare say that it has been buried in the debate because it presents a significant speed bump on the highway around the Common Cause allegations that some have cleverly constructed. Thus, the Common Cause allegations are not allegations in search of a criminal violation, but rather present allegations upon which a full investigation should be based.

It has been almost two years since the Common Cause allegations were first sent to the Department for consideration. In our responses, we have consistently assured Common Cause that we are reviewing the matter. The fact is the allegations have been and remain in limbo. However, the factual landscape surrounding the Common Cause allegations has changed dramatically over the last several months and there is reason to reevaluate the Department's

position. As a result of the Task Force's investigative efforts, it is clear that every aspect of the reelection effort was orchestrated from the White House. The DNC and Clinton/Gore were used as vessels, to be filled and emptied at the direction of -- among others -- Harold Ickes. Ickes injected himself into the DNC and Clinton/Gore as a manager, director and agent and took control of these organizations insofar as the reelection efforts were concerned. Simply stated, Ickes was empowered by the President to run the reelection effort and he did precisely that. To the extent that there was any effort to circumvent the regulations outlined above, Ickes was at the heart of the effort.

In addition, several facts have been developed -- outside of the content of the so-called issue ads -- which support the conclusion that the media fund contributions were collected in an effort to influence the 1996 presidential election and, therefore, arguably subject to FECA. The use of the Clinton/Gore credit card by the Vice President in soliciting contributions for the media fund has been referred to already. However, the Task Force recently learned that Laura Hartigan, when a Clinton/Gore employee, was tasked by Ickes to work with the DNC in an effort to coordinate state by state pledges to the media fund. Similarly, the recent interviews of the state committees which were used to purchase the generic "issue ads" suggest that they were mere conduits through which the funds passed in an effort to accomplish indirectly what the DNC and Clinton/Gore '96 could not accomplish directly. In short, the media fund was driven by the reelection effort as was the media campaign. The facts suggest a concerted effort -- orchestrated by the reelection team -- to circumvent the regulatory framework established to prevent this kind of activity.

Based upon the Department's established policies concerning the commencement and conduct of Task Force criminal investigations, there is now ample information upon which to commence and conduct an investigation relating to the Common Cause allegations. There is no reason to distinguish this matter from the numerous other allegations that have given rise to full-blown criminal investigations by the Task Force. It is intellectually dishonest to commence an investigation of Loral, Mark Middleton, COSCO, or Jude Kearney, to name a few, on a quantum of information at or below that which exists for the Common Cause allegations and not to commence an investigation of that matter simply because it implicates the ICA. There is no reason why the Department's policies and thresholds concerning campaign financing allegations should be altered simply because the ICA is implicated.

3. Diamond Walnut/Teamsters

Another area concerning Ickes involves his actions in connection with the Diamond Walnut matter. If nothing else, this incident underscores Ickes' position as a senior White House official who is close to the President and who used that position to leverage the fund raising efforts of the DNC in connection with the upcoming Presidential election.

The core allegation is that in an effort to encourage large Teamster contributions and public support of the Democratic Party, Ickes used his position at the White House to direct then U.S. Trade Representative Mickey Kantor to make contact with Diamond Walnut Senior Management to attempt to settle the on-going labor dispute between management and the Teamsters. The Task Force is just now putting flesh on these allegations. However, Ickes' Senate testimony as to what, if any, involvement he and the Administration had with this matter has also emerged as an area to be investigated. Indeed, while Ickes testified that he was unaware

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of any action taken by the Administration concerning the Diamond Walnut labor dispute, there is evidence -- testimonial and circumstantial -- to the contrary.

The Task Force has recently obtained several memos which suggest a direct contact between Ickes and Teamster officials in connection with the Diamond Walnut strike. In fact, what emerges from these memos is a plan initiated by Ickes to entice the Teamsters to increase their support of the re-election effort. The first document, annexed at Tab 31, is an undated memo entitled "Teamster Notes". Based upon other facts uncovered in the investigation, it appears that this memo was written in early 1995. In an interview, Ickes acknowledged that the handwriting and underlining on this memo was his, but claimed he did not know who prepared the document or why it was prepared. The relevant portions (with Ickes' underlining) are set out below:

> Carey is up for re-election in 1996.
>
> ***
>
> The Teamsters played an enormous role in the '92 campaign.
>
> ***
>
> When they are plugged in and energized they can be a huge asset. Over the past two years their enthusiasm has died down. They have been almost invisible at the DNC and other party committees for the past two years. With our proclamations on striker replacement, the Team Act ..., Davis-Bacon and the Service Contract Act and our NLRB appointments (very important to Carey) we are in a good position to rekindle the Teamster leadership's enthusiasm for the Administration, but they have some parochial issues that we need to work on.
>
> ***
>
> It is in our best interest to develop a better relationship with Carey. We won't always agree on issues and he's a tough, street fighter. But he is well intentioned, hell-bent on reforming the union and trying to root-out the "bad guys." If he doesn't succeed in his effort, the union is likely to fall back into the hands of the "old Teamsters." This would be a huge setback for the entire labor movement. Carey is not a schmoozer -- he wants results on issues he cares about. The Diamond Walnut strike and the organizing effort at Pony Express are two of Carey's biggest problems. We should assist in any way possible. Previous

> Teamster presidents have met with the POTUS. A meeting would be a good idea and could help Carey. (Tab 31)

The second document is an undated memo from Bill Hamilton (Teamsters Director of Governmental Affairs) to Ron Carey. Again, our investigation suggests that this memo was written in the first half of 1995. It refers to a June meeting between Hamilton, Carey, and Agriculture Secretary Dan Glickman to attempt to persuade Glickman "to cut off USDA support for Diamond Walnut" in connection with school lunch programs and promotion programs oversees. The memo notes that the meeting was set up for the Teamster officials "by the White House after [Carey and Hamilton] met with Ickes and others over there a month or so ago." (Tab 32)

Finally, there is a March 27, 1995, memo from Bill Hamilton to several Teamster officials regarding a "Meeting with the White House." (Tab 33) In this memo, Hamilton recounts that Teamster President Carey and he met with key White House and Clinton Administration people -- including Harold Ickes -- to discuss a range of Teamster topics. This meeting was apparently a follow up to an earlier February meeting between Ickes and Hamilton. The important part of the memo is listed under "Outcomes" and provides:

> 1. **Diamond Walnut** - Ickes said he met face-to-face with USTR Mickey Kantor last week and that Kantor agreed to use his discretionary authority to try to convince the CEO of that company that they should settle the dispute.

The White House recently produced documents relating to Kantor, Ickes and Diamond Walnut. The documents reflect a good deal of contact between Ickes' and Kantor's office concerning Ickes' request that Kantor contact Diamond Walnut Executives concerning the strike. Telephone records also confirm several calls to Kantor from Ickes in early 1995 which correspond

to several e-mails produced by the White House which reflect Ickes' desire for Kantor to contact Diamond Walnut executives in early 1995 concerning the strike.

These memos, telephone records and e-mails, as well as Ickes' conduct in connection with the Diamond Walnut strike, must be viewed in context. At the Democratic National Convention in August of 1992, Ickes arranged a meeting between Teamster President Carey and then candidate Bill Clinton. After this meeting Carey announced that the Teamsters would be supporting the Democratic Party after having supported the GOP in the last three elections. See Tab 23 at p. 1. Later, Ickes actively sought to solidify Teamster support by finding ways in which the Administration could support Teamster efforts in different areas. (See Tab 31) One of these areas was in connection with the lengthy Diamond Walnut strike. The fact is that Kantor, at Ickes' request, did contact the CEO of Diamond Walnut. When interviewed by FBI agents, CEO Cuff said that he has never before or since received a call from such a high level Administration official. (The strike, which began in the fall of 1991 is still unresolved.) According to Cuff, Kantor claimed that foreign leaders and negotiators were raising the Diamond Walnut situation whenever the United States referred to human rights abuses overseas and this was the impetus for the call. The essence of Kantor's message to Cuff was that the strike was hindering Kantor's international trade negotiations and it would be good if it was resolved. (Kantor has given similar innocuous explanations to pointed press inquiries on the subject.) The Teamsters' political backing was never mentioned. Cuff reported Kantor's call to the Board at the next Directors meeting. We have secured a copy of the relevant portion of the minutes and they confirm Cuff's statement.

These memos, meetings, telephone records and e-mails suggest much more of a substantive role by Ickes (and apparently Kantor at Ickes' request) than Ickes later admitted in his sworn testimony. Moreover, it is evident that Ickes' contact with Teamster officials was the result of a concerted effort by the DNC to court Teamster contributions, public support, and get out the vote efforts in connection with the upcoming Presidential election. The implications of Ickes conduct -- given his status with the DNC and Clinton/Gore -- are apparent. If Ickes used his official position to take official action or to cause official action to be taken in return for campaign contributions to the DNC, or if contributions were a reward for official action taken by Ickes or another official at his direction, a potential criminal violation exists. See, e.g., 18 U.S.C. §§ 600, 601, 1341 and 371.

Apart from the underlying transaction, it seems clear that Ickes' sworn testimony is at odds with the substance of the internal Teamster memos. This suggests a potential perjury charge in connection with Ickes' Senate testimony which warrants investigation.

The Diamond Walnut investigation is in its infancy. The matter was recently referred to the Department by the Senate in its final report. The issue, however, is not whether this information presents an indictable or prosecutable offense at this juncture. Rather, is there sufficient specific information from a credible source to commence a criminal investigation under the standard Task Force rules of engagement. We believe the answer is yes and have opened a criminal investigation. While the evidence and information is not overwhelming at this early stage, in light of the other matters detailed above, including Ickes' position with the reelection effort, it militates in favor of commencing a preliminary investigation under the ICA and reaching a prompt determination that further investigation is warranted.

B. The President

1. Trie's PLET Donations

There are several facts concerning the President's association with Trie at the time of the PLET donations which, in our view, warrant investigation. They are outlined below.

The Trust was established by and for the benefit of the President and First Lady. They were the Trust's sole beneficiaries. Monies that were contributed went to reduce their personal legal bills. When the Trust was established, there were several rules established concerning acceptance of contributions, the management of the Trust, and the public filing of periodic reports listing those who contributed. These rules and regulations were publicly released in connection with a general invitation to all qualified contributors to make qualified contributions. See Tab 24.

As detailed above, on the morning of March 21, 1996, Trie went to the Executive Director of PLET with $460,000 in checks and money orders. Trie assured the Executive Director that all the "donations" were from citizen donors and that he wanted to keep his association with the donation quiet because, among other things, he was soon to be appointed to an unnamed Commission by the President.

On January 31, 1996, the President had signed an Executive Order enlarging the Commission on U.S. Trade and Investment Policy by five members. The White House WAVES records confirm that Trie visited the President at the White House on January 29, 1996, two days before the President expanded the Commission. It would seem that it was on this visit that the

President informed Trie of the new seats to the Commission and the fact that Trie would be given one of those seats.[25]

Cardozo provisionally accepted the $460,000 checks and asked Trie to come back after lunch to continue their discussion about the proffered contributions. Trie left and apparently met Mark Middleton for lunch. Shortly after this lunch, Middleton faxed a letter prepared by Trie to the White House concerning Trie's impressions and concerns about the situation in the Taiwan Straits. The fax was directed by Middleton to Maureen -- (we believe Maureen Tucker who was an intern in the President's office). On the fax cover sheet transmitting Trie's letter, Middleton wrote:

> Dear Maureen,
> As you likely know, Charlie is a personal friend of the President from LR. He is also a major supporter. The President sat beside Charlie at the big Asian fundraiser several weeks ago." (See Tab 29)

On April 26, 1996, the President (based upon the recommendation of Tony Lake and other NSC staffers) responded to Trie's letter. Curiously, the President's letter was not sent to Trie's Watergate apartment. Rather, it was sent to Charlie Trie c/o Middleton's D.C. business address. (Tab 34)

Trie returned to meet with Cardozo later on the 21st. Cardozo returned $70,000 of the proffered checks to Trie because they were defective on their face. (This was after Middleton told Trie, after inspecting the PLET checks, that the checks looked "foreign" and should not be given to Cardozo.) The remaining $390,000 was deposited in an interest-bearing PLET account.

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[25] Between January 2, 1996 and March 21, 1996, Trie visited the White House on four occasions. Two of those visits listed the President as the person visited.

On April 4, 1996, Ickes and the First Lady were briefed by Cardozo on the Trie contributions to PLET and Cardozo's concerns with respect thereto. (As noted earlier, IGI's Chairman and CEO, Terry Lenzner entered the White House the day before this meeting and was scheduled to see Ickes). On April 22, 1996, Trie - the former Little Rock Restaurant Owner - was appointed to one of the newly created seats at the Commission on U.S. Trade and Investment Policy. As the Senate Report points out, Trie's qualifications were well below those of the other members of the Commission. On the same day that Trie was appointed, the PLET Trustees formally decided to hire IGI to investigate the checks gathered by Trie, but were instructed not to speak with Trie concerning the "contributions."

Two days after his appointment to the Commission, Trie returned to PLET with an additional $179,000 in checks. These checks were summarily rejected and Trie was told not to bring any more "donations" to the Trust.

On May 9th Ickes and a host of others were briefed at the White House on the IGI preliminary findings. One week later Cardozo, after receiving IGI's draft report, advised Cheryl Mills that PLET would be returning the balance of the Trie "donations."

The timing of Trie's PLET donations is indeed curious: one month before Trie was appointed to the Commission but after the creation of additional seats on the Commission and after Trie was told that he would be appointed. Were Trie's PLET "donations" related to the appointment? We know that the bulk of the funds were collected by Trie in New York on March 16, 1996 -- one week after Middleton sent the PLET rules and regulations to Trie's Watergate apartment. (Tab 25) (In fact, the "donations" were collected from followers of the Ching Hai sect at gatherings held in Houston, Los Angeles and New York.) Were the donations intended to

influence an official act or were they made because of an official act -- Trie's Commission appointment? Were the actions of the President sufficient to deprive the citizens of his honest and lawful services?[26]

Alternatively, were the contributions related to the subject matter contained in Trie's Taiwan Straits letter sent to the White House by Middleton on the day the contributions were tendered by Trie? Were they intended to facilitate the letter finding its way to the President? Were they offered as an incentive to encourage a positive action on the letter?

Was the decision to alter the Trust's reporting methods -- admittedly done to conceal the Trie "contributions" and the return thereof -- part of a scheme to defraud the Trust or the public in connection with the Trust's commitment to file a periodic disclosure statement? In light of Ickes' notes from the April 4th briefing -- a meeting he attended as the President's representative along with the First Lady --was the decision not to report the returned funds one in which the White House participated?

These are questions that can only be answered following an investigation. It may be that there are innocent explanations as to why the President, the First Lady, Harold Ickes, and White House counsel never advised the DNC or Clinton/Gore '96 about the Trie "donations" and consciously concealed the return of these "tainted" funds from the public until after the November elections. There may be an innocent explanation as to why PLET paid nearly $15,000 in fees to

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[26] While contributors often are given positions in Administrations, e.g., ambassadorships, this is substantively different. Here there are questions and real concerns about the source of the money "donated," and the timing of the "donations." In addition, these matters raise at least the suspicion of a quid pro quo. The timing of the Trie "donations" to PLET is at least as curious as the timing of contributions of Bernard Schwartz and the waivers sought by Loral in connection with its satellite project with China. The Loral matter is currently the subject of a full criminal investigation.

IGI to investigate the Trie "donations" and yet advised IGI not to interview Trie concerning these funds.[27] However, this conduct is certainly as redolent of a scheme to defraud as it is of a series of innocent actions. There is a need for further investigation.

In addition to the involvement of the President and Harold Ickes, it is clear that the First Lady and White House Counsel (Quinn and Mills at a minimum) also were intimately involved in the PLET fiasco. Did White House Counsel have a duty to advise Clinton/Gore or the DNC of the problems with the Trie "contributions?" The fact is that White House Counsel was often copied on Ickes' memos to the DNC and Clinton/Gore regarding various fundraising issues.

Based upon the established policy of the Department vis-a-vis Task Force investigations, we would commence an investigation and, based upon these facts, conclude that further investigation is warranted. The result should be no different because the ICA is implicated.

2. Common Cause Allegations and Conspiracy to Violate Soft Money Regulations

The President is likewise implicated in a potential violation outlined in the Common Cause allegations as well as a conspiracy to violate soft money regulations. It was the President who anointed Ickes as the head of the DNC and Clinton/Gore fundraising efforts and to whom Ickes reported directly. In fact, Ickes' calendars reflect a significant number of briefings of the President on various topics including the media fund and re-election efforts. (Tab 23) Therefore, to the extent Ickes had knowledge relating to the Common Cause allegations and soft money violations, it is likely, indeed probable, that the President shared that knowledge. At a minimum, this needs to be investigated fully.

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[27] Since PLET ultimately returned all of the Trie "donations," the IGI fee represented a $15,000 net loss to the Trust as a result of Trie's "fund raising" efforts.

3. Senior White House Official's Knowledge of Foreign Contributions: Soft and Hard Money

It has been evident from the outset that a good number of the cases under investigation at the Task Force involve foreign funds finding their way into the '96 Presidential election. There are several incidents that suggest that the President and senior White House officials knew or had reason to know that foreign funds were being funneled into the DNC and the re-election effort. (The same is true, of course, for several high-level RNC officials as we have seen from the Barbour investigation.)

The President, and Vice President, were sent regular memos from Ickes outlining the true financial situation of the DNC and the need to raise a great deal of money quickly to keep the media campaign going. The regular White House money and issue meetings also focused on the need to raise more and more money. This was a constant theme played by Ickes from late 1994 through election day 1996. The following events demonstrate a pattern of activity within the White House involving senior White House officials. This pattern suggests a level of knowledge within the White House -- including the President's and First Lady's offices -- concerning the injection of foreign funds into the reelection effort.

(a) Johnny Chung:

In December of 1994, Chung wrote to his DNC contact Richard Sullivan with his White House "wish list." Chung was attempting to arrange a series of White House events for a prominent group of Chinese businessmen he was bringing through Washington. The group included the Chairman of Haomen Beer who was described by Chung in his letter to Sullivan as someone who "will play an important role in our future party functions." (Tab 35) Chung's

wish list included lunch in the White House Mess and a photo session with the President in the Oval Office following the President's weekly radio address. As it turned out, Sullivan did not deliver and Chung arranged a photo op with the President through Maggie Williams in the First Lady's office.

In March of 1995, Chung again went to Sullivan with a White House access "wish list" involving prominent Chinese businessman, at least one of whom -- Chung told Sullivan -- could encourage American Chinese companies to donate to the DNC. Sullivan told Chung that a meeting with the President would be difficult to arrange. Chung responded that he would make a $50,000 contribution if Sullivan could make the arrangements. Once again, Sullivan did not deliver. And, once again, Chung went to the First Lady's office for assistance. This time Chung approached Evan Ryan, Special Assistant to Maggie Williams, and made the same $50,000 offer in return for granting his White House "wish list." Ryan went in to speak with Maggie Williams and when she returned, she told Chung that Williams and the First Lady's Office would assist Chung. Ryan also told Chung that the First Lady's Office owed the DNC $80,000 for the White House Christmas party, and if Chung could help with that debt, it would be appreciated. Chung said he would donate $50,000 to help retire the debt. The following day, Chung wrote a $50,000 check and gave it to Ryan (at the White House) for delivery to Williams. Williams then arranged a White House lunch and visit with the First Lady for the following day.

Chung returned to Williams and asked for a meeting with the President for himself and his Chinese businessmen. Thereafter, Chung and his delegation were admitted to the President's Saturday radio address. After the address, photos were taken of these Chinese businessmen with the President. However, somewhere between the photo session and the photos being sent out

from the White House, the NSC stepped in and questioned whether photos of the President with these so-called Chinese businessmen should be released. Chung was beside himself when the release of the photos was delayed. He had promised that these photos would be delivered on his next trip to China, but could not get them out of the White House.

In April, Chung wrote to Maggie Williams in an effort to get copies of the photos so he could take them to his delegation in China. (Tab 36) By that time, Chung had been advised by Sullivan that the NSC had concerns about releasing the photos. The e-mails on this subject between NSC staffers establish the knowledge of some at the White House concerning the link between the Chinese delegation and DNC contributions:

> A couple of weeks ago, late Friday night, the head of the DNC asked the President's office to include several people in the President's Saturday Radio Address. They did so, not knowing anything about them except that they were DNC contributors.
>
> It turns out they are various Chinese gurus and the POTUS wasn't sure we'd want photos of him with these people circulating around. Johnny Chung, one of the people on the list, is coming in to see Nancy Hernreich [Director of Oval Office Operations] tomorrow and Nancy needs to know urgently whether or not she can give him the pictures. Could you please review the list asap and give me your advice on whether we want these photos floating around? (FYI - these people are major DNC contributors and if we can give them the photos, the President's office would like to do so).
>
> See Tab 37 (emphasis added).

In his response, Robert Suttinger, Director of Asian Affairs at the NSC, warned about Chung and what White House access meant to him:

> I don't see any lasting damage to U.S. foreign policy from giving Johnny Chung the pictures. And to the degree it motivates him to continue contributing to the DNC, who am I to complain"?

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> But a caution - a warning of future deja vu. Having recently counseled a young intern from the First Lady's office [we believe this is a reference to Gina Ratliff] who had been offered a "dream job" by Johnny Chung, I think he should be treated with a pinch of suspicion. My impression is that he's a hustler, and appears to be involved in setting up some kind of consulting operation that will thrive by bringing Chinese entrepreneurs into town for exposure to high-level U.S. officials. My concern is that he will continue to make efforts to bring his "friends" into contact with the POTUS and FLOTUS - to show one and all he is a big shot, thereby enhancing his business. I'd venture a guess that not all his business ventures - or those of his clients - would be ones the President would support. . . ."

See Tab 38. The photos were released shortly thereafter.

In a separate incident in January 1995, Chung wrote to Doris Matsui, Deputy Assistant to the President, " . . . [i]n the next two years, I will be coordinating a lot of visits from Asian business leaders to support DNC." (Tab 39)

In light of these events, the connection between Chung's foreign business associates and DNC contributions is evident.[28] It is inconceivable that senior officials at the White House were oblivious to these connections.

(b) Charlie Trie:

The facts surrounding the incident with the PLET "donations" suggest a knowledge or a conscious decision by the White House not to learn the truth about Trie's DNC and Clinton/Gore '96 contributions and solicitations. From the first briefing, Ickes' notes reflect a concern with how the return of ineligible contributions would be reported to the public by the Trust. At that juncture, all Ickes knew about the Trie "donations" was what Cardozo had told

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[28] The importance of access to Chung's on-going businesses interests was best demonstrated by a mild extortion of Chung by the First Lady's staff. The facts are set out at pages 59-60.

him: they were from predominantly Asian-American donors; a good number of the checks were summarily rejected by Cardozo because they were facially defective; and the First Lady and Cardozo had concerns about the balance of the proffered "donations." And yet, Ickes' first concern was to keep any return of these "donations" from becoming public. Obviously, Ickes knew that any questionable transactions involving Trie -- a personal friend of the President from Little Rock -- would reflect adversely on the President and perhaps impact negatively on the reelection effort.

In addition, although IGI was paid nearly $15,000 to investigate the Trie donations, the investigators were not permitted to interview Trie, who was commonly known to be a close friend and big supporter of the President from Little Rock. And, after the Trie "donations" were returned because they were defective, no effort was made by anyone to alert the DNC or Clinton/Gore of this fact. As a result, tainted foreign and conduit donations continued to be solicited by Trie and accepted by the DNC and Clinton/Gore. These actions (and inactions) involving the President, First Lady, Ickes, White House Counsel and Bruce Lindsey, suggest a conscious decision not to learn the truth about Trie's fundraising activities. By not alerting the DNC and Clinton/Gore and by directing IGI not to confront Trie about the PLET "donations," the White House chose not to impede a potent fundraiser at a time when funds were needed.

C. Vice President Gore

Common Cause Allegations and Conspiracy to Violate Soft Money Regulations

During the investigation concerning Vice President Gore's fund raising calls from the White House, the Department concluded (among other things), that he did not solicit hard money and therefore there could be no § 607 violation. The fact is that Gore, using a Clinton/Gore (hard money) credit card, placed several calls from the White House to pitch soft money contributions. The Vice President denied that he was aware that the soft money contributions were routinely being split upon receipt by the DNC between soft and hard accounts. He stated in his interview that he did not recall the Ickes memos directed to him on the issue or the discussions at the regular Wednesday night meetings about this point. [29] (The Vice President's failure to recall reading the memos sent to him is reminiscent of his claim not to have read the April 1996 memos advising him that an event he was to attend at the Hsi Lai Temple in Hacienda Heights, CA, was in fact a fundraiser arranged in part by Maria Hsia.)

Quite apart from the § 607 analysis, it is evident that to the extent either the Common Cause allegations or a § 371 conspiracy to defraud the United States presents a viable potential

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[29] In September 1994, Ickes wrote to Panetta about the need for quick approval for generic media ads. In order to accomplish the media blitz, Ickes wrote that the DNC would have to raise approximately $3 million over the next 3 weeks, "of which $2 million should be 'hard' dollars. (An individual is permitted to contribute a maximum of $25,000 'hard' dollars to political activities during a calendar year.)" The memo, although not sent to the Vice President, goes on to outline how the President, Vice President and First Lady will have to be enlisted to accomplish this by, at a minimum, calling major donors who in turn would call other major donors. (Tab 40) It is inconceivable that this topic was not addressed at one of the regular Wednesday night meetings.

Based upon this memo, and the others penned by Ickes which were sent to the Vice President, it seems that everyone was on notice about the need for "hard" dollars and at least the possibility that the first $25,000 contributed in a given year would be applied to a hard money account. Certainly Ickes was aware of the possible split that did in fact occur.

violation of federal law, the Vice President would certainly be among those whose conduct would be reviewed. Like President Clinton and Harold Ickes, he participated in the fund raising and strategic efforts of the White House as they impacted the DNC and Clinton/Gore '96.

D. The First Lady

1. Trie's PLET "Contributions"

Many of the questions outstanding about Ickes and the President also apply to the First Lady. She knew who Trie was; she had been briefed about his donations to the PLET; and something in that briefing caused her to alert Cardozo of the need to be very diligent in vetting the Trie "contributions." In early May, the First Lady's Chief of Staff was among a small group briefed on the IGI findings. It is inconceivable that Maggie Williams did not pass this information on to the First Lady. And in August 1996, the First Lady was on a short list of people to receive, by hand delivery, a letter from David Lawrence outlining the untoward circumstances by which contributions to the PLET were obtained from members of the Ching Hai sect. (Tab 27)

Knowing of these problems with the Trie "contributions," being intimately involved in fundraising (she was employed by the campaign to solicit from major donors), and participating -- at times alone, and at times with the President -- in a variety of DNC and Clinton/Gore events, the First Lady certainly knew that Trie was donating to and soliciting heavily on behalf of the DNC. (Even Middleton, a former mid-level White House figure, knew this much, as evidenced by his cover note on the fax transmitting Trie's Taiwan Straits letter, on which he identified Trie as "a major supporter of the President.") And yet, the First Lady failed to give either the DNC or Clinton/Gore the same warning she gave to PLET and Cardozo (to scrutinize carefully Trie's "donation") after the problems with Trie's PLET donations were known to her. While she may

not have had the same fiduciary relationship to the DNC and Clinton/Gore which Ickes and the President did, based upon her knowledge that Trie's "contributions" to PLET were riddled with defects, in light of her direction to Cardozo to review carefully the Trie "donations," and the fact that she was a beneficiary of the Trust, her failure to advise the DNC, Clinton/Gore, or the public of these facts (and instead to welcome Trie to various events at the White House which were his only because of his questionable monetary donations and solicitations) is worthy of investigation.

2. Gina Ratliff Incident.

The incident involving Gina Ratliff and her brief employment with Johnny Chung, is also troubling. At about the same time Chung was setting up the radio address event, Chung was also attempting to hire Gina Ratliff, a FLOTUS intern, to help him with his public relations business. Eventually, Chung persuaded Ratliff to come to his business. Shortly after she went to work for Chung, Ratliff was either fired or left his employment. It was not a happy parting of the ways. Apparently, Ratliff believed that Chung owed her $15,000 for moving expenses incurred in connection with her new -- albeit short lived -- career. Chung disagreed and the dispute got ugly. In May 1995, Evan Ryan, Special Assistant to Maggie Williams, told Chung that unless he settled the dispute with Ratliff, the White House would be closed to him. In fact, Ryan made it clear that this message came directly from Maggie Williams, Chief of Staff for the First Lady. Ryan confirmed this in a recent interview. Chung subsequently paid Ratliff $8,000 through Ryan (at the White House) to settle the dispute. Chung stated that he felt pressured to make the payment because if he refused, his access to the White House would be adversely impacted. Since Chung's financial well being depended on continued access to the White House, Chung's business interests dictated that he resolve the matter -- a fact he said was well known by Williams and others at the

White House. As Chung explained in a recent interview, on numerous occasions he informed DNC and White House personnel that the more access he could get, the better his business would be and the more contributions he could make.

Based upon these facts, it could be argued that Ryan and Williams were seeking to extort money from Chung to settle Ratliff's claims in return for continued access to the White House, the President and the First Lady. Alternatively, Ryan and Williams were soliciting a thing of value – payment of Ratliff's claim – in return for access to the White House, the President and the First Lady. Certainly those around the President and the First Lady knew that to deny Chung access to the White House would adversely affect his business interests. And while Chung may not have been entitled to this access, the denial was used as a threat to extract a settlement of a dispute with a former intern of the First Lady.

The entire matter was handled by two senior officials in the First Lady's office. Chung and Ryan both confirm that Chung's continued access to the First Lady, and the White House, was at stake in connection with settling Ratliff's claim. While it is unclear at this juncture if anyone other than Ryan and Maggie Williams were aware of the squeeze being placed on Chung and the pressure being applied to the "White House access" lever, (there is no evidence that either the President or the First Lady were aware of these events), the matter does warrant further inquiry.

While the First Lady is not a covered person under the mandatory provisions of the Act, she should be considered under the discretionary clause. Given our threshold for opening investigations, determination of what the First Lady knew and what she did (or chose not to do) in connection with the information detailed above, is something which deserves further inquiry.

E. John Huang, Marvin Rosen, David Mercer and the DNC

There are several incidents involving John Huang, Marvin Rosen, David Mercer and the DNC which are troubling. These incidents suggest that at some level, certain DNC fundraisers were actively engaged in conduct which had the effect of concealing questionable fundraising conduct from the FEC and the public. The particulars are detailed below:

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2. Huang's Commerce Department Solicitations/Mercer's Cover-up

In a separate investigation, the Task Force has recently learned that David Mercer, another mid-level member of the DNC who regularly appeared at Ickes' White House strategy and money meetings, was also involved in what appears to be, at a minimum, a scheme -- again with John Huang -- to cause false entries to be made on the books and records of the DNC.

The Task Force has uncovered a document, dated October 30, 1995, from Mercer's files at the DNC. (Tab 43) The document lists a group of potential Asian-American contributors with anticipated donations and instructions relating to those who apparently are to place the various solicitation phone calls. Two entries relate to people apparently solicited by John Huang while he

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[32] Notes from Janice Kearney, who reported Presidential doings, describe the June 18 coffee in the following way: "The gathering was an eclectic group of top supporters of the President." In fact, of the twelve people at the coffee, fewer than half were acknowledged contributors. As noted earlier, these people were "invited" shortly before the coffee apparently to dilute the decidedly foreign presence of the CP Group and The other attendees were either foreign nationals, DNC officials, or Thai business people.

was employed at Commerce. (Huang left Commerce in either mid-December 1995 or in early 1996, in order to accept a paid fundraising position at DNC which was arranged directly by President Clinton.)

One of the donors attributed to Huang on the solicitation sheet is Mi Ahn, a California resident. Next to Ahn's name and the figure $10,000 is the notation "John Huang call." We have telephone records that show Ahn called Huang at Commerce on June 5, 1995. On June 9, 1995, there is a telephone message from Mercer to Huang at Commerce: "Have talked to Mi. Thank you very much." On June 12, 1995, Mi Ahn gave $10,000 to the DNC -- the same amount listed next to her name on the October '95 solicitation sheet. Mercer listed Jane Huang -- John's wife -- as the solicitor of these funds on the relevant DNC documents. We believe this was done because Huang was employed at Commerce at the time and was prohibited (under the Hatch Act) from soliciting funds. In an article in the Los Angeles Times, Ahn was quoted as saying Huang encouraged her to financially support the DNC during their phone conversation from his Commerce office. Ahn said a California DNC staffer followed up on the Huang call and she gave $10,000. Mercer's initials appear to be written over the name of the donor on the call sheet. (See Tab 43) During his Senate testimony and FBI interviews, Mercer simply had no recollection of why he thanked Huang in connection with Ahn and could offer no explanation as to why Jane Huang's name appears as the solicitor.

When Ahn was later interviewed by FBI agents, she denied that Huang had ever solicited her, and further denied the statements attributed to her in the Los Angeles Times article. However, the records appear to support Ahn's original version which appeared in the Los Angeles Times.

During the course of our investigation, no one has suggested that Jane Huang has ever been a DNC solicitor. Curiously, however, Jane Huang was also listed (by Mercer) as the solicitor for several other donations made while her husband John was at the Department of Commerce. On October 12, 1994, K. Wynn donated $12,000 to the DNC. At that time, Huang was working at the Department of Commerce. The DNC form first had John Huang as solicitor; his name is crossed out and replaced by that of his wife Jane. (Tab 44) And, on November 8, 1995, Arief and Soroya Wiriadinata each wrote a $15,000 check to the DNC. Although Jane Huang is listed as the solicitor of this $30,000 contribution, the Wiriadinatas admitted when interviewed that John Huang had "suggested" the donation be made. The Wiriadinatas denied even knowing Jane Huang.

Chung Lo was the second name associated with Huang on the October 30, 1995 call sheet. See pages 63-64 and Tab 43. There is evidence that Huang called Chung Lo in late October in an effort to persuade Lo to attend a November 2nd event featuring Vice President Gore. Lo declined to give a donation at that time. Lo has stated, however, that she was called by Huang when Huang was at Commerce for fundraising purposes. In fact, Lo said that the only calls she got from Huang while Huang was at Commerce were to solicit funds. While Lo did not contribute to the November 2nd event, she did send a check in 1996.

In an FBI interview, Lo admitted that when she was in Washington, she visited Huang at his Commerce office and would discuss fundraising but would do so in the Shanghainese dialect. She also confirmed that Huang called her in California from his Commerce office. She knows this because Huang would call and leave a message to return his call at his Commerce office. When Lo returned these calls, they would talk about fundraising. Huang's telephone records from

Commerce confirm several calls to Lo's telephone in San Francisco.[33] The notation on the October 1995 call sheet next to Chung Lo's name provides "I've been told she's holding out for another fundraiser or SOMETHING. John Huang and Charlie Trie to work on this." (Tab 43)

In connection with the November 2, 1995 Washington fundraiser, there was a concern that the event was going to be a flop. A few days before the event, Huang and Mercer met at the Willard Hotel. According to Mercer's Senate testimony on May 14, 1997, this was just a chance meeting and only pleasantries were exchanged. However, according to the Senate Report, Mercer's expense voucher for his parking at the Willard that day was explained as a meeting with John Huang. (Tab 45) Again, this meeting – three days after the dated call sheet referred to above – came at a time when Huang was at Commerce and therefore prohibited (under the Hatch Act) from engaging in fundraising. As improbable as Mercer's explanation is, he stuck to it in his sworn testimony to the Thompson Committee.[34]

The credible information points to the fact that Mercer knew John Huang was engaged in fundraising while he was at Commerce and that Mercer and Huang actively tried to conceal this

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[33] Phone records obtained by the Task Force show that several calls were placed from Commerce to Chung Lo's business telephone in San Francisco in June 1995 (1 call), September 1995 (3 calls), October 1995 (4 calls, including one on October 30th and another on October 31st), November 1995 (2 calls). Four of these calls were from Huang's extension at Commerce, the others were from other Commerce extensions during Huang's tenure at Commerce.

[34] Huang also met with fundraiser Sam Newman and DNC staffer Mona Pasquil, who were the organizers of the November 2nd event. Pasquil told the Senate that when she expressed concern that the event might not be a success, Huang said that he might be able to help her once he left the Department of Commerce and began working at the DNC. His apparent concern at this meeting about the strictures of the Hatch Act do not vitiate the other information we have suggesting that he may have violated that Act's terms. It may mean no more than he was not as familiar and comfortable with Pasquil and Newman as with Mercer. In any event, we do not need to resolve the motivation questions at this point. That there are questions about Huang's behavior only underscores the need to investigate further.

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fact by inserting Jane Huang as the solicitor to cover John's tracks. In fact, the Task Force records indicate that the above donations are the only donations attributed to Jane Huang. And those contributors with whom we have been able to speak have confirmed that they had no dealings whatsoever with Jane Huang. Indeed they did not even know who Jane Huang was.

By concealing John's fundraising activities, any suggestion of a possible Hatch Act violation could be avoided. While the Hatch Act has no criminal penalties for its violation, the disclosure of such a violation could have effected dramatically the continued employability of Huang at Commerce and future employment at DNC respectively. If Huang's fundraising activities were discovered before he left Commerce, his Commerce employment would have been jeopardized and the resulting inquiry would have made his move to the DNC a public relations nightmare.

Even though Huang and Mercer (and possibly others) were able to keep his fundraising activities a secret while he was at Commerce, thus avoiding the public relations' nightmare, this conduct does suggest a potential criminal violation. The Task Force asked Criminal Appeals to research a potential Section 371 conspiracy to defraud the United States based upon a Hatch Act violation. We recently received the benefit of the research in which it was concluded that a scheme to defraud in connection with false statements and active concealment relating to campaign funds solicited in violation of the Hatch Act, does present a viable prosecutable theory. In fact, the memo, (Tab 46), presents several theories upon which a Section 371 prosecution could be predicated. In light of this research, the conduct of Huang and Mercer presents a potential criminal violation and a full investigation is warranted.

The Task Force's investigation has uncovered facts which suggest that it was not only Mercer who was aware of John Huang's active fundraising at Commerce. An October 20, 1995, fax from Laura Hartigan -- who was working at Clinton/Gore at the time -- to Harold Ickes at the White House, included a document entitled "Clinton/Gore '96 Commitments - Media Fund." (Tab 4) This memo listed, among others, John Huang as having made a $75,000 commitment to the media fund. According to this memo, Huang's $75,000 commitment was received by the DNC as of October 20, 1995. Based upon our review of subpoenaed records, the $75,000 refers to funds solicited (not donated) by John Huang. This $75,000 commitment appears to be comprised of, among other donations, the Ahn ($10,000), Wynn ($12,000) and Wiriadinata ($30,000) donations, which were all credited by Mercer to "Jane Huang." Thus, at the same time David Mercer was altering the books and records of the DNC to conceal John Huang's active solicitations while Huang was at Commerce, Hartigan was boldly attesting to Huang's fundraising activities in an internal memo to Harold Ickes.[35] At a minimum, it appears that Hartigan, Ickes and Mercer were aware of the chicanery with respect to Huang's fundraising efforts while he was employed at Commerce. (As detailed below, Ickes was well aware in the fall of 1995 that Huang was employed at Commerce and was attempting to move to a paid position at DNC.) It would also appear that there is a potential perjury case to be investigated in connection with David Mercer's Senate testimony as it relates to John Huang.

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[35] In a recent interview, Hartigan -- true to DNC and Clinton/Gore form -- could recall nothing about the memo and what funds made up Huang's $75,000. She did confirm, however, that, according to the memo, the funds attributed to Huang were received by the DNC prior to the date of the memo.

It is also interesting to note that at the time Hartigan prepared this memo to Ickes on the media fund commitments, she was a Clinton/Gore employee. The funds reflected in this memo were comprised of soft money and included several corporate donations. This was exclusively a DNC project in that it related directly to the so-called "generic issue ads" and not to the reelection effort. The fact that a key Clinton/Gore employee was at the helm of this DNC effort – reporting directly to Harold Ickes on the project – speaks volumes about the true purpose of these "generic issue ads," Ickes' role in the reelection effort, and the willingness to eliminate even the pretense of independence among Senior White House officials, the DNC and Clinton/Gore '96.

John Huang's path from Commerce to the DNC provides an interesting backdrop to his questionable fundraising efforts at Commerce. The effort to have the DNC hire Huang as a fundraiser began in the summer of 1995. Huang was billed as someone who would be able to orchestrate the DNC's effort to tap into the Asian-American Community. In mid-September, Huang and the met with President Clinton and Bruce Lindsey at the White House. It was during this meeting that Huang's desire to leave Commerce and to begin work for the DNC was expressed. In fact, it was who underscored for the President that Huang's talents were being wasted at Commerce and should be utilized in some other way. In a follow-up meeting with Lindsey the next day, Huang confirmed that he wanted to leave Commerce for the DNC. Lindsey mentioned Huang's desire to Harold Ickes who had received the same message directly from the President. On October 2, 1995 – a few weeks before Ickes received Hartigan's memo reflecting Huang's $75,000 commitment to the Media Fund -- Ickes met Huang to discuss his move from Commerce. Huang told Ickes that he would go to either the DNC or Clinton/Gore – whichever Ickes thought was best. Ickes chose the DNC and contacted Marvin Rosen (and

possibly Fowler) about hiring Huang. Ickes then reported back to the President that Huang's move to the DNC was being worked out. Certainly when Ickes received the Hartigan memo and notice of Huang's $75,000 commitment which had been received by the DNC, he was aware of Huang's current employment at Commerce.

The President himself asked Marvin Rosen in early November about Huang's status with the DNC and commented that Huang came highly recommended. As a result, the next day Huang was called to set up an interview at the DNC. This was done despite Fowler's earlier reluctance to hire him. A few days later, Huang met Rosen and Sullivan and was hired by Fowler that same day. Within a few weeks, Huang was a paid DNC fundraiser. Apparently Rosen, Fowler and Sullivan were so concerned about Huang's understanding (or lack of understanding) of the law relating to fundraising, that they insisted that Huang receive special training in this area. At the same time, however, Huang was also given an incentive component to his base salary at DNC based upon his fundraising efforts. The incentive was calculated to make up for the salary cut he suffered in the move from Commerce to DNC.

Huang's fundraising efforts in his final months at Commerce, and the need to conceal these efforts by listing Jane Huang as the solicitor of record on the DNC books, take on quite a different hue when viewed in the context of the efforts to move Huang from Commerce to the DNC. The role of Ickes, the President, Fowler, Rosen, Mercer, and Hartigan certainly militate in favor of a full investigation into these efforts and the apparent altering of the books and records of the DNC to conceal Huang's activities during this "transition" period.

3. Miscellaneous Events

There are several miscellaneous events (some mentioned above) which raise questions about whether the DNC – at some level – was aware of (or intentionally oblivious to) potential campaign irregularities:

(a) According to the Senate Report, the DNC vetting procedures went from stringent to, at best, curiously lax. In 1992, a system was in place which involved the vetting of all contributions of $10,000 or more. A group varying from 6 to 10 persons were responsible for vetting the checks. By 1994, only one member of the DNC General Counsel's office and one DNC part-timer handled vetting, and they did so only for checks of $25,000 and over. In May of 1994, the part-timer left the DNC. After that, according to Chairman Fowler, the responsibility went to the Finance Division. However, he could provide "no specifics" on how it was performed, and Sullivan described the new process as "a poor compliance system."

(b) On December 14, 1994, Chung wrote to Sullivan at the DNC about a group of foreign nationals who were scheduled to visit the White House. He provided Sullivan with detailed information about the group, including Chairman Chen of Haomen Beer who, according to Chung, would play "an important role in our future party functions". (Tab 35)

(c) On March 8, 1995, Chung contacted Sullivan and asked if Sullivan could arrange for a meeting for Chung with the President. Sullivan did not do so. As he explained in his Senate deposition:

> We had gotten money from Johnny previously. I think he had contributed about 100,000 to that point over the past year, and the fact that -- him showing up with these five people from China, I had a concern that he might -- that they -- he might be taking -- I had a sense that he might be taking money from them and then giving it to us, you know. That was my concern.

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(Sullivan Senate Deposition, June 4, 1997, at 228).

(d) On January 4, 1995, Chung wrote to Doris Matsui, Deputy Assistant to the President:

> In the next two years I will be coordinating a lot of visits from Asian business leaders to support DNC. I look forward to working closely with you . . .

(Tab 39) (emphasis added).

None of these miscellaneous matters -- standing alone or together -- presents compelling information upon which a prosecution would be commenced. However, in the context of what we have learned, it is information worthy of further investigation.

As is evident, there are a variety of matters which raise concerns about the DNC and some of its officials. None of the DNC officials fall within the mandatory provision of the Act. On the contrary, aside from Ickes, none of these officials were de facto officers of Clinton/Gore exercising authority at the national level. However, an investigation into the fundraising activities of the organization and several of its high level officials -- including Rosen and Mercer -- at least suggests a potential political conflict of interest for the Department of Justice which should be considered. As long ago as 1978, when the office of Special Prosecutor was first created, Congress was concerned about this very scenario:

> The Attorney General and his principal assistants are appointees of the President and members of an elected administration. It is a conflict of interest for them to investigate their own campaign or, thereafter, any allegations of criminal wrongdoing by high-level officials of the executive branch.

1978 U.S.C.C.A.N. at 4222.

The reason such a potential political conflict is suggested is based in part on the fact that Ickes, and others, including the President, were very active in running the affairs of the DNC and

Clinton/Gore. The fact that both the President and Ickes were part of what could be considered the DNC and Clinton/Gore control group, casts a different light on the investigation. While this does not present the type of distilled potential conflict contemplated in the Act, it is a matter to be considered under the discretionary provision.

F. Loral Matter

There are several issues arising from the Loral matter which are troubling.

1. The Decision to Investigate

Recently, allegations surfaced that Loral was given a waiver on the export of satellite technology in return for campaign contributions by CEO Bernard Schwartz. The mere fact that these allegations were made has presented a dilemma for the Department. This was evident in the first meeting held to address the allegations. We were attempting to reach a consensus on the Department's response to these allegations when an interesting suggestion was made. Someone urged that in light of the Hill's announcement to have Congressman Cox's Committee look into the matter, perhaps the Department should stand down in connection with any criminal investigation/inquiry so as to avoid the inevitable tension between the Department and Cox's Committee reminiscent of the tension between the Task Force and Senator Thompson's Committee last year. The argument was that if we attempted to conduct a criminal investigation, the first time we requested that the Committee not grant immunity, not call a particular witness, or not make certain information public, we would be accused of obstruction and engaging in a cover up.

The other half of the dilemma was that although no one could articulate a solid basis upon which to predicate a criminal investigation, given the political climate, it was generally felt that the

Department had to commence an investigation. As a result, the Task Force was asked to formulate an investigative plan based upon allegations -- not because there was any real indication of a quid pro quo or criminal conduct -- but rather because allegations were made which, if true, suggested a potential violation of federal law. The Task Force did put together a proposed investigative plan which included potential criminal allegations. (Once again, the Task Force's low threshold with respect to matters not involving senior White House Officials was triggered and a full criminal investigation was begun.) When the Loral allegations are placed side by side with those contained in the Common Cause letters received by the Department almost two years ago, it is difficult to justify the Department's failure even to commence an investigation of the Common Cause allegations.

2. Actual And Potential Conflicts Of Interest

The Department has opted to commence an investigation of the Loral matter.

One of the areas to be reviewed is whether the contributions of Bernard Schwartz somehow corruptly influenced the President's decision to issue the 1998 waiver to Loral over the Justice Department's "concerns" that the waiver may adversely impact an ongoing criminal investigation. That is, was the waiver corruptly influenced by the President's desire to help his friend and generous DNC contributor Schwartz and to impede the ongoing investigation?

In connection with this investigation, at least two high-level DOJ employees will be witnesses. Their testimony will be material on the issue of what was said to the White House in

connection with the Department's concerns about the on-going criminal investigation. Several potential and actual conflicts arise as a result of these facts.

A. DOJ's Expressed Concerns

By expressing our concerns, the Department took a position adverse to that ultimately adopted by the President. The Department believed that a decision to grant the waiver had the potential to effect adversely the ongoing criminal investigation. We are now called on to investigate the motives underlying a decision by the President which was contrary to the position advanced by the Department. In addition, the President's decision -- even now -- continues to have the potential to effect adversely an ongoing criminal investigation being conducted by the Department. To us, the conflict is evident.

As a subtext to this conflict, it will become material what the precise conversation (or conversations) was (were) between Bob Litt and Chuck Ruff concerning the Department's position. This is especially true in light of indications by Ruff, according to press reports, that the Department's concerns were not deemed by the Department as significant given the manner in which they were communicated to the White House. It may be that the tone and tenor of the conversation (conversations) will be the subject of differing interpretations. There seems to be a "he said, he said" shaping up. At a minimum, the conversation (conservations) will likely be spun by the White House.

B. The White House Desire To "Get The Story Out"

Quite apart from these issues, the White House recently contacted the Department about document production to the Hill on the Loral matter. Apparently, the Department was contacted by DOD about the production of a particular DOD report to the Hill and what effect its

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production would have on the ongoing criminal investigation. This is the same criminal investigation which may be adversely effected by the President's decision to sign the waiver. The Department's response -- after consultation with the prosecutors handling the Loral matter -- was that production would effect adversely the investigation and the report should not be produced. Following this determination, Chuck Ruff called the Deputy's Office to have Justice reconsider its decision because the White House believed that a prompt release of all the documents was in its interest and would serve its purposes. A meeting was called by Bob Litt (one of the DOJ witnesses in our investigation) to revisit the issue and to see if a time could be agreed upon for the release of this report. At the meeting we expressed a concern about negotiating or even consulting with the White House on the timing of the release of documents simply because a quick release was in the interest of the White House. The contact should certainly not involve Bob Litt, one of the witnesses whose statement (testimony) will be material in the investigation of the manner in which the Department's concerns were communicated to the White House. (Bob Litt and Mark Richard recently requested to be recused from the Loral matter) This type of negotiation, consultation and posturing in the context of this investigation is unseemly and serves to underscore the conflict that underlies this entire matter.

While the issue concerning the release of the documents has been mooted, and the Department witnesses are no longer involved with the matter, the entire Loral matter presents a string of conflicts which will not go away and which cannot be ignored.

3. The Task Force's Dilemma

As a backdrop to the entire Loral matter, the initial concern is that our conducting this investigation is a recipe for disaster. If there is a single piece of paper that we miss, a single

employee anywhere that we neglect to interview, or a single question we do not ask, we will be branded incompetent at best and, at worst, part of a corrupt effort to cover up for the Administration. While this is not the type of environment in which to conduct a criminal investigation, it is not a sufficient reason to ship this matter to a preliminary inquiry under the ICA either. However, the following concerns may establish a principled reason to send this matter to a preliminary inquiry under the ICA.

There are two documents which could form a basis upon which to predicate a federal criminal investigation. The first is a February 13, 1998, letter from Thomas Ross, Vice President of Government Relations for Loral, to Samuel Berger, Assistant to the President for National Security Affairs. It could be argued from this letter that Schwartz intended to advocate for a quick decision on the waiver issue by the President. In the letter, annexed as Tab 47, Ross wrote: "Bernard Schwartz had intended to raise this issue (the waiver) with you (Berger) at the Blair dinner, but missed you in the crowd. In any event, we would greatly appreciate your help in getting a prompt decision for us."

In the letter Ross also outlined for Berger how a delay in granting the waiver may result in a loss of the contract and, if the decision is not forthcoming in the next day or so, Loral stood to "lose substantial amounts of money with each passing day." The President signed the waiver on February 18, 1998. On January 21, 1998, Schwartz had donated $30,000 to the DNC; on March 2, 1998, he donated an additional $25,000.

The second document is a memo from Ickes to the President dated September 20, 1994, in which Ickes wrote:

> In order to raise an additional $3,000,000 to permit the Democratic National Committee ("DNC") to produce and air generic tv/radio spots as soon as Congress adjourns (which may be as early as 7 October), I request that you telephone Vernon Jordan, Senator Rockefeller and Bernard Schwartz either today or tomorrow. You should ask them if they will call ten to twelve CEO/business people who are very supportive of the Administration and who have had very good relationships with the Administration to have breakfast with you, as well as with Messrs. Jordan, Rockefeller and Schwartz, very late this week or very early next week.
>
> The purpose of the breakfast would be for you to express your appreciation for all they have done to support the Administration, to impress them with the need to raise $3,000,000 within the next two weeks for generic media for the DNC and to ask them if they, in turn, would undertake to raise that amount of money.
>
> * * *
>
> There has been no preliminary discussion with Messrs. Jordan, Rockefeller or Schwartz as to whether they would agree to do this, although, I am sure Vernon would do it, and I have it on very good authority that Mr. Schwartz is prepared to do anything he can for the Administration.

See Tab 12 (emphasis in original).

From this memo one could argue that Ickes and the President viewed Schwartz as someone who would do anything for the Administration -- including raising millions of dollars in a short period of time to help the media campaign. We now know not only that the media campaign was managed by Ickes from the White House, but also that it played a critical role in the reelection effort. Consequently, it is not a leap to conclude that having been the beneficiary of Schwartz' generosity in connection with the media campaign, the Administration would do anything it could to help Bernie Schwartz (and Loral) if the need arose.

If in fact there is anything to investigate involving the Loral "allegations," it is -- as set out in the Task Force's draft investigative plan -- an investigation of the President. The President is the one who signed the waiver; the President is the one who has the relationship with Schwartz; and it was the President's media campaign that was the beneficiary of Schwartz' largess by virtue of his own substantial contributions and those which he was able to solicit. We do not yet know the extent of Schwartz solicitation efforts in connection with the media fund. However, if the matter is sufficiently serious to commence a criminal investigation, it is sufficiently serious to commence a preliminary inquiry under the ICA since it is the President who is at the center of the investigation.

For all these reasons, the Loral matter is something which, if it is to be investigated, should be handled pursuant to the provisions of the ICA.

IV. The Enforcement Dilemma

Apart from consideration of the information and evidence developed by the Task Force and what, if any, impact that evidence has upon the ICA, there is another significant issue which must be addressed. That is, given the information and evidence we have developed to date, what obligation does the Department have to ensure effective enforcement efforts in the future in the area of campaign finance violations. The short answer is that given the current state of the law, there is not much we can do. However, with a few key changes and modifications, an effective enforcement mechanism is within our reach. In light of the abuses we have uncovered over the last 21 months, we believe that it is incumbent upon the Department to articulate the problems and to propose changes (modest and ambitious) in a positive manner.

A. The Problems

1. FECA and the FEC: Impotence By Design

At the heart of the enforcement dilemma is the Federal Election Campaign Act ("FECA"). FECA, as drafted and amended, is designed so that any meaningful prosecution is difficult at best. By reducing felonies to misdemeanors and combining a shortened statute of limitation with a heightened intent requirement, the role of the prosecutor in all but the most egregious cases has been non-existent. And, when you add to this the FEC – the only administrative/civil game in town– with its special rules of engagement and paltry investigative resources, there is, by design, no effective civil or criminal enforcement mechanism in the area of campaign financing. It is no wonder that campaign finance abuse is such a fertile area for the clever white collar criminal. Not only is criminal prosecution made more difficult than in the typical fraud case, the risk of civil or administrative sanctions are likewise remote. There is virtually no deterrent that exists -- civil or criminal -- in this area and the '96 election cycle has demonstrated the depth of abuse that is possible. If one tenth of the energy and resources that were spent on the Senate and House oversight investigations were directed toward mending the impotent enforcement mechanisms Congress has created, we would be well on the road to recovery.

The fact is that the so-called enforcement system is nothing more than a bad joke. Thousands of Americans each year believe that if they check a box on their tax returns, they are striking a blow for campaign financing reform and against big contributors coopting our elected officials through a system whereby big contributors buy access to the exclusion of the average person. Simply stated, the matching funds provisions do not serve their stated purpose. Given

the loopholes, the law, the opportunists, and the elected officials in desperate need of funds to fuel media campaigns, the enforcement system is illusory at best.

2. Compliance By the Major Parties

Under the current enforcement system, the two major parties are virtually insulated from any serious enforcement actions. In the criminal arena, given the statutes we are dealing with and the way the parties have set up their fundraising mechanisms, it would be extremely difficult to charge the major parties with a criminal violation. Both parties have built in layers of deniability and negligence between senior party officials and the rank and file solicitors/fundraisers. As a result, the "lack of knowledge" and "negligent employee/volunteer" defenses are as much a part of the system (by design) as the need to raise money to fuel campaigns.

During the 1996 election cycle, the DNC had about as sloppy an operation as you could imagine. However, the DNC designed its operation to insulate top officials from the sins of the fundraisers and solicitors. On the one hand, there were the senior White House officials who, working with senior DNC and Clinton/Gore personnel, were the architects of a "contributions for access and perks" system calculated to fuel the media engine that was driving the reelection effort. From the White House these officials -- without benefit of formal title or position -- issued directives as to the access and perks available and the money needed to keep the media fund running. Always just days away from exhausting available funds, the drive for contributions was constant. See, e.g., Tabs 48 and 49.

On the other hand, enticing solicitors, fundraisers and donors with perks and access was the oil that kept this machine running. Those with business acumen quickly recognized how access and perks could be transformed into personal profit in the context of private business

opportunities. Trie, Chung, Kronenberg, Hsia, Jimenez, to name a few, are living proof of the environment created in the '96 election cycle. Without a credible compliance effort, those who chose to exploit the opportunities served up by the White House, the DNC and Clinton/Gore, went unsupervised and unhampered. This was true even after the warnings were heard loud and clear along the way by senior White House officials. See, e.g., PLET discussion supra at pages 46-50 (Ickes, First Lady, White House Counsel aware of donations collected by Trie which were comprised of foreign funds in violation of PLET rules and regulations); Tabs 35 and 39 (Chung letters to the DNC and White House linking DNC assistance and contributions to Chinese businessmen he intends to bring to the White House); Tabs 37 and 38 (NSC e-mails suggesting a connection between Chung's Chinese businessman and DNC contributions); and Senate deposition of Richard Sullivan reprinted in part at page 71 (suggesting that there was a suspicion concerning the true source of Chung's donations). The result was the solicitation and acceptance of conduit and foreign contributions.

The compliance disconnect involved not only solicitors, fundraisers and contributors, but applied to the DNC's internal functions as well. The DNC had a practice of automatically allocating a contribution first to a hard money account (up to an individual's yearly maximum) and sending the balance off to a soft money account. However, the required notifications to the contributors -- sent to alert them that they had reached their maximum hard money limit for that year -- were rarely sent out simply because compliance was not a priority and DNC resources were "better spent" on raising money rather than insuring compliance with exiting laws. Similarly, the vetting of checks also fell in favor of more aggressive fundraising efforts. However, the DNC's senior officials were always insulated from the sins of those in the accounting and

collection departments. The procedures were on the books and the failures were, according to the DNC officials, an oversight by, and the responsibility of, low level employees or volunteers.

In each of the areas outlined above, the DNC designed a system which gave the appearance of concern for compliance, but in fact provided no substance to ensure compliance with existing laws. Likewise, Clinton/Gore '96, working hand in hand with the DNC and the White House in the fundraising frenzy, presented a mere facade of a compliance framework. The result was the wholesale violations which the Task Force has been addressing over the last 21 months.

For its part the RNC, while apparently not on a par with the DNC, had its fair share of abuses. The Barbour matter is a good example of the type of disingenuous fundraising and loan transactions that were the hallmark of the 1996 election cycle. In fact, Barbour's position as head of the RNC and NPF -- and the liberties he took in those positions -- makes the $2 million transaction even more offensive than some concocted by the DNC. Indeed, with one $2 million transaction, the RNC accomplished what it took the DNC over 100 White House coffees to accomplish.

It is evident that the missing piece from campaign finance enforcement is a credible incentive for the major parties to comply with the law. Any real campaign finance reform has to begin with the major parties and motivating them to comply with the law. This can be accomplished in at least two ways.

The most ambitious approach would be to undertake an overhaul of the substantive provisions of FECA and to create an enforcement-ready FEC. This would, of course, entail addressing the jurisdictional reach of FECA (and the FEC) concerning soft money (foreign and

DOJ-FLB-00116

domestic), the intent requirements, the statute of limitations, and the funding and complexion of the FEC (including a credible enforcement arm of the FEC). These are complex issues requiring careful treatment. Our work on the Task Force provides excellent experiences upon which to participate in such an undertaking. We could write extensively on these points; however, that is best left for another report on another day.

Short of the type of complete overhaul contemplated above, there are several relatively minor adjustments which could increase enforcement dramatically. For example, the effective use of civil and administrative proceedings against the major parties (and in an appropriate case the candidate also) for the very type of abuses seen in the 1996 election cycle could accomplish a great deal. With a lower quantum of proof needed to prove a violation and a lesser intent requirement, a civil or administrative proceeding could hurt the parties in the areas in which they are vulnerable. First, with a sensible damage provision, a civil or administrative proceeding could be just the tool to compel the major parties to promulgate and enforce internal rules and regulations calculated to insure that everyone working within the party -- employees and volunteers alike -- is not only properly trained, but is properly supervised during the course of the election cycle. The parties have to be "inspired" to construct and maintain effective and credible internal compliance divisions which are as important to the operation of the parties as their fundraising components. Compliance divisions have to have the ability to enforce compliance within the party including making appropriate referrals for enforcement action. Monetary penalties would go a long way to encourage the creation of compliance divisions and credible internal scrutiny of party activities.

In addition, a civil or administrative proceeding provides the opportunity for the creative use of injunctive relief to compel (and to insure) future compliance. This can be accomplished by requiring the out of compliance party, committee, or candidate to maintain a compliance division which will in turn maintain certain minimum compliance standards. In addition, the party, committee, or candidate can be required to employ an outside monitor to oversee conduct in future election cycles following a violation. The outside monitor could observe the operation in connection with the next election cycle and report to the appropriate enforcement agency concerning the efforts in place to avoid future violations. These conditions can be imposed as part of a resolution of a particular violation by the party, committee, or candidate.

The reports which must be filed by the candidates and their committees should also be amended to ensure that important information is reported and reviewed by those who have enforcement responsibility at the time the reports are filed. Currently, most violations are detected initially by the press during periodic reviews of filings with the FEC or by an opposing candidate who is sufficiently outraged by a particular practice that he/she reports it to the FEC. This does not constitute an acceptable enforcement network. The regulators must take the reporting requirements as well as the information reported seriously. In order to accomplish this, the review of the material cannot be the result of a haphazard review occurring months and sometimes years after the reporting is made. Rather, the review process, as well as an appropriate enforcement response, must be methodical, timely, and diligent. These efforts will assist in motivating compliance.

You will recall the notes from the Panetta staff meeting as the fundraising scandal began to break in the press. The Task Force obtained these notes from the White House pursuant to

subpoena. The notes reflected comments by a White House Staffer who, amid reports of foreign money finding its way into the re-election effort, opined that any FECA violations would not be addressed by the FEC until after the election. What was not said -- but what was clearly understood -- was that any election abuse addressed after the election will likely be forgotten long before the next election and chalked up to the cost of doing business. In any event, it would have no impact on the current election.

In the Barbour investigation, it was discovered that the RNC took a similar tact by not drawing down on the Young loan to NPF until a date which insured that the $2 million transaction would not have to be reported to the FEC (and therefore publicly) until after the election. This was not accidental, but rather a strategic move calculated by top RNC officials to avoid a potentially embarrassing -- and possibly an illegal transaction -- from being discovered prior to election day. The RNC officials -- like the Panetta staff member -- knew full well that a post-election day discovery of a violation is an acceptable cost of doing business.

Given the lethargic response to campaign finance abuses in the past, it is no wonder there is no incentive to play by the rules. A critical problem is that the FEC has exclusive jurisdiction over administrative proceedings involving funding violations. And yet the FEC was designed to be impotent. Not only is the FEC under staffed, it cannot act absent a consensus of the politically balanced Commission. The system is not designed to function but rather to protect an environment in which abuses can flourish. Say what you will, but the FEC is not an effective enforcement mechanism.

In order to break this enforcement dilemma, the Civil Division of the Department of Justice should be given at least concurrent jurisdiction to bring administrative actions based on

FECA violations.[36] By doing so, and by establishing a significant section within the Civil Division to address such cases, the Department could accomplish in the area of campaign finance compliance what has been accomplished in the area of compliance by securities and commodities firms (and their employees) with respect to securities and commodities laws, rules and regulations. Virtually every broker-dealer today has elaborate and credible compliance departments which use best efforts to ensure that the company and all employees are observing all laws passed by Congress as well as the rules and regulations promulgated by the Securities and Exchange Commission ("SEC") and the Commodities Futures Trading Commission ("CFTC") for the marketplace. However, this compliance was not the result of an expression of goodwill or sudden enlightenment by the broker dealers. On the contrary, civil lawsuits and credible enforcement actions have established the principle that compliance is the norm in the marketplace. The brokerage houses are responsible for their employees and agents when they act in the marketplace. If an employee or agent is not properly trained or supervised and bad things result, the brokerage house responds in damages. In addition, the Government has from time to time snapped a broker into compliance with an enforcement action resulting in monetary damages and injunctive relief. These actions have been complimented by a mandatory monitoring system conducted by an investigative firm (which is paid by the offending brokerage house), which have become part of any settlement of the action. Compliance follows stiff civil and criminal enforcement and monitoring operations. It is that simple.

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[36] To the extent that there needs to be a legislative fix to grant the Department concurrent jurisdiction with the FEC for civil violations, the current political climate appears propitious. Members of the House recently broke ranks with the leadership and demanded some campaign finance reform. This may be the type of modest reform that will be acceptable to a majority on both sides of the aisle.

In the area of campaign financing, however, there is no real civil enforcement mechanism in place. The FEC is unable to engage in any meaningful enforcement efforts and the Department of Justice is precluded from doing so in the civil arena. As a result, there is no real effort by the major parties to comply with the law because the occasional FEC enforcement action or criminal misdemeanor prosecution is chalked up to the cost of doing business and nothing ever changes. Both the RNC and DNC pay lip service to compliance -- but nothing more. A few well-placed and expertly investigated civil actions will quickly ensure the creation of credible compliance departments within the major parties and genuine concern for how the fundraisers and solicitors bring in the money.[37]

It is curious that with the millions of dollars spent on media advertisements during the last election cycle, virtually nothing was spent by the parties on effective compliance departments. That speaks volumes about where the major parties place compliance with existing laws on their list of priorities -- somewhere below securing the obligatory red, white, and blue balloons for release on election night. We are now paying the price for this neglect.

3. The Conduit Problem And The Criminal Response

One of the major problems resulting from an ineffective enforcement mechanism is the proliferation of conduits in the election process. Through conduits two evils are realized. First, those who by law are not permitted to participate in our electoral process are able to do so. This can be foreign governments, foreign officials, ineligible residents or ineligible entities. Second, the

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[37] Here, unlike the investment situation, there are no disgruntled customers who have lost money and will scream "foul" as a result of a brokers conduct. Rather, in the election context the victim is the regulatory framework, the integrity of the electoral process and the public at large. Absent diligent investigative reporting or an opponent who is prepared to blow the whistle with respect to a particular practice, violations typically go undetected.

regulations concerning the types of money being donated (hard money vs. soft money) can be circumvented easily. The result is that the electoral process can shift by virtue of unauthorized contributions in favor of one candidate at the expense of another. While in the past we have treated these abuses as "minor offenses," the magnitude of these abuses can alter the outcome of a particular election. If we have learned anything about the election process it is that the amount of money raised as well as the type of money raised (hard vs. soft) can impact directly on the results of a particular election. And yet, we tolerate a system that promotes – and even rewards – the use of conduits. This has to change.

Conduit payments are difficult to detect. A simple reimbursement scheme – especially if accomplished with cash – does not leave a bright investigative trail. More often than not investigators back into a conduit scheme while investigating some other alleged violation. It is clear, based upon the Task Force's experience, that the criminal law alone is not an effective method to guard against conduit donations finding their way into the process. Rather, any effective deterrent has to begin with major parties and the fundraisers themselves. The key is enforced diligence in connection with solicited funds. An effective compliance department or legislated procedures could accomplish this. The standard procedures should include a requirement that contributors be required to attest on a donor card that: (i) the source of the money is not foreign; (ii) they are an authorized donor; and (iii) they are not being reimbursed, directly or indirectly, for the contribution. In addition, the donor should attest that they are aware that foreign funds or conduit reimbursement would be illegal and that this donor information will be filed by the Committee, candidate or party with the FEC (a federal government agency) and that the representations made on the card are true and accurate. Then, if conduit money was later

detected, a federal criminal violation could be brought and the intent requirement satisfied by virtue of the donor card. The standard "I didn't know it was not permitted" or "I never heard of the FEC" defenses would be eliminated. Similarly, fundraisers/solicitors should be required to advise prospective donors about the prohibitions of conduit and foreign source payments and make some effort in the field to determine that the donations are genuine and not reimbursed.

If credible compliance departments are maintained by the parties, enforcement efforts should be strict and when violations are found, the consequence should include prosecution of the conduit (as opposed to our general policy not to prosecute), the solicitors and, in appropriate cases, the party or Committee itself, under the felony provisions of Title 18 United States Code.

In order to accomplish this, the Department of Justice should revise its long standing policy relating to conduits. In the Federal Prosecution of Election Offenses, we have announced to the world that our approach to the conduit is one of non-prosecution. See Prosecution of Election Offenses (1995 Edition) at 117. We should now modify our policy and pledge an effective enforcement operation against conduits for violation of the law.

In addition, the Department's misdemeanor approach to campaign financing violations in general should be changed as well. The presumption should be that these violations are deemed serious by the Department and will be treated as such. With the minor adjustments suggested above, the Department could make a significant course change in the area of campaign finance abuse.

Short of legislative fixes, the Department has the tools right now to effect a change in the prosecutorial response to election offenses. This would, of course, mean altering our published guidelines. However, the experience of the task Force has given us more than ample reason to

alter our long standing policies. We noted earlier that the Department has articulated several compelling reasons why the Task Force's "pursue every lead and leave no stone unturned" approach justifies a somewhat relaxed predication requirement. See page 13 above. These relaxed predication requirements were adopted in response to a flood of election law violations. For these same reasons, it may be time to change the Department's public statements concerning the prosecution of election offenses. The tone and tenor of any new statements should reflect the seriousness of the criminal conduct we have been investigating, its effect on the political process, and the need for deterrence in this area. In short, any new statements should reflect an all felony approach for those orchestrating conduit or foreign contribution schemes and a misdemeanor (rather than no prosecution) approach for the simple conduit who was not part of the planning process.

The mere conduit – who we currently decline to prosecute – is not unlike the mule or courier in a typical airport or border-bust case. The real culprit is the drug dealer who has effectively insulated himself/herself from arrest by hiring a low level mule or courier to carry the drugs from point A to point B. However, our response has never been to give the mules a free pass or a one-time "get out of jail free" card because they are not players in the larger drug operation. To the contrary, we have no problem sending them to jail for 10-15 years to demonstrate how serious we deem the underlying offense, as a deterrent to others, and as an incentive for the mule to tell us all they know about the larger operation.

We should adopt the same approach with respect to the so-called simple conduit. It is rare that the conduit is truly ignorant of what is going on. They are asked to make a political contribution to a candidate or party designated by someone else who, in turn, reimburses them for

their contribution. Like the mule who claims he/she did not know the drugs were in the trunk or suitcase, but was only asked by a friend to drive the car into the United States or to carry the suitcase, the conduit always claims ignorance of the law and denies any knowledge that this conduct was somehow illegal. Those of us who deal with these conduits understand the kabuki dance that we are engaged in. We rush to grant immunity (or issue one of our now famous non-prosecution conduit letters) so that we can focus on the organizer of the conduit scheme.

Without the conduit, the system does not work. And yet, we have publicly stated that absent aggravating circumstances, the conduit will not be prosecuted. Moreover, there is no incentive for them to tell us the whole truth when they and their lawyers know that if they stick to their scripted lines, they will not be prosecuted. (More times than not their attorney is paid for by the target of the conduit investigation and the conduit's version is generally consistent with whatever "defense" the target is constructing.). An effective and intelligent prosecution plan -- coupled with the changes outlined above concerning the donor cards -- will effect this.

The particulars of an effective enforcement mechanism may of course take different forms than those outlined above. We could write volumes on the subject based upon our experiences with the Task Force. However, it is sufficient at this point to alert you to the enforcement dilemma and to suggest some possible resolutions. The Department should put an energized working group together (a healthy portion of which should include experienced AUSAs) to address these issues in the near future. This is not a matter we can leave for someone else to resolve. It is clear that if the Department fails to address this dilemma, we will find ourselves faced with the same conduct at the end of every election cycle.

V. Conclusion

We have been reviewing the facts and the evidence for the last ten months. During that time we have gained a familiarity with the cases, the documents and the characters sufficient to draw some solid conclusions. It seems that everyone has been waiting for that single document, witness, or event that will establish, with clarity, action by a covered person (or someone within the discretionary provision) that is violative of a federal law. Everyone can understand the implications of a smoking gun. However, these cases have not presented a single event, document or witness. Rather, there are bits of information (and evidence) which must be pieced together in order to put seemingly innocent actions in perspective. While this may take more work to accomplish, in our view it is no less compelling than the proverbial smoking gun in the end. As is evident from the items detailed above, when that is done, there is much information (and evidence) that is specific and from credible sources. Indeed, were this quantum of information amassed during a preliminary inquiry under the ICA, we would have to conclude that there are reasonable grounds to believe that further investigation is warranted. As suggested throughout this memo, there are many as yet unanswered questions. However, the information suggesting these questions is more than sufficient to commence a criminal investigation.

It may be that in the end the allegations outlined above will all wash out and not a single additional prosecution will be brought. In fact, as an experienced prosecutor and investigator we are confident that we cam predict the course that some of these matters will take. However, we must operate within the four corners of the ICA as drafted, not as we would have it drafted. It seems clear to us that in the end, the prosecutorial discretion necessary to make a determination concerning the matters outlined above, given the status of the people whose conduct is under

review and the provisions of the ICA, is the type of decision designed to be made by a responsible Independent Counsel.

Attachments

CONFIDENTIAL MEMORANDUM

July 20, 1998

To: The Attorney General
The Deputy Attorney General
James K. Robinson, Assistant Attorney General

From: Robert S. Litt

Re: La Bella/DeSarno Memorandum

I thought I would set down some preliminary observations about the memorandum provided to you by Chuck La Bella and Jim DeSarno. I believe that Public Integrity should be asked to comment on it.

The Independent Counsel Act

The memorandum argues at length that the Department has applied the Act improperly and inconsistently. Setting aside the repeated attacks on the motivations of those who disagree with the conclusions reached in the memorandum — attacks which I think are unjustified and inaccurate — the central argument is that we have applied too high a standard in seeking specific and credible evidence of criminality, and that the Task Force's investigation has been hindered by this artificial standard.

I would have thought that this issue had been laid to rest by now. The comprehensive nature of this memorandum shows that the Task Force has not been blocked from pursuing any leads in matters where there is predication for a criminal investigation.[1] However, to date it has been unable to come up with any specific and credible information that a covered person may have committed a crime. The memorandum

[1] The memorandum states that "[e]very time" it was suggested that the Task Force "conduct[] an inquiry or investigation of the entire campaign finance landscape in order to determine if there exists specific information from a credible source" that would trigger the Act, "it has been rejected on the theory that such an inquiry can only be conducted pursuant to a preliminary investigation." (pp. 7-8) I am unaware of any occasion on which this has happened. On the contrary, the Attorney General constantly asks whether we have uncovered information sufficient to trigger the Act, and constantly emphasizes that the Task Force must follow the evidence wherever it leads.



frequently raises questions, but a question or a speculation is not specific and credible information. In other words, it is not the Independent Counsel Act that is blocking investigation of the President and those around him; it is the lack of any specific and credible information that they may have committed a crime.

I do agree with the memo that the decision to investigate the Loral matter seems to involve a lower standard of predication than we ordinarily use. Indeed, the memo itself makes it clear that there is absolutely no evidence at this time of anything more than that the President and others in the White House may have taken into account the fact that Loral was a major contributor — although even this much is by no means clear. However, as we have often discussed, this is simply not a crime in the absence of a specific quid pro quo. I do not doubt that had this matter been brought to any U.S. Attorney's office in the country it would have been closed without investigation. (I note that no one has expressed interest in following up criminally on the recent Wall Street Journal article setting forth numerous instances in which Sen. Lott took actions favoring large contributors).

Our decision to investigate the Loral matter was, thus, in part a response to outside pressure. (It was for this reason that I believed, and still believe, that we should have deferred a criminal investigation to Congressional inquiries). However, it is not unusual for us to commence investigations of matters we would not ordinarily investigate in response to outside pressure (Martin Luther King, for example). Moreover, Loral is different from the Common Cause allegations (which I will discuss somewhat more below) in that there is no agency with the sort of primary jurisdiction that the FEC has to evaluate campaign finance matters. If the Loral investigation leads to any specific and credible information against the President or another covered person, then we must trigger the Act; but not even the memorandum's authors believe we have that now.[2]

Finally, although I don't think that it has any impact on the analysis,I want to note my disagreement with the proposition that the Attorney General's statements that we will follow all leads in the campaign finance investigation constitutes an established policy of the Department for purposes of the Independent Counsel Act (p. 12). That cannot be so; if the

[2] I leave to others the analysis of whether the role that Mark Richard and I played in communicating with the White House creates a conflict for the Department.

Attorney General stated that we would not investigate this matter, would that constitute a policy enabling us to avoid invocation of the Act? It seems clear to me that such a policy has to be independent of the particular case; that certainly has been the practice of the Department, as we noted in the § 607 preliminary inquiry. Parenthetically, I note that the memorandum fails to acknowledge that the MOU with the FEC clearly is such a policy.

The Common Cause Allegations

The Department having determined that the activities of the White House and the DNC in the media fund campaign did not warrant criminal investigation under FECA or the presidential funding acts, the memorandum argues that they should be prosecuted as a conspiracy to defraud the United States. (Sen. Thompson's committee made the same argument; no one appears to press the election law violations now). It notes that we are pursuing this theory with respect to John Huang, whose alleged fund-raising activities at the Department of Commerce may have violated the Hatch Act — but not the criminal provisions of the Act.

Whatever the merits of the theory may be with respect to Huang, however, there is a crucial difference. Huang's activities (if true) violated the Hatch Act; the argument in the memorandum is that the media fund campaign was a crime even if it did not violate the election laws and indeed followed the guidance issued by the FEC. I am certainly not aware of any case in which a defendant followed a comprehensive regulatory scheme and exploited a loophole in it, but was later prosecuted because prosecutors later decide that the loophole should not have been there.

For example, under the Ethics in Government Act certain government officials are required by statute to file financial disclosure forms, and false statements on those forms are criminal. The forms permit you to omit listing any assets worth less than $1000 (I believe that is the amount, but the particular number is irrelevant). If a wealthy man broke up all his assets into stockholdings of less than $1000, so that his worth appeared to be zero on the EIGA form (and did it in conspiracy with his stockbroker), could he be prosecuted for conspiracy to violate the United States? I would hope not. Yet fundamentally that is what happened here.

At bottom, the "conspiracy to defraud" theory advocated here rests upon the premise that the campaign finance laws were in fact violated by the White House's control of the DNC media campaign.[3] Having found, however, that control itself is irrelevant, and that the question of the content of the advertisements should be deferred to the FEC, I think we have moved beyond this point.[4]

Ickes

I remain troubled, as I was when I read the draft memorandum, by the allegations concerning Ickes, although they are somewhat confusing and the potential violations are not totally clear. It would certainly be helpful to see a chronological listing of the Ickes/Trie/Huang matters. But it still seems to me that we have enough to investigate whether Ickes is criminally culpable as an aider and abettor to illegal campaign contributions, and whether he committed perjury in the Diamond Walnut matter.

However, Ickes is covered under the Independent Counsel Act, if at all, only under the discretionary provision. The attempt to make him a "de facto" covered person because of his campaign authority flies in the face of both the language of the Act, which requires that he be an officer of the campaign exercising authority at a national level, and of the Department's consistent practice, which looks to both function and title. The memorandum argues, in effect, that since Ickes exercised authority at a national level, and had a major role in running the Clinton Gore campaign, he should be deemed to have a title. This is exactly the kind of creative reading of the Act that the memorandum unjustly accuses the Department of engaging in.[5]

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[3] For example, at p. 39, the memo suggests the possibility that "civil violations may form the predicate for a § 371 violation" (emphasis supplied), and claims that new facts have been discovered showing that the White House directed the media fund campaign -- an issue which has never been disputed.

[4] I note also that it is inaccurate to intimate that the analysis of the Common Cause allegations was contorted in an effort to avoid the Independent Counsel Act. While the authors of the memorandum may disagree with the conclusions reached, those conclusions were reached as a result of an analysis of the law without reference to the Act.

[5] The same is true of the suggestion, at p. 20 n.8, that even though Ickes was not covered as a White House employee under the terms of the statute, he should have been.

Since Ickes is covered only under the discretionary clause, the strict time limits of the Act do not apply. I would urge that there be a more thorough analysis of what we are investigating with respect to Ickes. But it is my view, in accord with the memorandum, that if we in fact do have predication for a criminal investigation of Ickes, we should give serious consideration to having it handled by an independent counsel. Ickes was and is very close to the President, in all the ways described in the memorandum, and a strong argument can be made that we would have a conflict of interest in investigating him -- although I note that we previously rejected that position in connection with an allegation unrelated to his campaign activities.

Other Matters

There is no question that there is much here worth investigating. The Task Force appears to be pursuing these leads vigorously and capably. There are surely individuals at the DNC who are at least subjects of this inquiry; but it bears repeating that no one at the DNC is a covered person, and we have long ago determined that there is no conflict in investigating Huang or others mentioned in the memorandum. The Task Force should simply be reminded to pursue this matter wherever it leads and if specific and credible information points to the President or another covered person, or a person as to whom the Department might have a conflict (such as the First Lady), to notify you immediately.

Remedies

The section of the memorandum dealing with remedies going forward has some ideas worth considering. It seems to me that it would be helpful to separate that section out from the rest of the memorandum (perhaps toning down the rhetoric somewhat) and circulate it more broadly for comment. I completely agree with the idea of requiring the parties to have contributors affirmatively state that they are not being reimbursed; furthermore, it seems to me that without that we would not be able to institute the revised prosecutive policy for conduits that the memorandum advocates, since proof of intent to violate the law would otherwise be very difficult. Moreover, there may be good reasons for some of our existing prosecutive policies which it is suggested we change, and it seems to me that a serious discussion of these ideas would be useful.

U. S. Department of Justice

Campaign Financing Task Force
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July 30, 1998

MEMORANDUM

TO: Robert S. Litt
Principal Associate Deputy Attorney General

James Robinson
Assistant Attorney General
Criminal Division

FROM: David A. Vicinanzo DAV.
Supervising Attorney
Campaign Financing Task Force

SUBJECT: Harold Ickes/Diamond Walnut Growers, Inc.
[redacted] 6(a)

PRELIMINARY FACTUAL SUMMARY:
HAROLD ICKES AND THE DIAMOND WALNUT MATTER

Over the last month, the Campaign Financing Task Force has conducted an investigation of the role of then-Deputy White House Chief of Staff Harold Ickes in the so-called Diamond Walnut strike. What follows is a summary of the information learned to date. During the next week, more potentially significant material will be received, and I will do a legal analysis of Ickes' actions informed by the additional facts. At this stage, it appears likely that Ickes made false statements under oath in his Senate deposition, perhaps in violation of 18 U.S.C. § 1001 and 18 U.S.C. § 1621.

EXHIBIT 26

DOJ-HI-00027

THE FACTS TO DATE

Throughout the 1980s, the International Brotherhood of Teamsters union ("IBT" or "Teamsters") supported Republican candidates for the presidency of the United States. In 1991, however, Ronald Carey was elected President of the Teamsters and the union's political leanings changed. Carey shifted IBT support to Democratic Party candidates and causes, and allocated significant resources to support the 1992 Clinton campaign for the presidency. A memorandum produced by the White House described this Teamsters' support as follows:

> The Teamsters played an enormous role in the '92 campaign. They spent upwards of $2.4 million in contributions to [Democratic] state coordinated campaigns, the DNC, the Clinton campaign, DCCC/DSCC and congressional candidates. They successfully educated and mobilized several hundred thousand of their members for the election and in many cases, local leaders and staff all across the country worked full time on the campaign.[1]

Following the 1992 campaign, however, the Teamsters' support for Democratic political campaigns tapered off. The DNC analyzed these circumstances as follows:

> The Teamsters did not contribute anything to the DNC in 1993 or 1994, due largely to internal union politics. President Ron Carey is up for reelection in 1996 and is being strongly challenged by Jimmy Hoffa, Jr. It will not be any easier for them to contribute this cycle, but there is a new political director (Bill Hamilton) and we ought to find ways for them to contribute without the money going to the DNC (state parties, NCES, etc.).[2]

In early 1995, the White House determined that it would attempt to renew the Teamsters' interest in Democratic campaigns. Documents produced by the White House demonstrate the

[1] The memorandum (attached as Ex. 1), entitled "Teamster Notes," is undated and its author is unknown. Testimony and circumstances place its creation and use in January or February 1995. It is clear that then-Deputy Chief of Staff Harold Ickes' handwritten notes, underlining and doodles appear on the document.

[2] Memorandum from Jim Thompson to Senator Dodd and Chairman Fowler, February 13, 1995.

nature of this effort. In January or February 1995, Harold Ickes considered several specific recommendations for encouraging interest by unions in President Clinton's and the DNC's upcoming campaigns.[3] These recommendations included inviting labor leaders to meet with the President and other Administration policy makers, and discussing Administration assistance on certain specific policy initiatives.

Early in 1995, Ickes reviewed the document entitled "Teamster Notes" (anonymous and undated, but produced by the White House) containing the following analysis of the Teamster's political activities:

> In the early days of the Administration, [the Teamsters] worked to mobilize hundreds of thousands of Teamster families to contact members of Congress in support of the President's economic plan (they sent 150,000 post cards to Arlen Specter alone.) When they are plugged in and energized they can be a huge asset. Over the past two years their enthusiasm has died down. They have been almost invisible at the DNC and other party committees. . . . With our proclamations on striker replacement ... and our NLRB appointments (very important to Carey) we are in a good position to rekindle the Teamster leadership's enthusiasm for the Administration, **but they have some parochial issues that we need to work on**.[4]

Ickes' handwritten editing on the document indicated that Bill Hamilton would be the "new director of government relations for the IBT, and that "[h]e [Hamilton] will control the DRIVE (Teamster pac) purse strings."

Later in the document (under the heading "Recommendations), Ickes underlined portions of the following text:

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[3] See deposition of Harold Ickes, September 22, 1997, pp. 197-218. Ickes' duties as Deputy Chief of Staff included service as the White House "point person" for organized labor, and the White House "point person" for the Clinton-Gore Campaign and the DNC. Testimony of Harold Ickes, October 8, 1997, pp. 8-9, 160.

[4] Teamster Notes Memo (Ex. 1) (boldface added).

> It is in our best interest to develop a better relationship with Carey. . . . Carey is not a schmoozer -- he wants results on issues he cares about. The Diamond Walnut strike and the organizing effort at Pony Express are two of Carey's biggest problems. We should assist in any way possible.[5]

THE TEAMSTER PLAN

As it turned out, Carey, Hamilton and the Teamsters had already come up with ideas how the Administration could help them. Intervention on Diamond Walnut was at the top of the list. Early in 1995, the Teamsters, through Bill Hamilton (IBT Political Director) and Judy Scott (IBT General Counsel), were working with a consulting group, Podesta Associates, Inc. ("Podesta"). A Podesta memorandum, dated February 10, 1995 and entitled "Diamond Walnut Strike," outlines "a two-pronged strategy [by the Teamsters] to apply pressure to the California Walnut Commission and Diamond Walnut" [which presents] "an opportunity for the Clinton Administration to help resolve a long-running, high-visibility strike."[6]

The first prong of the Teamster/Podesta strategy, as described in the memorandum, was to use the confirmation hearings of the incoming Secretary of Agriculture "to raise the visibility of the Diamond Walnut strike and of the U.S. Department of Agriculture (USDA) programs that benefit walnut growers."[7]

The second prong was to "[p]ressure the United States Trade Representatives [sic] Office and USDA to reject pleas from Walnut [sic] growers when deciding upon trade negotiation

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[5] Teamster Notes Memo (Ex. 1) at 2 (emphasis added by Ickes). Diamond Walnut Growers, Inc. (DWG) is a cooperative of 2,000 walnut growers in Stockton, California. In 1991, Teamster Local 601 went on strike at DWG. Replacement workers were hired, and the strike continues to the present day.

[6] Ex. 2 at 1.

[7] Id.

strategies and tell the growers that Administration support for them on trade matters will come to an end until the strike is resolved." [8]

The Teamster ideas for Administration assistance seems to have originated or been approved at the top. A Teamster memorandum, which appears from the context[9] to be authored by Bill Hamilton for Ron Carey, president of the IBT, reads in pertinent part:

> **DIAMOND WALNUT:**
>
> * * *
>
> **We need the United States Trade Representative (Mickey Kantor) to condition support for walnut export promotion on the settlement of the strike, and we need the Department of Agriculture to stop its financial support for the California walnut industry until the strike is resolved. This won't happen unless the White House makes it happen. We need the Commerce Department to lean on Diamond Walnut and Sun Diamond [a cooperative 32% owned by Diamond Walnut].** [10]

This Teamster memo is entitled "MEETING WITH HAROLD ICKES."[11]

THE ADMINISTRATION'S INITIATIVE ON DIAMOND WALNUT

It was through such meetings with Harold Ickes and the IBT that the Administration's initiative on Diamond Walnut began in 1995. In the months following his review of the "Teamster

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[8] Id. at 2.

[9] Ex. 3. For example, at one point, the memorandum reads: "My support for Bill Clinton is being used by my opponents as an issue against my re-election." This must be a reference by Carey to his upcoming bid for re-election to the Teamster presidency.

[10] Id.

[11] It is unclear whether the memo summarizes a past meeting with Ickes or (as appears more likely from context) was authored prospectively as a kind of "talking points" memo in preparation for a meeting.

The "Meeting With Harold Ickes" memo also references a meeting between the Teamsters and Vice President Gore on the same topic, including the Diamond Walnut strike. It is unknown at this time if the Gore meeting ever occurred.

Notes" memorandum, Ickes met at least three times (February 1995, early March 1995 and late March 1995) with Teamster representatives to discuss the Diamond Walnut strike and other issues important to the union.

A. The Intervention of U.S. Trade Representative Kantor

One such meeting was held in late March 1995, and included Hamilton, Ickes, Deputy Transportation Secretary Mort Downey, Labor Undersecretary Thomas Glynn, Steven Silberman from Cabinet Affairs at the White House, and Steven Rosenthal, then Assistant Secretary of Labor for Policy.[12] As set forth in a contemporaneous memorandum prepared by Hamilton, the "Outcomes" of that meeting included commitments by the Administration to take steps that could benefit the Teamsters on the Diamond Walnut strike and other issues. The memo states, in part:

> **Diamond Walnut -- Ickes said he met face-to-face with USTR Mickey Kantor last week and that Kantor agreed to use his discretionary authority to try to convince the CEO of that company that they should settle the dispute.[13]**

Hamilton's claim that Ickes had successfully enlisted Kantor's help to intervene in the Diamond Walnut strike is also proved by documentary evidence. For example, Ickes wrote a memorandum on White House letterhead to Kantor on March 6, 1995. The memorandum, entitled "Diamond Walnut Growers Cooperative (Stockton, CA) Strike," notes that Ickes has met "with Bill Hamilton and others from the Teamsters about the strike" and requests a meeting with Kantor "at your very earliest possible convenience to discuss this situation." (Ex. 5). Attached to the memorandum are various fact sheets, reports and NLRB opinions casting Diamond Walnut management in an unflattering light. One such attachment to the Ickes White House

[12] Teamster Memorandum drafted by Bill Hamilton, March 27, 1995 (Ex. 4).

[13] Id.

memorandum, entitled "Background on the Diamond Walnut Strike," contains the subheading "Role of USDA and USTR." The subheading contains the following language:

> **A company's labor practices should be considered before it is offered government assistance in expanding its foreign markets. Diamond should received no further assistance -- financial or otherwise -- from U.S. agencies until it negotiates and [sic] end to the strike.**

Ex. 5 at Bates J Sup 006964.

A later memo from Ickes to Kantor, also on White House letterhead, is dated March 27, 1995. Entitled "Sun Diamond in California -- Teamsters' Strike," reads in part:

> Mr. Ambassador, I appreciate your taking the time to meet with me the other day about the above referenced matter and trust you will follow up.

Ex. 6.

The evidence shows that both Ickes and Kantor's staff took pains to ensure that Kantor did, in fact, "follow up." For instance, a week or so after Ickes met with Kantor about Diamond Walnut, Peter Scher, Kantor's Chief of Staff, sent the following E-mail to Jeff Nuechterlein, another Kantor staffer:

> MK [Mickey Kantor] Call to Diamond Walnut Folks.
>
> Jeff - **Mickey told Ickes that he would call the Diamond Walnut folks and put some pressure on them vis-a-vis the strike.** I mentioned this to him tonight and he knows he needs to do it. Would you please add it to his call list so it gets done this week. Thanks.

Ex. 7 (boldface added).

At the same time, Ickes told his assistant, Jennifer O'Connor, to keep calling Kantor's office to learn if Kantor had called the CEO of Diamond Walnut. (Interview of Jennifer O'Connor, July 23, 1998). For several weeks, she was unsuccessful. In an April 19, 1995, E-

mail to Janice Enright, another Ickes assistant, O'Connor states:

> **And, also if I don't see him [Ickes] before, can you have him ask Kantor if he has called the Diamond Walnut people yet. Harold asked him to do it a month ago and I have been bugging his staff but they just keep telling me he's been trading calls with them.**

Ex. 8.

Shortly after this E-mail, O'Connor heard from Peter Scher, Kantor's Chief of Staff. Scher told her that Kantor had called the CEO of Diamond Walnut and spoken to him about ending the strike. The CEO had listened but still remained "unmoved." (Interview of Jennifer O'Connor, July 23, 1998).

O'Connor reported to Ickes what she had learned from Scher about Kantor's conversation with the Diamond Walnut CEO. She remembers repeating the word "unmoved" to Ickes in describing the Diamond Walnut CEO's response.[14]

B. The Intervention of the U.S. Department of Agriculture

The Diamond Walnut section of the "MEETING WITH HAROLD ICKES" memo (Ex. 3) notes that, besides obtaining Trade Representative Kantor's intervention, "we need the Department of Agriculture to stop its financial support for the California walnut industry until the strike is resolved." In the fact sheets attached to Ickes' memorandum to Kantor of March 6, 1995, under the heading "Role of the USDA and USTR," the following language appears:

[14] Id. The then-CEO of Diamond Walnut, William Cuff IV, confirms that U.S. Trade Representative Kantor called him about the strike, saying that "he [Kantor] was concerned about it, and that he wanted to see it settled." (Cuff interview of June 16, 1998). Kantor claimed the strike was "hurting him in terms of trade negotiations with top leaders around the world" and that "if Cuff could resolve [the strike] then it would be in the best interests of Cuff and DWG." (Id.) Cuff had never met or spoken to Kantor before, and has not since. When he "received the call from Kantor, [he] believed that the Administration was doing anything it could to resolve the strike." (Id.)

> **Diamond Walnut receives significant funding (over $10 million in '91-'93 through the Market Promotion Program administered by the Foreign Agricultural Service [of USDA]. * * * Diamond should receive no further assistance - financial or otherwise - from U.S. agencies until it negotiates and [sic] end to the strike.**

Ex. 5 at Bates J Sup 006964.

With the USDA as with the U.S. Trade Representative, Ickes did more than just talk or write memoranda. A Teamster memorandum[15] from Bill Hamilton to IBT President Carey notes that Ickes set up a Diamond Walnut session for the Teamsters with USDA Secretary Glickman:

> **We have a meeting with the new Agriculture Secretary, Dan Glickman, at his office on June 7 at 11 a.m. to try to ask him to cut off USDA support for Diamond Walnut - both the use of the bonus program and the continuing support of the USDA Market Promotion Program monies to help sell California walnuts abroad.**
>
> **It would be helpful if you attended this meeting. It was set up for us by the White House after you and I and Wytkind met with Ickes and others over there a month or so ago.**

Ex. 9 (emphasis added).[16]

Moreover, during the approximate same time period, Diamond Walnut CEO William Cuff IV received a series of between four (4) and six (6) telephone calls from Deputy Agriculture Secretary Richard Rominger.[17] When Rominger called, he focused on the Teamsters strike, and

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[15] The memo is undated, but the context strongly suggests an approximate date of May 1995.

[16] The investigators are working to confirm that the Ickes-orchestrated meeting on Diamond Walnut with the USDA Secretary took place as scheduled. Secretary Glickman is scheduled for interview on July 31, 1998.

[17] Interview of William Cuff IV of June 16, 1998.

wanted to know how he could bring the parties together.[18] Cuff viewed the calls as unusual, in part because Diamond Walnut is a small to medium sized company. Additionally,

> [a]s CEO of DWG, Cuff did not normally receive telephone calls from government leaders. Cuff had a sense that they were urged by the Teamsters to call him. Cuff doesn't believe they would have called otherwise.

Cuff interview of June 16, 1998.[19]

ICKES TESTIMONY ABOUT DIAMOND WALNUT

On September 22, 1997, Harold Ickes was deposed under oath by counsel in the Senate Committee investigation. In the course of the deposition, Senate counsel inquired about the Teamsters[20] and the Diamond Walnut strike. The following colloquy between Senate counsel Margaret Hickey and Ickes took place:

Q To your knowledge, what if anything was done on the Diamond Walnut strike?
A By--
Q By the Administration.

---

[18] Rominger is scheduled for interview on August 3, 1998. The NLRB was heavily involved in the strike, and had, only months before (January 20, 1995), set aside a vote in which Diamond Walnut replacement workers rejected Teamster representation. The Task Force is examining whether the intervention by the USDA and Ambassador Kantor, in a matter under the possible quasi-judicial jurisdiction of the NLRB, was appropriate under federal labor and administrative law.

[19] Cuff's successor as Diamond Walnut CEO, Michael Mendes, claims that Rominger's telephone calls actually caused Diamond Walnut to reopen negotiations with the Teamsters. The renewed talks, however, ultimately did not produce a settlement.

[20] Ickes deposition took place on Monday, September 22, 1997. Several days before, accounts of the guilty pleas of Ansara, Davis and Nash in the Teamster/Carey campaign finance case had appeared in the press and media. The charging Informations and plea colloquies made reference to an official of the Democratic National Committee and a former official of the Clinton/Gore '96 Reelection Committee. Ickes acknowledged having read newspaper accounts of the guilty pleas. Ickes Deposition Transcript 9/22/97 at 143.

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A I'm not sure that anything was done on the Diamond Walnut strike.[21]

Thereafter, counsel for Ickes and White House counsel raised questions concerning the scope of the inquiry. After several minutes, Senate counsel Hickey resumed questioning about the Diamond Walnut strike. The following colloquy took place:

Q What did the administration do regarding the Diamond Walnut strike?
A Asked and answered. You've asked me that, and I've answered it.
Q Okay. I'll read the transcript.
I'd ask you, Mr. Ickes, if you'd just restate the answer.
THE WITNESS: Well, have the reporter read it back.
MS. HICKEY: Okay.
THE WITNESS: I'm not going to sit here and answer the same damn question time after time at 2:30 in the afternoon. Come on.
MR. PERRY: It would speed things up if--
THE WITNESS: Hey, man, I'll sit here until 5 if you want--6, 10. If you guys can't remember what questions you asked 2 minutes ago--
MR. PERRY: No, no, no. It's not a question of what questions were asked. It's what the answer was, if anything.
THE WITNESS: The reporter has a record.
MR. PERRY: I'm just not sure that it's on the record. That's why I asked you--
THE WITNESS: Well, then go back and find out.
MR. PERRY: Sir, it's no use getting angry here. We're just trying to do our job, all right?
THE WITNESS: I got it, pal.
MS. HICKEY: Why don't we take a 2-minute break--
MR. PERRY: And we'll find it on the record.
MS. HICKEY: --and we'll find it on the record.
[Recess]
MS. HICKEY: Back on the record.
BY MS. HICKEY:
Q Can you answer the question?
A Is there a question on the table?
Q There's the one that you said was asked and answered.
MS. SABRIN: Could you repeat that question one more time?

[21] Ickes Deposition transcript (9/22/97) at 132-33. Transcript pages 131-143 are attached as Ex. 10.

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BY MS. HICKEY:

Q What did the administration do regarding the Diamond Walnut strike?

A Nothing that I know of.

(Ex. 10, Ickes Senate transcript 9/22/97 at 140-41.)

Attachments

cc: Mark M Richard
Deputy Assistant Attorney General
Criminal Division

Lee Radek, Chief
Public Integrity Section
Criminal Division

James V. DeSarno
Assistant Director - FBI
CAMPCON Task Force

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 31, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: DEPUTY ATTORNEY GENERAL 7-31-98

FROM: James K. Robinson
Assistant Attorney General
Criminal Division

SUBJECT: Harold Ickes/Diamond Walnut Growers, Inc.

PURPOSE: To update you on the status of the investigation.

TIMETABLE: Not applicable at this point.

SYNOPSIS: Further investigation may be determined regarding Harold Ickes.

DISCUSSION: Criminal Division will make a recommendation to you next week.

Attached is a memorandum from David Vicinanzo, Supervising Attorney, Campaign Financing Task Force, setting out the state of the evidence in the investigation of Harold Ickes' activities concerning the labor dispute between the International Brotherhood of Teamsters and Diamond Walnut Growers, Inc.

David concludes that, at this stage, it appears likely that Ickes made false statements under oath in his Senate deposition, perhaps in violation of 18 U.S.C. §§1001, 1621.

The Criminal Division is considering the following options which we will elaborate on next week.

1. Find that the investigation of Harold Ickes for this matter does not pose a conflict of interest for the Department under the Independent Counsel Act, and instruct the Task Force to continue it's investigation.

2. Find that the investigation does constitute a conflict of interest, commence a preliminary investigation under the Independent Counsel Act, and cease all grand jury investigation by the Task Force.

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3. Defer a decision on whether a conflict of interest exists until more investigation is completed and a more informed decision is completed.

Attachment

U. S. Department of Justice

Washington, D.C. 20530

AUG 03 1998

MEMORANDUM

TO: Jim Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Timing of Independent Counsel Decisions

The Attorney General's Office has requested an analysis of the various deadlines that may exist if any of the recommendations contained in the LaBella report are deemed by the Attorney General to be specific and credible information about a covered person, or about a person whose investigation would constitute a conflict of interest for the Department of Justice.

A few guiding principles have led to the deadlines listed below. First, there are no deadlines with respect to the Attorney General's invocation of the Discretionary Clause. Section 591(c)(1) provides that when she determines that an investigation or prosecution may result in a conflict of interest, she may conduct a preliminary investigation if she receives information sufficient to constitute grounds to investigate. Implicit in the use of the permissive "may" is the ability to not conduct a preliminary investigation at any time.

With respect to covered persons, the statute's time requirements always begin with the receipt of information by the Attorney General. Interpreting this to mean information constituting an allegation, the statute then gives her 30 days to determine if there are grounds to investigate, and gives her permission to find otherwise only if the information is not specific or from a credible source. If she is unable to so find, she must commence a preliminary investigation, which must be completed within 90 days, with one 60 day extension permissible with court approval.

JR:LJR:mcw
Typed: 8-3-98
Records Section Chron

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The phrase, "receipt of information by the Attorney General" is problematic. The Attorney General acts through her agents and attorneys, who often fail to recognize Independent Counsel Act ramifications of information that they receive. Yet the legislative history makes clear that the Department of Justice cannot avoid the time strictures of the Act by simply concealing the information from the person of the Attorney General. The question of who must receive the information in order for the deadlines to be triggered was addressed in an Office of Legal Counsel opinion on Dec. 21, 1981. OLC opined that the information is received by the Attorney General when it is received by someone in a position to recognize it for what it is. The Department has consistently interpreted that opinion to mean receipt of the information by someone in a position to recognize its nature, usually the Public Integrity Section or someone in the chain of command above that Section.

Note that the statute and the Department procedures all begin with the receipt of information at some level. There is no history of incidents where the Department has received information, analyzed its independent counsel ramifications, and later determined that there was a previously unnoticed violation. There is simply no precedent for a triggering event other that the receipt of information.

However, it could be argued that a reasonable interpretation of the statute and the OLC opinion is that if the information must be received by someone in a position to recognize its Independent Counsel implications, such a receipt could only occur if it was possible to determine that it constituted a violation. For example, if the Department possessed information that a covered person performed an act that courts had subsequently held to be noncriminal, no independent counsel deadline would occur. If the Supreme Court were to then reverse those judicial decisions and determine that the conduct was prohibited, this would be the first opportunity for the Department to recognize a violation, and the deadlines should be based upon that point in time.

However, just as it is the receipt of information by someone in a position to know, not actual knowledge, that triggers the time provisions, it should be the receipt of knowledge of a potential violation by a person in a position to recognize it, not the actual recognition that causes the statute to become operational. To interpret otherwise would leave the triggering device open to differences in the legal reasoning of Departmental officials at all levels, a test much too subjective to be consistent with the purposes of the statute.

One final assumption leads to the deadlines that follow. This memorandum treats Mr. LaBella as if he was an attorney in the field, without an intimate working knowledge of the Independent Counsel Act. This is justified because he was not in the actual

decision making apparatus on Independent Counsel matters, and further, he denied on a weekly basis that there was any specific and credible evidence concerning a covered person. To treat him otherwise would require that the deadlines be set whenever Mr. Labella learned the facts he sets out under each of the allegations in the memo.

LABELLA ALLEGATIONS

Applying the above principles to the LaBella/DeSarno memorandum and its various arguments for an independent counsel, the following deadlines would, or could apply:

All allegations against Harold Ickes.

If the Attorney General agrees with the premise that Ickes is a covered person either under the LaBella de facto theory or the "should have been paid more" theory, the fact that he was a covered person was not recognized until the Attorney General did so. Moreover, since these theories are so obscure, it seems reasonable to concluded that there was no one in a position to know that he was covered until the Attorney General so determined. Therefore, it would seem that the 30-day analysis of specificity and credibility should commence upon the Attorney General's determination. At worst, since the LaBella report is the first recitation by anyone of such a theory, the date that the Attorney General received the July 16 report would begin the 30-day analysis period.

If the Attorney General believes that there is a conflict of interest for the Department to investigate these allegations against Ickes, there are no statutory deadlines. The permissive language of the Discretionary Clause allows the Attorney General to invoke the provisions of the Act and trigger a preliminary investigation at any time after the receipt of specific and credible information.

Allegation that President Clinton took bribes or gratuities from Charlie Trie.

The first time such an inference from these facts has been drawn seems to be the July 16 LaBella report. The 30-day period would commence with the Attorney General's receipt of that report.

Allegation that President Clinton and Vice President Gore had knowledge of foreign contributions by Johnny Chung.

Should the Attorney General determine that this is a crime, the date of the report, which first sets out the operative facts, might be deemed the triggering date. It could also be argued, since the violation is so obscure, no one was in a position to

recognize it until the Attorney General found it to be a possible violation.

Allegation that President Clinton participated in accepting conduit or foreign contributions by not alerting the DNC and Clinton/Gore about problems with Trie's legal fund contributions.

As above, the date would be the date of the report, or arguably the date that the Attorney General determined that this was a crime.

Allegation that Vice President Gore violated the law by making fund raising calls.

To the extent that this is a revisitation of the old section 607 allegation, the statute has already been triggered. Absent new evidence, it seems that reopening this would require an immediate independent counsel request, since all the time periods have expired.

All allegations against Hillary Rodham Clinton.

The First Lady is not a covered person. To the extent that there is any allegation against her contained in the report, the discretionary provisions apply, and there are no deadlines.

Common Cause allegations.

This area is problematic, in that each and every facet of these allegations has been examined and analyzed under the Independent Counsel Act. It is difficult to argue that there was no one in a position to recognize the nature of these allegations almost from the day they were received. Therefore, the time limits have run, and an immediate independent counsel request is probably required.

However, the memo sets forth the first written analysis of the theory that the evidence developed to date constitutes an allegation that the President, Vice President and others engaged in a conspiracy to defraud the Federal Election Commission by circumventing its regulations by committing civil violations. This, like several above, is a novel theory that one could argue no one in the Department was in a position to recognize until the Attorney General determines that it might constitute a crime, and therefore, the date the Attorney General makes such a determination is the controlling date. It could also be argued that the date the theory was first posited to her, i.e. the date she received the report, could control.

The Loral allegations.

To the extent that the allegations are against the President, the 30-day period should commence from when they were first reported in the press, and almost immediately made known to the Attorney General and others in position to recognize their nature. They have changed little subsequently. It could be argued, however, that the report is the first time that an inference of Presidential bribery has been drawn from these facts, and therefore the date of receipt of the report begins the 30-day period.

To the extent that the Loral investigation constitutes a conflict of interest for the Department to investigate, there are no deadlines under the discretionary clause.

U. S. Department of Justice

Washington, D.C. 20530

August 5, 1998

MEMORANDUM

TO: Lee Radek
Chief
Public Integrity Section
Criminal Division

FROM: [redacted]
Trial Attorney
Public Integrity Section
Criminal Division

SUBJECT: Impact of Documents Recently Produced on the Results of the Section 607 Preliminary Investigation of the Vice President

This memorandum explains why the recent discovery of six pages of memoranda, charts, and summaries with handwritten notations that appear to relate to, among other topics, the fundraising telephone calls made by the Vice President during late 1995 and early 1996 should be viewed as a new matter focussed on a possible violation of 18 U.S.C. § 1001 and not an event that triggers the reopening of the former section 607 investigation.

Background

As discussed in my July 26, 1998 memorandum, the Vice President's counsel, Jim Neal, recently produced documents that he claimed were discovered by Joe Eyre, a clerical employee in the Office of the Vice President. While the documents themselves had been previously produced by the Executive Office of the President (EOP), the six pages found by Eyre had handwritten notations apparently made by David Strauss, the Vice President's former Deputy Chief of Staff.

As noted in my previous memorandum, the recently produced documents relate to some of the topics that were at issue in our preliminary investigation into whether the Vice President violated 18 U.S.C. § 607 by making fundraising telephone calls from his office in the White House. Specifically, the handwritten notations may indicate that the hard money component to the media fund was,

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in fact, discussed at the November 21, 1995 meeting attended by the Vice President. Similarly, the notes may indicate that a definition of soft money including the limitations on individual gifts may have been discussed.

If the notes do indeed reflect discussions on these two topics, they may show that the Vice President was provided information at odds with his stated belief during this period on two significant topics. Stated differently, the notes may provide evidence that the Vice President's state of mind and knowledge of the media fund at the time of the calls was not what he described to agents and attorney during his interview.

However, the notes do not provide any more evidence that the Vice President violated section 607 when he made the calls. Moreover, the recently produced evidence has no effect on the determination, made last December, that pursuant to established Department of Justice policy the absence of an aggravating circumstance makes prosecution for a section 607 violation unwarranted.

New Evidence and Results of Section 607 Investigation

When on December 2, 1997, the Attorney General notified the court of her determination not to seek an independent counsel, she cited two reasons. First, she noted that evidence that the Vice President may have violated section 607 is insufficient to warrant further investigation. Second, she told the court that even if the evidence suggested a violation, established Department of Justice policy required that there be aggravating circumstances before a prosecution under this statute is warranted. No aggravating circumstance was uncovered during our investigation.

In summarizing the basis for her finding that the evidence was insufficient to warrant further investigation, the Attorney General, in her Notification to the court, cited a "wealth of affirmative evidence" that had nothing to do with the Vice President's understanding of the media fund but, nevertheless, demonstrated that the Vice President was not soliciting hard money in his telephone calls. Noted was the fact that no evidence was uncovered that indicated that the Vice President knew of the Democratic National Committee's (DNC) practice of reallocating a portion of large contributions to hard money accounts. Also cited was the absence of evidence showing that the Vice President asked for funds to support the election of any federal official, including himself. It was further noted that donors who understood the concepts of hard and soft money interpreted the Vice President's request to be for soft money and many of the these donors recall that the conversations focussed on soft money. In addition, the amounts requested by the Vice President suggested a soft money request and, in some cases, his requests focussed on corporate contributions which could only be soft money contributions. Finally, the Attorney General noted that the donations made in response to the Vice President's calls were, in

the vast majority of cases, handled by the DNC as soft money.

While the Attorney General included the Vice President's explanation--that he understood the media campaign to be funded entirely by soft money--as part of her analysis, the fact that the explanation may be discredited by the new evidence and further investigation, does not raise questions about the conclusion itself. It remains undisputed that a major share of the media campaign was, in fact, funded by soft money. Moreover, documentary evidence uncovered during our investigation clearly indicates that the need for soft money, not hard money, was most critical at the time that the Vice President volunteered to make the phone calls.[1]

Furthermore, even if it can be established that the Vice President falsely stated, during his interview, that he believed, at the time, that the media campaign was run with soft money, this fact does not draw into question the remainder of his explanation for his conduct. Specifically, his claim that it was easier to ask for soft money, especially corporate soft money, and that the people he was calling were asked for--because they were capable of giving--large sums that could only be soft money remain credible.

Turning to the policy ground cited by the Attorney General in her notification, the recently produced evidence in no way affects the finding that evidence of aggravating circumstances are lacking in this matter. The notes on the new documents do not suggest that the Vice President was told in the November meeting of the DNC allocation practice--a fact that may suggest an aggravating circumstance if it can be shown that he asked donors for soft money knowing all along that some of their gift would be treated as hard money. Nor can the Vice President's statement about his understanding of the media fund composition, assuming it was made in violation of section 1001, be reasonably viewed as an aggravating circumstance relating to a section 607 violation two years earlier.

Absent new evidence of an aggravating circumstance, then, the policy finding, as described in the Notification, remains an independent dispositive ground for declining to seek an independent counsel to pursue a section 607 violation. For this reason the new information, which does not appear to relate to any possible aggravating circumstance, should not support a decision to reopen

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[1] Documents indicate that at the end of 1995, when the party was in need of at least $3 million dollars to stay "on the air", the DNC had the capability of borrowing hard money but not soft money. It was in this context--the need to make up a shortfall of mostly soft money through the end of the calendar year--that the phone call project was conceived. This factor was given very little emphasis during our preliminary investigation because the Vice President claimed both that he did not read the documents and that he erroneously believed that the media campaign was run entirely with soft money.

the section 607 investigation.

Conclusion

In conclusion, the new matter that arose upon receipt of the six pages on July 27, 1998, is properly treated as a new and independent investigation focussed on a possible section 1001 violation. Pursuant to 28 U.S.C. § 591 (d)(2), the Attorney General will need to determine by August 26, 1998, whether the new information requires the commencement of a preliminary investigation under the Act.

Copy 1 of 8
3/31/2000

"RADEK RESPONSE"
August 5, 1998

Redacted to delete information the disclosure of which could adversely affect
a pending criminal investigation or prosecution
or would violate Rule 6(e) of the Federal Rules of Criminal Procedure
Redactions completed on March 24, 2000.

DOJ-FLB-00128



U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

August 6, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Campaign Financing Task Force - Independent Counsel Proposal

TIMETABLE: None. Information only.

PURPOSE: To provide you with two memos relevant to a review of the LaBella memo.

DISCUSSION: As you know, I am in the process of reviewing the LaBella memo in anticipation of providing you with my recommendation on how to proceed. In this regard, I have already met "one-on-one" with Lee Radek, Chuck LaBella and Dave Vicinanzo to discuss their views. I am considering also meeting with James DeSarno of the FBI as he is the co-author of the memo.

In the meanwhile, I am attaching hereto a memo prepared by Lee Radek commenting on the LaBella report as well as a memo prepared by our Appellate Section on the Application of the "Conspiracy to Defraud" Provision of 18 U.S.C. § 371. This statute plays a critical role in LaBella's analysis as set forth in his report.

RECOMMENDATION: None.

Attachments

U. S. Department of Justice

Washington, D.C. 20530

AUG 0[illegible] 3

TO: James K. Robinson
Assistant Attorney General
Criminal Division]

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Review of Interim Report

The Public Integrity Section has carefully reviewed the "Interim Report" prepared by Charles LaBella, former Supervising Attorney for the Campaign Financing Task Force, and James DeSarno, Assistant Director, Federal Bureau of Investigation (FBI), CAMPCON (Task Force). The Report presents the authors' views of the standards set out in the Independent Counsel Reauthorization Act of 1994 (the Act), and recommends that the Attorney General seek appointment of an independent counsel to handle campaign financing matters. The Report also makes individual recommendations with respect to the President and Vice President (the only covered persons discussed in the Report) and a number of persons not covered by the Act, recommending in each case that an independent counsel should be sought to investigate further. Finally, drawing upon the observations of these two individuals, the Report makes a number of recommendations for changes, legislative and policy, with respect to our handling of campaign finance matters. These merit further review and consideration by the Department, but will not be discussed further in this memorandum.

I am troubled that the Report ignores the purposes that we had hoped to see accomplished in the course of this undertaking. The Report does not provide an in-depth summary or overview of the work of the Task Force, what it has accomplished and where it is headed. It offers no framework or plan for completing the work that these two supervisors have begun. It does not set out the authors' view of the appropriate role of the Department of Justice in addressing campaign financing issues -- what we can and should be seeking to accomplish -- or how that role has been and will be fulfilled through the work of the Task Force. I find

the Interim Report disappointing in this regard, to say the least.

The bulk of the Report, rather, is devoted to a recommendation that the Attorney General refer the entire campaign financing matter[1] to an Independent Counsel. It is that portion of the Report that I will address in depth here. It is my conclusion that the recommendation is flawed and based on numerous misinterpretations of the Independent Counsel Act.

One point must be made at the outset. I am, to put it directly, outraged by the personal attacks and the suggestions contained in this Report, some subtle and some stunningly blunt, that the motivations of those who have advised the Attorney General over the last two years concerning the application of the Act with respect to campaign financing matters have been colored by bad faith, a deliberate twisting of the law and an effort to protect the White House. We have worked closely with these two individuals over many months, and while we certainly have had our disagreements, I am shocked that they should harbor such views. For example, they describe the attitudes and participation in the investigative process of those who have taken positions with which they disagree as "result oriented," "going through contortions," "gamesmanship," and "intellectually dishonest." Of course, these two officials of the Department are entitled to communicate their concerns to you, and if they had such concerns, should have done so long ago and cleared the air in a forum in which they would have remained confidential. It is inexcusable, and I believe clearly calculated, that they have chosen to communicate their views about others within the Department in a memorandum that is the subject of such intense public interest, and is therefore likely to be leaked or become public through some other route.

1. Complaints about "Stovepipe" Approach to the Investigation

It is not clear to me what the Report's concern is in this section of the memorandum. The Report seems to express a view that the Task Force's work is being conducted as an uncoordinated group of individual investigations, with no one assessing the "big picture."

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[1] We assume that this is the recommendation, although the Report nowhere is explicit as to whether it is recommending independent counsels with respect to specific alleged violations purportedly committed by specific individuals, or a general "campaign financing" independent counsel, with jurisdiction over all allegations of campaign financing abuse within the statute of limitations.

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First of all, all decisions about how to structure the Task Force's investigation have been made by the Task Force command structure; to the extent there has been any failure to incorporate an unified approach or engage in an interlocking analysis of all the facts, I am unable to comment. However, I can say that in all the decades of experience I have had in the Department, I am unaware of any previous effort that has been as carefully coordinated and in which such extensive steps have been taken to ensure that any overlapping evidence or potentially interlocking cases is not overlooked. All task force matters nationwide have been directly supervised for the past year by one person, Mr. LaBella, whose job it was to make sure that the forest was not overlooked for the trees. A single team of FBI agents and other investigative personnel reported directly to one FBI supervisor, Mr. DeSarno. To the extent that these two may have become enmeshed in the details of individual investigations and cases, there were weekly, and often twice weekly meetings, with the Deputy Attorney General and the Attorney General to review developments and progress, with overlaps and interconnections a constant topic of review. If there is a "big picture" that is being ignored by the Task Force, prompt steps should be taken by its new head to address that failure.

One factual assertion must be addressed here. The Report contends that the Task Force's efforts to do a broad survey of the "entire campaign finance landscape" have been "rejected," and that under our approach to the Independent Counsel Act, evidence of wrongdoing "must just appear." This is simply untrue, and I am unaware of any occasion when this has happened. The Task Force generally and Mr. LaBella personally, to my knowledge and in my presence, have been repeatedly told that no investigative steps were closed to them, that they are free to follow any leads, and that if their efforts develop specific and credible information that any covered person may have violated the law, the Attorney General will trigger the Act.

The two examples the Report cites in fact illustrate how off the mark this complaint is. The Common Cause allegations were thoroughly considered, analyzed at length, and closed on their merits. Even so, the Task Force has repeatedly been assured that to the extent the facts underlying the Common Cause allegations are relevant to its investigation, it is free to explore them. The other example, the so-called "core group" investigative approach, was pursued by the Task Force for a period of time and eventually dropped by the Task Force because it was unproductive; no one instructed the Task Force that it could not conduct such a review.[2]

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[2] Indeed, this effort was insisted upon by Director Freeh, and numerous agents were directed to turn their attention to a pursuit of this unpredicated investigation at a time when the

Director Freeh's December 1997 testimony before the House Government Reform and Oversight Committee on the progress of the investigation is illuminating on this point. He repeatedly assured Congress that while there had been disagreements from time to time over investigative strategy, the investigation had not been impeded or blocked. In response to a question from Congressman Burton as to whether the FBI felt that its ability to investigate the campaign financing matters had been impeded by the Department, Director Freeh responded:

> Not impeded in the sense that they were unable to conduct what we believe is the requisite investigation. There have been complaints and there have been differences between prosecutors and agents in this case -- again, not an uncommon phenomenon -- about the scope or the direction or the perspective, but those have been, to my satisfaction, resolved without the investigation being harmed or impeded.

To summarize, I agree entirely that it has been important that this project be handled as an unified task force undertaking, rather than having the individual cases parcelled out to the United States Attorneys' Offices, as would normally be the case. That was accomplished through the supervision of the two individuals who have authored this report. Weekly meetings have been held to ensure that patterns and the possibility of overlapping or connected schemes were identified and discussed. The Attorney General has asked repeatedly as the investigation has progressed whether information has been developed that warrants reconsideration of the Independent Counsel issue and has repeatedly been told by these two individuals, responsible for coordination of the entire investigation, that there is no such information.

2. The Independent Counsel Act

The Report argues that the Department has improperly and inconsistently interpreted the Independent Counsel Act in its approach to matters arising under the Task Force jurisdiction. I believe that the authors of the Report have misunderstood, and in some instances mischaracterized, the recommendations of the Criminal Division to the Attorney General, which have provided the analytical foundations on which her final conclusions have rested. In some crucial aspects as well, I suggest that the

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Task Force was attempting to review large quantities of documents that had been obtained from the Democratic National Committee (DNC). This led to delay in the review of documents, and resulted in the discovery of important evidence by the press before we were aware of it. Mr. LaBella's appointment was a direct result of the ensuing furor.

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source, the Attorney General shall, upon making that determination, commence a preliminary investigation [.]" 28 U.S.C. § 591(d)(2). This is the standard that has been applied to each matter under the Act, and to each allegation that has arisen within the context of the campaign financing investigation.

The Report fundamentally misunderstands the requirements of the Independent Counsel Act -- and as a result leaps to the outrageous conclusion that the Public Integrity Section has engaged in a result-oriented analysis to protect the White House -- when it asserts that different standards have been applied to the various campaign financing matters that have arisen under the Act. In the Babbitt matter there was sworn testimony from a credible individual with no known motive to lie directly contradicting statements Babbitt had made under oath. In the Herman matter, we received detailed allegations from an individual in a position to have first-hand knowledge of the facts that Herman had a concealed financial interest that she had failed to disclose on her financial disclosure forms. There is no such specific and credible information concerning the President or Vice President, the only two covered persons mentioned in the Report, outlined anywhere in the Report or that has been brought to our attention in any other context. Furthermore, this allegation conveniently ignores the fact that both the President and Vice President have been investigated pursuant to the Independent Counsel Act with respect to campaign financing violations; that is, when we were presented with specific information from a credible source, we did not hesitate to trigger the Act.

(b) Dual Standard of Predication

The Report next suggests that the Task Force has an extremely low standard of predication before opening a criminal investigation, and therefore the same standard should govern the determination as to whether the Independent Counsel Act is triggered. The Task Force's predication standard with respect to matters that arise outside the Independent Counsel Act is a matter of prosecutorial discretion, bounded only by the limits of due process, and there well may be sound reasons for it to be so low. Obviously, this power to investigate is subject to tremendous abuse, and should be used only sparingly; in this case the public interest has led the Attorney General to conclude that it is appropriate to pursue investigations we would not otherwise pursue.

The Independent Counsel Act, in contrast, is a statutory standard that we are not free to ignore. Congress did not intend that independent counsels would be appointed merely because there was public concern or congressional pressure to investigate. The "specific and credible information" standard was specifically

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adopted to ensure that there must be concrete factual support for a conclusion that a covered person may have committed a crime before triggering the requirements of the Act. In 1978, when the Act was first passed, only specific information of the offense was required: "The term 'specific information' is used so that the provisions of [the Act] will not apply to a generalized allegation of wrongdoing which contains no specific factual support." S. Rep. 170 at 52. In 1982, concerned that the trigger standard was too low, Congress raised it to add the credibility requirement:

> Public confidence is not served by investigation of meritless allegations made by unreliable sources. [The prior standard requiring only specific information] invites abuse of the special prosecutor process by persons who want to harm the reputations of public officials. Finally, this standard wastes valuable Department of Justice resources by requiring high priority investigations in situations where no one else would be investigated.

S. Rep. 496 at 12. Congress reiterated in 1982 that the specificity requirement meant that "the provisions of [the Act] will not apply to generalized allegations of wrongdoing which contain no factual support." Id.

The Report argues that the legislative history supports the opposite reading. It contends that Congress intended that covered persons should be investigated under the same circumstances that ordinary citizens would be investigated, and that since the Task Force is investigating individuals based only on a "wisp of information" under circumstances where the allegations may be described as "frivolous," the same standard should apply to covered persons. The legislative history is indeed replete with expressions of concern that there be a level playing field with respect to covered persons and ordinary citizens, and that the same standards should apply. However, Congress's concern in making these observations was that the triggering standards were too low, and that covered persons were being subjected to investigations under circumstances where no ordinary citizen would be; it therefore included the "specific and credible" predication standard to approximate the generally applicable standards for initiation of a criminal investigation. See, e.g., FBI General Crimes Guidelines. The prospect that the Department would devote resources to the investigation of unsubstantiated, frivolous allegations against ordinary citizens was simply not a factor in Congress's calculus. See, S. Rep. No. 496 at 11-13 (1982) (discussing need to raise triggering standard so unsupported allegations do not trigger the Act).

We believe the Act itself as well as the legislative history make it clear that the Act is to be triggered only when the

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Department receives specific and credible information suggesting that an individual, either covered by the Act or as to whom it would be a conflict of interest for the Department to investigate, may have committed a violation of federal criminal law. Whatever may be our authority to conduct inquiries of "allegations" without factual support under more flexible standards or for other purposes under our broad prosecutorial discretion with respect to matters not arising under the Act, triggering the Act requires specific and credible information that a crime may have been committed.[3]

This is still an extremely low threshold. In assessing whether the Act is triggered, we lack the discretion to weigh all the traditional factors that we ordinarily consider in deciding whether a matter merits investigation. We cannot consider the

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[3] The Report also argues that since the Attorney General has directed that "no stone be left unturned," and the Task Force is fully investigating all campaign financing allegations whether they appear to be meritorious or not, this constitutes an "established policy" of the Department which ought to govern the determination of whether the Independent Counsel Act is triggered. 28 U.S.C. § 592(c)(1)(B). Following a preliminary investigation, the Department is indeed required to follow established policies with respect to the conduct of investigations pursuant to this provision of the Act. This provision was added in 1982, and is intended to permit, with a report to the Court, the closing of matters as to which we have an established policy against prosecution. See S. Rep. 2059 at 14-15. This provision does not affect and does not come into play with respect to the decision whether to initiate a preliminary investigation, which requires specific and credible information.

It is also worthy of note that while the Report places great stock in the informal public statements of the Attorney General that "no stone be left unturned" as establishing a policy of the Department which we are bound to follow, it advocates that we completely ignore a longstanding written policy of the Department, the Memorandum of Understanding (MOU) with the Federal Election Commission (FEC), discussed infra. Apparently policies are only to be followed if they lead to the results sought by the authors.

It should go without saying that the remarks of the Attorney General describing the approach to a particular investigation could never constitute a written or established policy of the Department under the Act. Otherwise, any Attorney General could predetermine the outcome of the independent counsel decision with such an ad hoc pronouncement.

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minor nature of the alleged offense, the lack of potential jury appeal, the availability of alternative remedies, or the likelihood that the investigation will develop a solid enough case to prove an offense beyond a reasonable doubt. Covered individuals have repeatedly been subjected to a full-scale preliminary investigation and subsequent investigation by independent counsels in circumstances where most prosecutors, exercising prosecutorial discretion, would have declined even to investigate. Public servants covered by the Act do, however, have the statutory protection that the provisions of the Act will not be triggered absent specific and credible information that they may have violated the law. The Report's conclusion that this minimal standard should be set aside in this case has no support in the Act, and indeed appears to us to be the very sort of strained, result-oriented analysis of which it accuses those who disagree with the authors.

3. Specific Recommendations that the Act be Triggered

The Report then makes a series of recommendations that the Independent Counsel Act be triggered with respect to several specific individuals and allegations. Each will be addressed below.

(a) Harold Ickes

Although the Report argues otherwise, Harold Ickes is not a covered person. The Act covers "any officer" of the Clinton/Gore '96 campaign committee "exercising authority at the national level." 28 U.S.C § 591(b)(6). During the campaign, Ickes was Deputy Chief of Staff at the White House with primary responsibility for coordinating the campaign functions among the White House, the DNC, and Clinton/Gore '96; he was not an officer of the campaign. He held no campaign title and received no compensation from the campaign. Nevertheless, the Report argues that because Ickes acted like an officer of the campaign he is a "de facto" covered person under the Act.[4]

[4] One part of the Report criticizes this Section's handling of independent counsel matters by citing legislative history from the 1987 Reenactment that criticizes the Department for conducting preliminary investigations under the guise of threshold inquiries in order to avoid the Act's reporting requirements. However, in its effort to determine during the 30-day period whether a person may have violated criminal law as required under § 591(a), the Department has always conducted whatever investigation of the facts that could be accomplished in the short amount of time allowed. Indeed, in the Senate Report following the hearings for the latest Reenactment, the Department's closure without preliminary investigation of several matters because the facts proved to be untrue, and others because the facts did not constitute an offense,

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We can find no support in the Act or its legislative history for the "de facto" argument. The Act's coverage provisions are bright line markers. Covered individuals are clearly demarcated by title and salary level. The Act provides that "officers" of the campaign who exercise national authority are covered, not "individuals" who do so even though they are not officers. We are not free to rewrite the statute to cover persons whom Congress chose not to cover. Indeed, the interpretation advanced in the memorandum effectively eliminates half of the statutory provision: it would cover anyone who exercised national authority, regardless of whether they were officers. Again, to reach its conclusion that Ickes is covered, the Report seems to be engaging in the same twisting and stretching of the terms of the Act to reach a desired result of which it accuses those who disagree with its authors.

The Report also hints that Ickes should be considered to be covered under the Act because of his former high-level position in the White House. He held the title of Deputy Chief of Staff, a title that in previous Administrations typically had received sufficient compensation to render the incumbent a covered person under section 591(b)(3). Ickes, however, was compensated at a rate of pay below Level II of the Executive Schedule, which is the statutory cutoff. Under the clear provisions of the Act, he is not and never was covered under this provision. In any event, he left this position well over a year ago, and thus would no longer be covered no matter what his rate of pay may have been.

More persuasive is the argument that because of Ickes' exercise of power and authority with respect to campaign matters, together with his high-level (though again not covered) former position as a White House staffer, he should be found to be covered under the discretionary clause. The Criminal Division has always considered the decision whether to invoke the discretionary clause to be a personal decision entrusted to the Attorney General, and other than notifying the Attorney General when an individual as to whom she may want to consider use of the discretionary clause is under investigation, has avoided weighing in on the merits of the issue.

However, the Report affirmatively asserts that Ickes and others are "covered" under the discretionary clause, seemingly overlooking the fact that the clause is discretionary. The Report asserts that the discretionary clause was "intended to include" certain persons as covered. Report at 25. To the contrary, the discretionary clause was intended to permit the Attorney General to decide that any person as to whom there was a

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were cited as being in compliance with the Statute.

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conflict of interest should be investigated under the provisions of the Act. The legislative history suggests some individuals as examples of persons as to whom the Attorney General might find a conflict, but the provision does not in any way direct that any of these persons are to be considered covered.

The Report recounts at some length the reasons why the Attorney General might determine that she should utilize the discretionary clause with respect to Ickes. Dave Vicinanzo has undertaken a thorough analysis of the information the Task Force has gathered suggesting that Ickes may have violated federal criminal law. Even should the Attorney General ultimately decide to exercise the discretionary cause with respect to Ickes, the restrictive time periods and investigative limitations imposed by the Act do not come into play until that decision is made, and I see no reason why the Attorney General should rush to a conclusion to utilize the discretionary clause. At the very least, a thorough analysis of the information we have and the reasonable inferences that can be based on that information should be completed before any decision is made.

I do note, however, that I am unaware of any case that would support the suggestion in the Report that Ickes is criminally responsible in connection with Charlie Trie's illegal contributions to the DNC because he failed to warn it after learning that Trie had made questionable payments to the President's legal defense fund. The Report offers no case or statutory analysis to support its theory. I understand that Dave Vicinanzo is reviewing this issue as well.

(b) President Clinton

(i) Charlie Trie and the Presidential Legal Expense Trust (PLET) Contributions

The Report next recommends that the Act be triggered with respect to President Clinton. On April 22, 1996, President Clinton appointed his friend Charlie Trie to the Commission on U.S. Trade and Investment Policy (Commission). Approximately one month earlier, Trie had provided the Presidential Legal Expense Trust (PLET) with a large number of donations he claimed to have solicited from the Asian-American community on behalf of the President, many of which PLET subsequently returned because they appeared to be conduit or foreign contributions. When he made the contribution, Trie made comments that suggested he had already been told he was going to be named to the Commission.

The Report goes on to ask a series of rhetorical questions inquiring whether the President may have committed a bribe, knowingly accepted a gratuity, or committed other crimes with respect to the decision to name Trie to the Commission or the handling of PLET decisions, and suggests that while "there may be

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innocent explanations," the only way to know the answers to the questions is to conduct a criminal investigation, and since the President is a covered person, the Independent Counsel Act is therefore triggered.

The authors of the Report apparently recognize that there is absolutely no specific and credible information suggesting that the President committed a crime with respect to any of these matters; the Report identifies none, but rather lists a series of provocative and speculative hypothetical questions it asserts should be answered. It falls back on its argument that since the Task Force investigates allegations and speculation without predication, this matter should be treated the same way. As explained in detail above, this is not the standard of the Independent Counsel Act, and does not govern the decision to trigger the Act.

However, the conduct of Charlie Trie and his role in the solicitation and delivery of illegal campaign contributions, and the degree to which his conduct with respect to the PLET contributions mirrored that role, are clearly matters of legitimate interest to the Task Force. In the course of its investigation of Trie, should the Task Force develop any facts -- as opposed to speculative questions -- suggesting that the President named Trie to the Commission in quid pro quo exchange for his PLET contributions, that will trigger the Act, and we will conduct a preliminary investigation at that time. The Report recognizes, of course, that financial supporters of the Administration are not barred from service to the government, and that the President is free to name his financial and political supporters to a variety of governmental positions without running afoul of the law. Report at 49, n.26. We do not and will not investigate every public official who takes official action that benefits a supporter on the speculation that it may have been a bribe, though I recognize that the current investigation of the Loral matter edges close.[5] If this were the standard, every member of Congress would be under criminal investigation, since each regularly takes official action that benefits his or her supporters.

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[5] The Report's discussion of the Loral matter will be explored in more detail later in this memorandum. In brief, rather than conclude from the Loral precedent that all such matters should be investigated, we suggest that the Loral decision is an anomaly because of the unique circumstances of that matter. We also would recommend that if our initial inquiry does not promptly develop evidence to support a theory that there was criminal conduct with respect to the Loral matter, it should be closed.

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(ii) Knowledge of Foreign Contributions

The Report then recommends that the Act be triggered because the President, Vice President and senior White House officials knew or had reason to know that foreign funds were being funnelled into the DNC. It contends that Johnny Chung was granted access to the White House because he was a contributor to the DNC, and that White House staffers knew he was bringing foreign nationals to the White House for various events. It outlines an exchange of memos and e-mails among mid-level White House staffers expressing some concern about Chung and the individuals he was bringing into the White House. From this, the Report concludes that "the White House" knew that Chung's contributions were illegal conduit contributions of foreign money, and that "it is inconceivable that senior officials at the White House were oblivious to these connections."

It is my view that there is no information whatsoever outlined in the Report to support this conclusion. Far from inconceivable, I think it very unlikely that Chung informed anyone at the White House that his contributions were illegal or that they had any awareness of this fact. Indeed, the focus of the internal communications that are described in the Report was on Chung's apparent representations that he could encourage apparently legal American-Chinese business donations. The internal communications quoted by the Report plainly do not suggest that the authors recognized any possibility that Chung's contributions were illegal in any way.

The Report also contends that the President and others engaged in a "conscious decision not to learn the truth" about Charlie Trie's fund-raising and therefore are guilty of "not alerting the DNC and Clinton/Gore" about potential problems with Trie. Other than the fact that apparently no one in the White House did alert the DNC after the problems with Trie's PLET contributions were uncovered, the Report contains no explanation as to why it concludes that this was potentially criminal. There is no legal or factual analysis offered of the circumstances under which such non-action by individuals outside the campaign might be criminal.

It is my view that the facts described in the Report do not support a conclusion that any covered person may have violated federal criminal law and thus do not trigger the Independent Counsel Act. As noted above, however, Trie's conduct is clearly within the legitimate scope of the Task Force's investigation; if in the course of its continuing review it develops facts, as opposed to speculation, supporting a conclusion that a covered person may have committed a crime relating to Trie's contributions, we will consider at that time whether the Independent Counsel Act has been triggered.

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Finally, the Report argues that "senior White House and high-level DNC personnel" knew or consciously decided to avoid learning the truth about illegal foreign funds in connection with contributions. This is a very brief portion of the Report. It does not identify any facts concerning the President except that he attended coffee. The Report does not explain how or why it reaches the conclusion that based on that attendance, the President knew or should have known than was making illegal contributions of foreign funds. No other covered person is mentioned.

The Task Force has never been restricted in any way in its investigation of the coffees, though concern has indeed been expressed by me and others from time to time that this line of investigation carries little likelihood of bearing fruit. Nevertheless, the FBI and the Task Force supervisors expressed their continuing interest in exploring the circumstances of the coffees. Should the Task Force develop information in the course of that investigation that the President or any other covered person violated federal criminal law with respect to the donations, we will consider at that time whether the Independent Counsel Act has been triggered.

(c) Vice President Gore

The portion of the Report devoted to Vice President Gore is only one page long, and is so superficial that I am at a loss as to how to respond. It seems to suggest that the Attorney General was wrong in her section 607 analysis which led to the conclusion that no independent counsel need to be appointed with respect to Vice President Gore's fund-raising calls. Its bottom line, however, without analysis, is that if there were a viable "§ 371 conspiracy to defraud the United States," the Vice President "would certainly be among those whose conduct would be reviewed." Because we are offered no facts or analysis, I am unable to offer any views of this recommendation.

With respect to the apparent criticism of the Attorney General's conclusion last year that the fund-raising calls did not warrant appointment of an independent counsel, the Report makes no specific points and thus I am unable to respond. To the extent that the Report seems to suggest that the decision was inappropriately based solely on the uncorroborated statements of the Vice President as to his intent and lack of knowledge, this is a gross misreading of our recommendation to the Attorney General. Our conclusions that these were soft money solicitations and thus outside the scope of section 607 was based on the results of hundreds of interviews with those who participated in the calls, and the examination of scores of

documents.[6] In addition, as a wholly independent ground supporting our recommendation, we documented a well-established Departmental policy of not prosecuting section 607 violations absent aggravating circumstances not present here.

(d) The First Lady

The First Lady is not a covered person. Nevertheless, I assume it is very likely that the Attorney General would decide to invoke the discretionary clause were we to receive substantial information suggesting that the First Lady had committed a federal criminal violation. I reiterate, as was pointed out above, that the discretionary clause grants us considerably more flexibility than do the mandatory provisions of the Act. We are free to explore any allegations preliminarily and test information received before deciding whether the Act should be invoked.

The Report contends that the First Lady may be criminally liable for her failure to warn the DNC about Trie after learning of his questionable contributions to PLET. As is discussed above, it offers no case or legal analysis to support this theory. The First Lady was not an officer in the DNC, and there is no evidence that she knew of Trie's contributions to the DNC. I am aware of no established -- or even cutting edge -- theory of criminal liability under which the First Lady could be prosecuted based on these facts, although again, Dave Vicinanzo is reviewing this issue.

The "Gina Ratliff incident," described as a "mild extortion," hardly merits discussion. The Report acknowledges that there is no evidence whatsoever that the First Lady even knew of these events, which were handled by two of her staffers. While it says that it is "unclear" whether any others in the White House knew, it does not describe why it is unclear. In any event, I do not believe that it is an extortion for the White House to inform Chung that his continued privileges to visit the White House depended upon his meeting his contractual obligations to a former White House intern.

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[6] The Report asserts at one point that "the calls had nothing to do with the reelection effort, according to the Vice President," id., at 5, insinuating that because of the patent absurdity of that representation, nothing the Vice President said about the calls should be believed. The problem with this argument is that the Vice President said no such thing. In his interview, he acknowledged without hesitation that the calls, and the resulting funds that would be raised, were expected to have a positive impact on the campaign.

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(e) Other Matters

The Report concludes its survey of matters that it recommends warrant the appointment of an independent counsel with the description of variety of incidents which it describes as "troubling." They range from the coffee to John Huang's apparent fund-raising while he was still employed at the Department of Commerce to a variety of incidents that may suggest DNC officials should have been aware that some contributions were from foreign sources. The individuals named include John Huang, DNC fund-raiser Marvin Rosen, DNC mid-level official David Mercer, and others.

None of these individuals are covered by the Act, and the Attorney General concluded long ago that there was insufficient potential for a conflict of interest to warrant use of the discretionary clause with respect to these individuals and events. It has been my assumption that all of these matters have been under active ongoing investigation by the Task Force. The Report identifies no new information or developments that would suggest that there is now a conflict of interest for the Task Force to continue the investigation and resolve these matters.[7]

(f) Common Cause Allegations

The argument that the Act should be triggered based on the Common Cause allegations runs throughout the memorandum. This issue has been discussed and analyzed within the Department repeatedly and at great length, and the Attorney General has reached and publicly announced her decision that the allegations do not warrant appointment of an independent counsel.[8] We see

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[7] This does not mean that I concur that prosecution based on the legal theories of liability advanced in the Report would necessarily be appropriate or valid. I am particularly troubled by the prospect of escalating a possible civil Hatch Act violation into a felony conspiracy. Considerably more legal and policy analysis is called for before proceeding on this theory.

[8] The Report's repeated complaint that the Common Cause allegations have been left unresolved and hanging, without action, is simply untrue. The Attorney General has repeatedly responded to these allegations in writing and has testified concerning her conclusion in this matter. See, e.g., Letter from the Attorney General to Senator Orrin Hatch, Chairman, Committee on the Judiciary, April 14, 1997. In her recent testimony, the Attorney General explained at some length both her decision and the basis for it:

With respect to the advocacy ads, as I have pointed out

> to you before, and the statute that creates the Federal Election Commission has made very clear, the FEC has primary responsibility under the law for interpreting the election laws and for investigating violations of those laws. The Department has had a longstanding policy, reflected in a written 1977 memorandum of understanding, deferring to the FEC in investigating election law violations.
>
> We have brought criminal prosecutions only where the law is clearly established and clearly violated. To establish a criminal violation, we have to show that the defendant acted knowingly and willfully, that he consciously violated the law. The law governing these allegations is far from clear and it is impossible to conclude on what we know that anyone could have violated it knowingly and willfully. At the same time, the FEC is pursuing this and if they determine that there is evidence, they will refer it to us and if it reflects on a covered person and is specific and credible with respect to a covered person, I will trigger the Act.
>
> First, at the time of the ad campaigns at issue, the Department of Justice and the FEC had taken the position that coordination between a party and its candidate was irrelevant. What mattered was the content of the advertisement, what it said.
>
> Secondly, the content tests are very unsettled. Courts differ on whether the proper standard is express advocacy or electioneering message. The courts differ over the application of these tests in particular cases. ...
>
> The Department has no experience in judging the content of political advertisements. We have never investigated such a matter. This is precisely the sort of thing which should be deferred to the FEC under the structure of the Act. We are aware that the FEC already has under investigation allegations that soft money was misused during the 1996 election by the parties and the candidates to evade the spending limits. If the FEC uncovers evidence of a knowing and willful violation of the election laws that warrants criminal prosecution, I am sure they will refer it to us under established procedures, and if it triggers the Independent Counsel Act, I will do so.

This is hardly a matter that is "unresolved" or left hanging in

nothing to be gained by further debate of the issue, and will address only a few points with respect to Common Cause.

First of all, the Report misrepresents the course of discussion on this issue. The Report alleges that the Common Cause analysis was based on a "parochial and professorial application" of the Independent Counsel Act, that our handling of the matter has been "marked by gamesmanship" and is "intellectually dishonest." The Report argues that we were "hostile" to the triggering of the Act, and thus "had to find a theory" to avoid conducting an investigation.[9]

The authors' attribution of bad faith to those of us who have disagreed with them on various issues is nothing short of shocking. A range of experienced attorneys, including an attorney from the Appellate Section, have devoted innumerable hours of work to exploring these complicated issues, and there is simply nothing in any of our exchanges with Messrs. LaBella and DeSarno that would merit such attacks on the integrity of these attorneys. We have explored every argument advanced by them concerning the Common Cause allegations with consideration and respect, but have in the end disagreed. It is outrageous for this Report to twist these attorneys' good faith efforts to explore these issues by labelling them with pejorative terms, or to suggest that their -- and my -- views were corrupted by a determination to avoid any given result.

Indeed, the Common Cause allegations were analyzed without respect to the Independent Counsel Act. Those allegations were rejected on their merits as not suggesting potential violations of federal criminal law, based on the information available to us. While we did not conclude that the handling of soft money by the two campaigns was necessarily in conformity with the Federal Election Campaign Act (FECA), we did conclude that given the state of the law, that conduct could not have been a willful violation of the law, and thus could not be prosecuted criminally. We further concluded that this sort of regulatory issue is one that is squarely within the province of the FEC and properly handled by it both as a matter of administrative law and pursuant to our long-established MOU with the Commission, which

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limbo. The Attorney General could not have been clearer.

[9] This allegation would surprise the numerous subjects of ongoing independent counsel investigations. When specific and credible evidence of a potential violation of law by a covered person warrants further investigation, the record shows that no one involved in this process has hesitated to recommend that an independent counsel be appointed.

allocates initial responsibility for such matters to the FEC. We are unable to identify any "gamesmanship," or "parochial and professorial" reasoning in any of these determinations.

The Report argues that the Attorney General's conclusion with respect to the Common Cause allegations "virtually ignores the possibility that there exists a section 371 conspiracy to defraud the United States by violating the civil regulatory framework set out in the FECA." I do not dispute that a conspiracy to engage in concerted violations of the law, even the civil law, may support a criminal prosecution, though I believe there are sound reasons why any such prosecution should be approached with care, and why in most such cases deferral to the civil authorities is likely to be the most appropriate remedy. But no one "ignored" this "significant speed bump" that the Report claims this theory represents.

To the contrary, the Attorney General has addressed the ultimate issue here squarely. She has decided that no amount of coordination between the candidates and the party can, by itself, constitute a violation. Only the content of the ads can establish even a civil violation of the FECA.

Since the authors of the report would find a potential crime on these facts it would seem that they argue that it is a conspiracy to defraud the United States even where there is no civil violation, that is, where the subjects have conformed their behavior to the law. A recent Appellate Section memorandum rejects their theory, as should all who give it any serious consideration.[10]

The Attorney General has concluded that these allegations are properly addressed initially through the established regulatory processes of the FEC, not as a matter of criminal law. This is not sophistry or evasion of our responsibility to enforce the criminal law, as the Report seems to suggest. Rather, it is an analysis based on the appropriate allocation of enforcement responsibility in a complicated regulatory scheme. Our deference to the FEC is an established policy of the Department,

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[10] Any conspiracy requires specific intent, and the Attorney General's conclusion was that given the state of the law at the time, any violation of the FECA based on the conduct alleged by Common Cause could not be proven to have been a purposeful violation of a statutory standard known and understood by the offender. National Right to Work Comm. v. FEC, 716 F.2d 1401 (D.C. Cir. 1983) (civil enforcement action). Thus, if there were violations of the civil regulatory scheme -- and that is a determination properly made in the first instance by the FEC -- there is no basis on which to conclude that they may have been willful.

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memorialized in a formal MOU, not a theory concocted on the spot to avoid application of the Independent Counsel Act.

The Report's argument that the only reason for our decision was the involvement of the President and other high-level officials is preposterous. Indeed, such allegations under any other circumstances would never have been considered for prosecution, and would never have received the serious exploration and consideration that have marked our review of the Common Cause letters. In fact, in the history of the election laws we have never investigated criminally any allegation of improper coordination of campaign advertising, or improper control of a party's ads by a candidate. The only reason this case has merited the attention it has received is precisely because it involves the President.

(g) The Loral Investigation

It is true that with regard to the Loral matter, the Task Force is examining a transaction without predicate. That happens from time to time when there is substantial public concern about a matter. However, at present, there is not a scintilla of evidence -- or information -- that the President was corruptly influenced by Bernard Schwartz, as the authors concede. It is stretching our investigative prerogative even to open an inquiry into the Loral transaction; it would be absurd -- and contrary to the law -- to refer it to an independent counsel without any evidence suggesting that any wrongdoing occurred.[11]

The Report suggests that there will be a conflict of interest with respect to this inquiry because two high-level Department officials, both of whom have dealt closely with the Task Force, are potential witnesses. That is an issue that is commonly dealt with, and has been dealt with in this case, by

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[11] The Report cites two documents which it suggests weakly "may establish a principled reason" to handle this matter under the Independent Counsel Act. One is a letter to National Security Counsel head Samuel Berger from a Loral executive urging a quick decision on the matter, because delay would result in serious financial losses to the company. We see nothing in this letter to suggest a corrupt deal between Loral and the Administration. The second document is a memorandum authored by Ickes three and a half years earlier, naming Schwartz as an individual that the President should call to ask for assistance in fund-raising in the course of the campaign. As set out earlier, we decline to infer that action taken on behalf of a supporter of an elected official is presumed to be corrupt, and there is nothing in these two documents that establishes anything other than that Loral was seeking action and Schwartz was a supporter of the President.

recusals. We see no reason why this would create a conflict of interest for the Department, were it to continue to investigate this matter. Department employees frequently are witnesses in criminal matters.

Similarly, the fact that this transaction involves a matter as to which the Department recommended a course other than that which the White House followed does not create a conflict of interest. The events are historical; we are not in a position where our investigation could be viewed as a cudgel to try to force the White House into following our recommendation. The Department frequently is asked for its views on a variety of governmental actions. Never has it been suggested that this creates a later conflict of interest if allegations of criminality arise. If we commented on a piece of legislation, would it then be a conflict of interest for us to investigate allegations that a legislator who voted contrary to our views took a bribe?

Finally, the document production issues raised by the White House with the Department are the sort of routine give-and-take among Executive Branch agencies that occur all the time. They do indeed create some tensions and difficulties, but they are common and not the sort of conflict of interest that would justify resort to the Independent Counsel Act.

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Copy 1 of 8
3/31/2000

"LA BELLA REPLY"
August 12, 1998

Redacted to delete information the disclosure of which could adversely affect
a pending criminal investigation or prosecution
or would violate Rule 6(e) of the Federal Rules of Criminal Procedure
Redactions completed on March 24, 2000.



ADDENDUM TO INTERIM REPORT

FOR

JANET RENO
ATTORNEY GENERAL

AND

LOUIS J. FREEH
DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

PREPARED BY:

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Campaign Financing Task Force

and

James DeSarno
Assistant Director
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CAMPCON Task Force

August 12, 1998

ADDENDUM TO INTERIM REPORT

I. INTRODUCTION

We have received from James Robinson, Lee Radek's Review of Interim Report ("Review") a copy of which is annexed at Tab 1. At this juncture, we are faced with crucial issues which need to be aired fully and we welcome the opportunity for a frank exchange with others in the Department who are familiar with these matters. However, we would be remiss if we did not reference at the outset the acrimonious tone and tenor of the Review. Such an approach lessens legitimate debate and hampers the ability to reason to a result based on the merits. We therefore intend to concentrate on the substance of the arguments rather than the personal animus.

A. STOVEPIPE ANALYSIS

In describing the "stovepipe" approach, we intended, in large part, to reference the natural tendency of investigators and prosecutors to segment individual allegations and charges. The Interim Report was our way of forcing us to break out of that mold by marshaling together in one place disparate pieces of evidence. We remain hopeful that the Interim Report will cause those with whom the Attorney General chooses to share it also to reevaluate the matter, whatever may be the ultimate outcome or their personal view of the matter. In any event, the landscape approach is an approach that we have advocated on countless occasions during our tenure in Washington; it should come as no surprise to anyone. We have often said that when time allowed, we intended to engage in such an analysis.

The Common Cause allegations and Core Group investigations would have hastened such an overview. The rejection of the Core Group approach (like the closure of the PLET investigation) was accomplished before we were involved in the Task Force and therefore we only

know what has been reported to us by those who were present at the time. We are, however, shocked to read in the Review that the Common Cause allegations were "thoroughly considered, analyzed at length, and closed on their merits." (Review at Page 3)(emphasis added). To the best of our knowledge that is not the case.[1] On the contrary, after a flurry of memoranda on the issue this past winter, we understood that the matter was tabled. Although we attempted at various points to bring it to resolution, i.e., to have a decision one way or the other as to whether the allegations formed a predicate for investigation, we were repeatedly told that the matter remained under consideration. No one has ever advised us otherwise. Indeed, the sudden appearance of an August 4, 1998, memorandum by Criminal Appeals on this very issue appears to support our belief that the matter remains unresolved. We have no knowledge of what triggered the writing of this memorandum. However, since it is addressed to Jim Robinson and Bob Litt, we presume that one or both must have requested the analysis. We trust that this would not have been done if the issue had been "closed on the merits" some months ago.[2]

Moreover, it is not just we two who were under the impression that the matter was tabled. [redacted]he AUSA brought in to review and to investigate the Common Cause allegations, was under the same impression. In late December [redacted]eft the Task Force in frustration because

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[1] If indeed this matter was "closed on the merits," we would be very interested in seeing the closing or declination memo. It was our understanding that closing memoranda were to be written and the Director of the Federal Bureau of Investigation was to be consulted before a matter was closed. To our knowledge, neither one of us has seen, much less reviewed, a closing or declination memo concerning the Common Cause allegations.

[2] Further supporting this view is the fact that to our knowledge the Common Cause letters (dating back almost two years) remain unanswered despite the Attorney General's well-known mandate to respond promptly to all correspondence. We were told that no written response to Common Cause would be made until a decision on the issue had been reached.

he was prevented from commencing an investigation based on these allegations. In his departure memo, dated December 23, 1997, a copy of which is annexed at Tab 2, [redacted] wrote concerning the Common Cause allegations:

> The pool of persons potentially responsible for this corruption is both limited and well known. There are criminal statutes applicable to this conduct, and at this point we simply cannot say that the conduct is not prosecutable, as a matter of law. What we do not know, without investigating, is whether or not we could responsibly initiate criminal prosecutions.
>
> That, to date, we have been unable to investigate the Common Cause allegations in a straightforward way has been a great personal and professional disappointment. But, I believe the public has been most dis-served by the way in which the "whether to investigate" issue has been approached, debated, and resolved. Never did I dream that the Task Force's effort to air this issue would be met with so much behind-the-scenes, maneuvering, personal animosity, distortions of fact, and contortions of law.[3] (It also is my impression that many involved have not read the pertinent cases.) All this, not to forestall an ill-conceived indictment, not to foreclose a report making an independent counsel referral, but to prevent any investigation of a matter involving a potential loss of more than $180 million to the federal treasury.
>
> You, of course, are well informed of my views. By no means do I minimize the real impediments to a prosecution. Yet, nearly every day something developed in other investigations comes to our attention, which has significance to the Common Cause allegations. As an example, I have recently been directed to the deposition testimony of Harold Ickes in which he states: that only he and Sosnik had the power to authorize payment of the media consultants' bills [9/22/97 Senate Depo. P. 62]; that he decided whether the DNC or C/G Committees would pay a particular bill [9/22/97 Senate Depo. Pp 64-5]; and that while he thinks that the

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[3] I will not repeat the details, most of which you already know. While I recognize that there have been legitimate disagreements, some positions urged in support of avoiding any investigation have been so plainly wrong as to be disheartening (e.g., the suggested referral to the FEC, on the misapplication of the MOU with that agency, with the claim that the FEC could refer the case back after it checked out the ad content, but with the unspoken reality that no criminal investigation would ever happen -- certainly not within the three-year statute of limitations; or the contention that an independent counsel referral must be made immediately if any investigation is even authorized).

DNC and C/G Committees signed separate contracts with the media consultants, he's not sure he ever saw them [9/22/97 Senate Depo. Pp. 78-9]. Thus, it appears that the President's Deputy Chief of Staff (who was not an employee of the DNC) determined which media ads the DNC paid for, without regard to the DNC's contractual liability, if any.

I realize that I have moved from a neutral position to that of an advocate for investigating the Common Cause allegations. Further, I now believe that the only responsible step, likely to uncover the facts is a grand jury investigation. That position, coupled with the mutual loss of confidence evident between myself and those outside the Task Force who have weighed in on this issue, leads to the inevitable conclusion that I can no longer play a useful role in the evaluation or pursuit of the Common Cause allegations.

ATTY NAME

Since [redacted] left the Task Force at the end of December, neither of us has been advised of a resolution of the Common Cause allegations "on the merits." It is our understanding that the matter remains open and unresolved. It was because of this that the current media fund investigation was opened around May of this year. It is an attempt to investigate some of the matters presented while waiting for a final decision on the Common Cause allegations. This was done so that, should we be given final authorization to pursue the matter, we would at least have the foundation of an investigation in place.

B. COMMON CAUSE ALLEGATIONS

The issue remains whether, as a matter of law, the Common Cause allegations fail to set out potential violations of federal criminal law (FECA, PPMPAA, PECFA, § 371, etc.). If there is no possible violation, there can be no investigation.

The importance of the issue cannot be overstated. The two principal presidential candidates together received approximately $180 million in federal funds for 1995-96. The candidates for 1999-2000 will receive substantially more. If the money for '95-96 was obtained on the basis of false representations (in particular, regarding agreed limitations on spending), the

people of the United States were defrauded of those funds. If this possible fraud is left unaddressed, the pressures of ever-increasing campaign spending portend unchecked corruption.

Recently a new voice has been heard. The FEC's Audit Division has issued a report, pursuant to its statutory duty (not in response to any Department referral), addressing, among other things, the core of the Common Cause allegations regarding the Clinton-Gore campaign.[4] In spite of campaign committee delay in providing some records and outright refusal to provide others, the FEC auditors found strong evidence of media campaign coordination between agents of the DNC and the campaign committees. That evidence, coupled with the electioneering content of the ads in the media campaign, led the auditors to find the DNC media payments ($46,546,476) to have been an in-kind contribution to either the primary or general campaign committee. Reimbursement of overpayments was recommended.

The Clinton-Gore committees' response to the audit findings is essentially the same defense already mounted by them in the news media. The ads in question, they say, are merely "issue ads" long approved by the FEC. Admitting a high degree of coordination (and not denying that one person may have been responsible for authorizing payment for ads for both the DNC and the committees), the committees claim that the ads nevertheless contain no "electioneering message." In the alternative they urge that if there are electioneering messages, the applicable legal standard actually is "express advocacy," which they assert is in none of the ads.

The Clinton/Gore arguments are not dispositive. For example, when urging that the FEC has approved issues ads, they fail to note that the cited Advisory Opinion, stating that a national

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[4] Contrary to the suggestion in the Review, and repeated often at meetings, the MOU does not mandate that initial responsibility be placed with the FEC. It is clear that the Department can investigate independently (MOU para. 4).

party committee's "issues" advertising costs can be generic spending, limits that opinion to spending that does not in fact constitute a coordinated expenditure subject to 2 U.S.C. 441a(d). FEC Advisory Opinion 1995-25. Further, the Clinton/Gore paper completely omits any reference to the application of the presidential campaign funding statutes, or their interpretation by the courts (rejecting, for example, first amendment limitations).

The Supreme Court has specifically held that the public campaign financing laws do not violate the first amendment rights of candidates or their supporters because the candidate is free to reject the limits of those laws. Buckley v. Valeo, 424 U.S. 1, 57 n.65, 91-109 (1976)(per curiam). Thus, to the extent that there exists a content test for communications expenditures which may be regulated under FECA, it need not be read into the public campaign financing laws.

The central question posed by the Common Cause allegations is not whether the national party committees could lawfully (under FECA) pay for the ads in question with hard or soft money, or as coordinated expenses under FECA, or independently (outside FECA). Rather, the question is whether the spending was, in fact, that of the candidates or their campaign committees, regardless of the content of the ads. The fact that an agent's payment for a candidate's campaign expense may be innocent or unknowing does not relieve the candidate of the legal obligation not to exceed spending or contribution limits under PPMPAA or PECFA.

What the FEC auditors' reports add is considerable, credible and *new* information supporting the Common Cause allegations. Because they have been working on this audit since January 1997, whereas we were allowed to begin to look at the edges of this issue only four months ago, they have received and analyzed more documents than have we. Their financial

analysis is far more elaborate than we have been able to prepare. Things we only suspected now have empirical support.

For example, the auditors point to specific indications on bank records of the media vendors which substantiate the payment, timing of payments, and the purpose of payments by the DNC for advertising directed and controlled by the candidate and the campaign committee. We did not know, until we read in the auditors report, the contents of the ads. The text and video of the ads is pertinent to a determination whether the ads were those of the DNC or the campaign committee. Specifically supported is the allegation that the Democratic presidential candidate directed and controlled ads which he intended to influence his election -- ads which were paid for by the DNC at the candidate's request. Exclusion of the spending for such ads from the candidate's voluntary agreement to limit expenses (in connection with, or to further, his election) is a potential criminal violation of the federal campaign financing laws. It should be investigated.

The auditors' report also substantially undercuts the conclusion of the August 4, 1998 Appellate Section memo that a Section 371 conspiracy to defraud charge would not be permissible because the ad campaigns were lawful under the campaign statutes. Assuming, without conceding, that "the proper treatment of the advertisements does not turn on either the degree of coordination between the candidates and the parties or their subjective intent" (Appellate Memo, pp. 17-18) but on "whether they contain an 'electioneering message'" (Id., p. 18), the auditors found just that -- electioneering content. Moreover, the Memo's reliance on First Amendment protection of political expression ignores the Supreme Court's explicit holding that the public campaign financing laws do not implicate the first amendment.

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We recognize that the FEC document is a report by auditors and the final FEC product, reviewed by FEC General Counsel, among others, may be somewhat different. However, the Independent Counsel Act denies us the option of waiting for the ultimate version. This is so for two reasons. First, it may be months before the FEC issues its final report. In the meantime, the statute of limitations is running, especially on the FECA claims which have a shortened three year limitation period. Second, to wait is tantamount to saying career auditors with the FEC are not a credible source and that it takes the imprimatur of lawyers to make a claim viable. Such an argument is untenable.

C. ICA

1. Evidence and Information

As set forth in the Interim Report (p.10), evidence suggests something which furnishes proof, whereas information need not be as directed. As such, we continue to believe that the distinction is relevant, and to the extent that the import of words shapes our analysis, we should be precise in this area. We appreciate that the Review does reference information rather than evidence (albeit without acknowledging a distinction). However, it refers to "specific and credible information" as the proper standard (Review pp. 5 and 6). In fact, that phrase nowhere appears in the Act. Rather the ICA speaks of specific information from a credible source. 28 U.S.C. § 591. Again, the precision of the Act's wording is crucial because it can, in certain instances, make a difference in determining whether the Act should be triggered. For example, it is possible that specific information may come from a credible source, although the information itself is not especially credible. Yet unless it descends to the level of "frivolous," the Act must be triggered. See S. Rep. 100-123, 1987 U.S.C.C.A.N. at 2158.

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The Review complains bitterly about references to the Herman and Babbitt referrals. When applying the Act in the Alexis Herman matter, the Attorney General spoke eloquently of the need to do so because she could not rule out the possibility that the law had been violated. To the extent that we are aware of the facts in the Herman investigation, we appreciate fully the Attorney General's reluctance to apply the Act to allegations which seem so ephemeral, and we respect all the more her decision to call for an ICA even though the allegations seem so unlikely to result in a prosecution. The argument set forth in the Interim Report is simply that the analysis applied in Herman (as well as Babbitt) calls for a triggering of the Act here; whether any prosecution will result is not the issue.

2. Dual Standard of Predication

The Review's analysis relies almost entirely on the statutory amendments of 1982. And indeed, at that time Congress was concerned that the Act had been triggered too cavalierly. They were responding particularly to the appointment of a Special Prosecutor (only later was the term Independent Counsel used) for Carter appointees Hamilton Jordan and Timothy Kraft. Both men were investigated for possession of personal use amounts of cocaine even though there was "a clear Departmental policy not to prosecute" because of the minimal quantity involved. S. Rep. 97-496 (1982) at 15, 1983 U.S.C.C.A.N. 3537, 3550-51. But by 1987 and 1994 the pendulum had swung. Congress was reacting to what it saw as stonewalling by the Department in its refusal to appoint an Independent Counsel in instances where the information available warranted it. The legislative history to these later amendments, which form the basis of the Act we now must interpret, is therefore what is crucial to our analysis today. The pertinent legislative history from 1987 and 1994 is set forth at pp. 15-19 of the Interim Report. Reaching back to language in the

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legislative history relating to the 1982 amendment is of limited use in establishing a context for the ICA in light of the 1987 and 1994 amendments.

D. SPECIFIC RECOMMENDATIONS

1. Harold Ickes

There is no dispute that Harold Ickes is not a covered person under the literal wording of the Act. That is, he was not officially designated as an officer of Clinton/Gore. We continue to believe however, that such literalness strangles meaning, and as such, is contrary to legitimate methods of statutory interpretation. See, e.g., Lynch v. Overholser, 369 U.S. 705, 710 (1962).

We will not repeat the facts which make it clear that Harold Ickes was a de facto officer (principal) of Clinton/Gore '96 and the legal ramifications of such a conclusion.[5] However, it is worth reviewing what the Clinton/Gore '96 Committee itself has said about Harold Ickes in its most recent submission to the FEC relating to, among other things, the Common Cause allegations:

> Finally, the Audit staff relies on an authorization memorandum to Primary committee and DNC staff indicating that Harold Ickes had authorized payment of certain SKO invoices as evidence of coordination. ... In any event, it is the content of an ad that determines whether expenditures for that ad count against limitations applicable to the Primary Committee or to the DNC for 441a(d) expenditures. The fact that one or more persons are responsible for authorizing ads for both the DNC and the Primary Committee is irrelevant because coordination is legal.

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[5] We understand that while rejecting the de facto argument as out of hand, Lee Radek has also suggested that at most it shows Ickes' role in the financial decision making of Clinton/Gore, as if this were not enough. As we have argued all along, the money is the essence of it all, because the need to feed the media fund was of paramount importance. To presume that other work would not be delegated by the head of an organization -- de facto or not -- is to ignore the realities of leadership.

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Response of Clinton/Gore '96 Primary Committee, Inc. And Clinton/Gore '96 General Committee, Inc. To the Exit Conference Memoranda of the Audit Division at p 11 (emphasis added).

The statement that Harold Ickes is responsible for authorizing ads for both the DNC and Clinton/Gore constitutes an admission by Clinton/Gore '96. The fact that Clinton/Gore '96 (Primary and General Committees) is making such an admission concerning Harold Ickes' responsibility vis-a-vis the reelection effort, is of import in the discussion of Harold Ickes' position. Is this not an admission of an official role filled by Harold Ickes? Is it not an admission that Harold Ickes held a position (as agent at a minimum) with the Committee and in that position he exercised control at the national level? This is a sound argument that should be made on these facts.

If we were talking about corporate liability based upon the conduct of Harold Ickes, we would, without question, conclude that Harold Ickes was an acknowledged agent and, given the control exercised by him, a de facto officer of the Committee. Therefore, Ickes' conduct would bind the corporation for criminal acts committed by him. Quite apart from Ickes' own criminal exposure, it is a fact that the Committee is bound by his conduct in light of the admission that Ickes was one of the people (officer/agent) responsible for certain media related conduct on behal of the Committee. To the extent that that conduct presents a potential violation of law, Ickes and the "corporation" are proper targets of an investigation.

Rejection of the de facto argument ignores the reality of the situation. Another document not referenced in the Interim Report, underscores dramatically Harold Ickes' control of DNC an

media-related funds. In a document entitled "Procedures for Generic Media Buys," the relevant portion of which is annexed at Tab 3, the following procedure is established:

> No money will be moved by the DNC unless and until DNC has received confirmation from Harold of the total amount approved to be spent.

When combined with the recent admission by the Clinton/Gore Committee, recited above, this establishes beyond question Harold Ickes' de facto role.

Beyond that, however, the very factors that the Review dismisses as irrelevant to the mandatory clause analysis (Review pp.9-11), i.e., that Harold Ickes' salary was lowered to come just under the statutory cutoff, that his position had traditionally been covered, and that his exercise of power and authority was extraordinary, at the very least warrant exercise of the discretionary clause. While we gather that it is Public Integrity's policy not to give advice as to invocation of the discretionary clause (Review, p.10), we believe that as supervisors of the Task Force, it is our responsibility to address this important issue. To do otherwise is to ignore the facts and fail to provide a framework in which they should be considered. After hearing the various viewpoints, the decision, of course, is entirely the Attorney General's to make.

We are also troubled enormously by the contention that there should be a "thorough analysis of the information we have and the reasonable inferences that can be based on that information" before a determination is made as to whether Harold Ickes comes within the discretionary clause. (Review, p. 11) Such an approach seems directly contrary to the purpose c the Act for it suggests that the conflicts which warrant invocation of the discretionary clause will vary depending on the information gathered. The conflicts, if they exist, are independent of the information collected. They result from the position occupied by Harold Ickes in connection wit

the matters at issue and not from the strength of the information developed concerning the underlying transactions.

Finally, the Review concludes that there are no statutes or theories to support the idea that Harold Ickes could be criminally responsible in connection with Trie's illegal contributions to the DNC by virtue of Ickes' involvement in the PLET matter. We believe there is sound support however in basic agency law as well as in such statutes as 18 U.S.C. §§ 371 and 1341, among others.

2. President Clinton

It is clear, and the Interim Report acknowledges, that the information about the President is not as considerable as that relating to Harold Ickes. This is because the information relating to Harold Ickes is overwhelming. However, the information relating to the President is nonetheless substantial. Indeed, Harold Ickes attended the April and subsequent meetings with Cardozo as the President's agent. We know that the President was informed of the problems with the Trie "donations" since, as the Report points out, the President and First Lady later agreed with the PLET trustees that the Trie "donations" should be returned in their entirety. Without reiterating all the information and arguments in the Interim Report, the issues concerning the President cannot be dismissed simply because they are characterized as less weighty than those concerning Harold Ickes.

In dismissing the possibility that the President's activities may warrant a triggering of the Act, the Review again resorts to a stovepipe analysis. Without discussing any of the fact patterns

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outlined in the Report (see pp. 51-56), the Review dismisses them individually as insignificant.[6] Again, the purpose of this Report was to focus on the information *collectively*. We believe when that is done, the predicate set forth in the Act is met. In fact, the timing between the Trie contributions and the Trie appointment is specific information from a credible source of a potential Quid Pro Quo. As we pointed out in the Interim Report, the information is at least as compelling as the facts presented in the Loral matter which triggered a full criminal investigation or the . Absent meaningless hairsplitting, the weight of these facts cannot be fairly distinguished from those in Loral nor from those that triggered the § 607 inquiries late last year. In sum, we cannot understand how the PLET information falls short of the other information which has triggered criminal investigations as well as preliminary investigations under the ICA.

The Interim Report also contained a section entitled, "Senior White House Officials Knowledge of Foreign Contribution: Soft and hard Money. See Interim Report at 51 - 56. The report recites the following:

> The following events demonstrate a pattern of activity within the White House involving senior White officials. This pattern suggests a level of knowledge within the White House -- including the President's and First Lady's offices -- concerning the injection of foreign funds into the reelection effort.

Although this is trivialized in the Review, it is pertinent as circumstantial evidence that there was a degree of knowledge within the White House concerning the counting of foreign

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[6] To take but one instance, in referencing the the Review (p. 8) states that the Report "does not identify any facts concerning the President except that he attended". On the contrary, what is so significant about his attendance is the fact that he was present while John Huang solicited funds although almost all the attendees were foreign nationals precluded by statute from making donations. (Report, p. 56) We know from the President's interview during his Preliminary Inquiry that he was well aware of the ban on foreign money donations.

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funds. At a minimum, this suggests a conscious avoidance of the truth concerning some of the more flamboyant fund raisers such as Trie and facts are recited with sufficient particularity to satisfy the ICA's threshold of specific information from a credible source that a potential violation of federal law occurred. While this section of the Interim report was expressly intended only to demonstrate a level of knowledge and not as a separate predicate upon which to trigger the ICA, the evidence is significant in that regard.

3. Vice President Gore

Since the Report was written (and as Lee Radek is well aware though it is not referenced in the Review) new evidence has surfaced concerning the Vice President's role in fundraising. We were recently provided a memorandum of a meeting attended by the Vice President. The memo contains David Strauss' handwritten notation of "$20,000" (the hard money cutoff) and references comments attributed to the Vice President about his role in the fundraising marathon. (Strauss was Deputy Chief of Staff to the Vice President.) The memo therefore resurrects the question of the Vice President's knowledge that his solicitations within the White House were designed, at least in part, to raise hard money. This possible § 607 violation (along with the possibility that the Vice President may have given a false statement on this point during his interview) adds to the analysis given in the Interim Report and bolsters the conclusion that an Independent Counsel should review the allegations against the Vice President. Indeed, this evidence supports the position taken by the Task Force in November concerning the then available information that suggested the appointment of an Independent Counsel was warranted (use of Clinton/Gore credit card to place calls and the failure of recollection concerning the memos that were addressed to the Vice President). See Tab 4.

4. The First Lady

The analysis of the First Lady's role again turns on the predication necessary to trigger the Act. The facts are set forth with particularity. Her potential criminal involvement tracks the conduct set forth relating to the PLET incident. While the information against the First Lady is not overwhelming at this time, in light of the involvement of Harold Ickes, the President and White House Counsel, it is sufficient to warrant further inquiry.

5. Other Matters

Although the Review trivializes the involvement of Huang, Rosen, Mercer and the DNC, this does disservice to the facts. The DNC was an organization central to the election of the President (especially because, due to the ubiquity of Harold Ickes, its function merged with that of Clinton/Gore). It therefore appears to pose the type of political conflict of interest which can so shake confidence in decisions of the Department. Huang and Mercer, as DNC employees, bring the issue into relief. And since the Report was written, the fact that Mercer accepted $5,000 in travelers checks from Charlie Trie has become public. While we were aware of this fact, at this juncture we do not know precisely why this money was given. Again, it raises questions which need to be answered and can best be handled by a person perceived to be independent of the political consequences.

6. Common Cause Allegations

We reiterate our observations above, pp.4-8.

7. Loral

The Review shares the view expressed in the Interim Report that this was a matter which likely did not merit any investigation. Now that we are there however, the Review asserts that there is no conflict in conducting that investigation because the conflicted persons have been recused. It is true, of course, that in general there can be effective recusals of Department officials involved in a matter under investigation. What makes the recusal unworkable in this case however, is that the persons being recused are at the epicenter of the entire Campaign Finance investigation. As unfair as it may be, Bob Litt's name has been invoked repeatedly by persons trying to discredit the Department's neutrality in this investigation. It therefore is especially inappropriate to have Departmental attorneys evaluating Bob's credibility. In the event that the "he said/he said" is viewed as favoring Bob's recollection, the Department will inevitably be accused of having had a political motive for its determination. In such circumstances, it is in everyone's best interest to remove the decision from this possible line of attack. It is, in this respect, a classic political conflict of interest which we believe the ICA is designed to avoid. Finally, to the extent we are pursuing the Loral investigation, the President is at its center. This fact alone is sufficient under the ICA to trigger a preliminary investigation.

II. CONCLUSION

Our first objective when joining the Task Force was to get investigations on track. That having been accomplished we can now sit back and see the forest as well as the trees. We have spent several months preparing the overview set forth in the Interim Report. It contains many conclusions. The Review dismisses them all. While we stand by the Report in its entirety, you

need not accept every argument therein in order to conclude that the weight of the information now is such that an Independent Counsel is warranted under the strictures of the Act.

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U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

August 17, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

James K. Robinson
Assistant Attorney General

FROM: PMS Patty Merkamp Stemler
Chief, Appellate Section

SUBJECT: The Discretionary Provision of the Ethics in Government Act, 28 U.S.C. § 591(c)(1)

PURPOSE: This memorandum addresses the question whether, to invoke the discretionary provision of the Ethics in Government Act, 28 U.S.C. § 591(c)(1), you must conclude that there is a potential for an "actual" conflict of interest or merely an "appearance" of a conflict of interest.

TIMETABLE: None.

SYNOPSIS: After reviewing the plain language of 28 U.S.C. § 591, its structure, and its legislative history, I conclude that you may employ the Independent Counsel process with respect to a noncovered person only if you determine that investigation or prosecution by the Department of Justice may give rise to an actual conflict of interest.

DISCUSSION:

The Ethics in Government Act, as amended by the Independent Counsel Reauthorization Act of 1994, authorizes you to conduct a preliminary investigation in accordance with 28 U.S.C. § 592 in three situations. First, pursuant to Section 591(a), you "shall" conduct a preliminary investigation upon receipt of "information sufficient to constitute grounds to investigate whether any person described in subsection (b) [the President, Vice-President, cabinet officers, and other high-ranking covered persons] may have violated



any Federal criminal law * * * ." Pursuant to Section 591(c)(1), you "may" conduct a preliminary investigation whenever you determine "that an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest." Finally, pursuant to Section 591(c)(2), you "may" conduct a preliminary investigation to investigate whether a Member of Congress has violated the criminal laws when you determine "that it would be in the public interest." Congress has not authorized you to conduct a preliminary investigation, which could lead to appointment of an Independent Counsel, in any other situation.

The plain language of these provisions makes clear Congress's intent to create three different triggers for initiating a preliminary investigation that could result in an independent counsel. The triggers turn on the status of the subject of the investigation. Thus, for the group of precisely defined covered persons, you have no discretion. You **must** conduct a preliminary investigation if you receive specific and credible evidence that the covered person has engaged in crime. 28 U.S.C. § 591(a). For Members of Congress, you have broad discretion to initiate a preliminary investigation upon receiving specific and credible evidence. You need only determine that invocation of the Act would be "in the public interest." 28 U.S.C. § 591(c)(2). With respect to anyone else, however, you may conduct a preliminary investigation only if an investigation or prosecution by the Department of Justice "may result in a personal, financial, or political conflict of interest." 28 U.S.C. § 591(c)(1). By the plain terms of this provision, Congress manifested an intention to cabin your discretion so that you may invoke the expensive, freewheeling independent counsel process only if there is a possibility of an actual conflict of interest. The plain language of the statute does not permit you to conduct a preliminary investigation where there is merely the possibility of an "appearance" of a conflict of interest. There are no "rare and exceptional circumstances" (Ardestani v. INS, 502 U.S. 129, 135 (1991)) warranting a deviation from the plain language.

Moreover, the legislative history is consistent with the plain language, and does not provide a basis for adding "appearance" to Section 591(c)(1). See United States v. Albertini, 472 U.S. 675, 680 (1985), quoting Garcia v. United States, 469 U.S. 70, 75 (1984) ("'[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from [the plain] language."). The original Special Prosecutor Act of 1978 did not authorize the Attorney General to initiate an Independent Counsel investigation of a noncovered person. See Pub. L. 95-521. A discretionary provision was first proposed in 1982, along with a mandatory provision relating to the President's family. See S. Rep. No. 97-496, 97th Cong., 2d Sess. 9-10 (1982). The proposed

discretionary provision authorized the Attorney General to invoke the independent counsel process where an investigation by the Department may create "an actual or apparent conflict of interest." Id. at 9. The bill was amended on the House floor, however, to delete the "appearance" language. Congressman Hall, the bill's sponsor, explained the amendment during the floor debate (128 Cong. Rec. 30273 (Dec. 13, 1982)[emphasis added]):

> The Senate-passed bill provides that the Attorney General may apply for the appointment of a special prosecutor to investigate persons other than the class of individuals specifically covered whenever the Attorney General determines a personal, financial, or political conflict of interest or the appearance thereof may result if an officer of the Department of Justice conducts the investigation. **The bill as amended, deletes the reference to appearances, and thereby requires the Attorney General to determine that an actual conflict may exist in order to utilize the special prosecutor procedures.**

Twelve years later, Congress added a discretionary provision for Members of Congress in the Independent Counsel Reauthorization Act of 1994. See 28 U.S.C. § 591(c)(2); Pub. L. 103-270. This provision explicitly authorizes the Attorney General to begin a preliminary investigation of a Member of Congress if the Attorney General determines it is "in the public interest." As the Senate Report explains, this "broader standard" replaces the requirement that the Attorney General first find an actual conflict of interest prior to invoking the statute for Members of Congress. S. Rep. No. 103-101, 103d Cong., 1st Sess. 36 (1993). For these individuals, the Attorney General may use the Independent Counsel procedures, not only when there is an "actual conflict of interest," but also when there is an "appearance of a conflict of interest" which might "weaken public confidence in the investigation and any prosecution." Ibid. The Conference Report likewise explains that the "broader" public interest standard "would permit the Attorney General to use the independent counsel process for Members of Congress in cases of perceived as well as actual conflicts of interest." H. R. Rep. 103-270, 103d Cong., 2d Sess. 10 (1994). The Conference Report emphasizes that Congress did not intend to alter the standard for the "general discretionary provision" (Section 591(c)(1)) that applies to all noncovered persons other than Members of Congress. Ibid.

The conclusion in the Freeh memorandum (pp.26-27) that you may invoke the independent counsel process for a noncovered person where there is merely an "appearance" of a conflict is directly contrary to the legislative history and the plain language of the statute. It cites no support for its interpretation of the statute but seems to be based entirely on the statement that "it makes little sense

conceptually to conclude that appearances can be taken into account for investigating 'covered persons' but not other officials." But Congress plainly did not intend to treat non-covered persons the same as covered persons, and for good reason. Covered persons are the highest ranking officials in the government, with whom the President and the Attorney General work closely, and for whom the independent counsel process is mandatory. In contrast, Section 591(c)(1) can reach anyone with the most tenuous connection to our government. Such individuals should not be the central target of an independent counsel investigation unless there is at least the possibility of an actual conflict of interest. Congress's distinction is rational, and the Freeh memorandum provides no authority for disregarding it.

U. S. Department of Justice

Washington, D.C. 20530

EXHIBIT 33

August 17, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Harold Ickes

This memorandum addresses two issues raised in connection with allegations involving Harold Ickes.

1) It has been suggested that Ickes knew, should have known, or should have suspected that contributions raised by Charlie Trie for the DNC and Clinton-Gore '96 were illegally derived through foreign conduit sources. The basis for knowledge on the part of Ickes was his knowledge that Trie had made foreign conduit contributions to the President's Legal Expense Trust (PLET) in contravention of PLET's internal rules. (It should be emphasized that Trie's contributions to PLET violated no criminal law.) The issue raised is whether Ickes committed a crime in that he allegedly failed to alert the DNC and Clinton-Gore officials, who were responsible for accepting those contributions and accounting for them to the FEC, that the campaign contributions conveyed by Trie were actually or likely derived from foreign sources and should be examined carefully. The focus of concern is that Ickes' silence constituted a criminal act. The information provided does not provide a basis to believe that Ickes had any legal duty to disclose his possible knowledge or suspicions.

2) It is alleged that at Ickes' behest United States Trade Representative Micky Kantor made a request by telephone to the management of Diamond Walnut, an agricultural company that was having labor relations problems. Ickes' request for Kantor's intervention to settle a labor dispute may have been premised on a desire to win over the support of the Teamsters Union and to entice the Teamsters into making political contributions. Likewise, the Teamsters may have appreciated Ickes' support. The

information provided, however, does not indicate that a quid pro quo was involved nor that any obstruction of National Labor Relations Board proceedings was intended or occurred. There is likewise no basis to conclude that federal program benefits laws were violated. See 18 U.S.C §§ 600 and 601.

The Charlie Trie Contributions

Ickes knew that Trie had conveyed unwanted, albeit not illegal, foreign contributions to PLET. It has been suggested that Ickes committed a crime because he did not share with appropriate campaign officials his knowledge or suspicion that contributions conveyed by Trie to the DNC and/or Clinton-Gore also came from foreign conduit sources. There is no information suggesting that Ickes actually knew the source of the Trie campaign contributions beyond Ickes' presumed awareness that some of the money Trie had raised for PLET originated from foreign sources. PLET returned this money. In brief, there is no information to suggest that Ickes was anything other than a passive observer of Trie's fund-raising activities.

There is no suggestion that Ickes accepted the contributions, participated in raising the funds, otherwise was involved with the solicitation or delivery of the contributions, or counselled anyone in connection with these contributions. While the assumption that Ickes knew that Trie was repeating the PLET mistake with funds he was raising for the DNC and the Clinton-Gore campaign is speculative at best, our analysis assumes arguendo that Ickes had reason to suspect that the source of the contributions was illegal.

The dispositive issue is whether Ickes had a legal duty to bring facts concerning the possible illegality of Trie's political contributions to the attention of others in political committees with which he was affiliated, thereby possibly preventing those committees from accepting Trie's contributions. We do not believe that Ickes' failure to step forward and provide information to committee officials who accepted the contributions and prepared relevant filings for the FEC provides a predicate for criminal culpability on the part of Ickes either under the provisions of the Federal Election Campaign Act (FECA) relating directly to the responsibilities of campaign committee officials or under a theory that Ickes' failure caused the filing of false FECA reports. We likewise conclude that there is no indication that Ickes was a participant in a criminal conspiracy or engaged in mail or wire fraud under these facts.

FECA

FECA addresses with careful precision the responsibilities of various participants in the political fund-raising process. To violate a provision of FECA, Ickes must have personally

participated in the solicitation or receipt of illegal contributions, or he must have had a duty under the Act to come forward with information about his knowledge or suspicion that the contributions conveyed by Trie were derived illegally. Neither scenario is present.

FECA imposes duties to act and to furnish information concerning contributions on only two categories of individuals: 1) the designated Treasurers of campaign committees, and 2) fund-raising agents who "accept contributions for" a committee. Under 2 U.S.C. § 434(a), only committee Treasurers have an affirmative duty to prepare the periodic public reports on contributions and expenditures, and to file those reports containing that information with the FEC. 2 U.S.C. § 434(a). There is no basis to conclude that these responsibilities may be imposed on any other individual by reason of de facto activity. Reliance on "designated" campaign officials to fulfill responsibilities under FECA is a cornerstone of the statutory scheme. See 2 U.S.C. §§ 432(b), 434(a).

The Treasurer is the only "officer" that 2 U.S.C. § 432(a) requires to be in place before a political committee can accept contributions or make expenditures. Under 2 U.S.C. § 432(b), any person who accepts a contribution "for a committee" must account accurately for it to the committee's Treasurer.[1]

FEC regulations, notably 11 C.F.R. § 103.3, impose further duties on political committee personnel insofar as the acceptance of contributions and the determination of their legality are concerned. The focus is entirely on the Treasurer. The regulation requires Treasurers to examine contribution checks as they are received. If the checks bear facial indicia of illegality under FECA, they must be returned within a specific time frame. If checks arrive accompanied with insufficient data to allow the Treasurer to determine legality, or if the data provided is inadequate to allow the Treasurer to fulfill the reporting obligations imposed by the Act, the Treasurer is required to use "best efforts" to secure the missing data. If incoming checks appear on their faces to be lawful, this regulation allows the Treasurer to deposit them. Finally, if data subsequently comes to the Treasurer's attention that suggests certain checks that have already been received were illegally given, the Treasurer must at that time refund them.

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[1] The Treasurer's affirmative duty to report information to the FEC under FECA is, of course, distinct from the obligation of a person volunteering information to campaign officials. Where the volunteered information will forseeably be used as the basis for an FEC filing, it must be truthful. This latter obligation is pertinent to the discussion of §1001, below.

Ickes was not the Treasurer of any campaign committee. Thus, he did not have a duty under FEC regulation 11 C.F.R. § 103.3 to examine incoming checks or to use "best efforts" to determine their legality. Similarly, he had no duty under 2 U.S.C. § 434(a) to ascertain and to report data concerning those checks to the FEC.

Specifically, FECA imposes no duty on agents of political committees other than fund-raisers -- persons who accept contributions "for" a committee -- and committee Treasurers to seek out or to volunteer information concerning the legality of contribution checks that the committee may be receiving.[2]

Thus, Ickes was not a "fund-raiser," nor was he someone who had accepted the Trie checks "for" the committees within the meaning of 2 U.S.C. § 432(b). As a result, he lacked any duty under FECA to provide the Treasurer -- or anyone else -- with information he might have possessed concerning the Trie contributions.

A criminal violation of FECA requires proof that 1) the offender violated a substantive provision of the Act, 2) the offender was aware of the existence of the substantive provision when the violation took place, and 3) the violation entailed the making, receiving, or reporting of contributions and expenditures that aggregated at least $2,000 in a calendar year.[3] Here, there is no basis for believing that Ickes violated FECA.

18 U.S.C. § 1001

Activities that disguise illegal contributions to federal campaign committees as lawful contributions can present violations of 18 U.S.C. § 1001. These offenses are premised on the fact that the Treasurer is required by law to report to the FEC data concerning contributions. Duping the Treasurer as to the illegal source of a contribution causes the Treasurer to furnish false, material information to the FEC. The unwitting

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[2] Craig Donsanto has discussed this conclusion with two senior officials in the FEC's Office of General Counsel (Lois Lerner and N. Bradley Litchfield), both of whom confirmed its accuracy. Ms. Lerner, however, suggested that if Ickes was a de jure agent of either political committee, any actual knowledge of illegality concerning contributions received that he possessed could be imputed to the committee in question for the purpose of establishing the committee's civil liability under FECA.

[3] 2 U.S.C. 437g(d); United States v. Curran, 20 F.3d 560 (3d Cir. 1994); AFL-CIO v. FEC, 628 F.2d 97 (D.C. Cir. 1980); National Right to Work Committee v. FEC, 716 F.2d 1401 (D.C. Cir. 1983).

Treasurer is an innocent principal. Contributors and complicit fund-raisers who generate illegal contributions are customarily charged under 18 U.S.C. § 1001(a)(2) and § 2(b) with "willfully causing" the Treasurer to furnish materially false information to the FEC.[4] We have also considered applicability of 18 U.S.C. § 1001(a)(1) which prohibits the covering-up of a material fact by trick, scheme, or device.

Assuming arguendo that Ickes actually knew that the Trie contributions received by DNC and Clinton-Gore were illegal, the issue as to whether an offense under §§ 1001(a)(2) and 2(b) is present here boils down to whether Ickes' passive silence concerning the truth -- presumably that the Trie checks came from illegal foreign funding sources -- satisfies the requirements of "willful causation" of the Treasurer's false report under the aiding and abetting provisions of 18 U.S.C. § 2(b).

18 U.S.C. § 2 provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

With regard to section 2(a), "[t]o have aided and abetted a crime . . ., a defendant must have (1) associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed." United States v. Stone 960 F.2d 426, 433 (5th Cir. 1992); accord Nye & Nissen v. United States, 336 U.S. 613, 619 (1949). "Association" requires proof that the defendant shared the principal's criminal intent. United States v. Beck, 615 F.2d 441, 449 (7th Cir. 1980). But the defendant "need not have the exact intent as the principal.

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[4] United States v. Gabriel, 125 F.3d 89 (2d Cir. 1997); United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990); see also United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985)(opinion by Scalia, J.). The Third Circuit requires proof of two additional elements where Section 1001 is used to prosecute false statements generated in the context of FECA: 1) that the false statement have involved a violation of a substantive provision of FECA; and 2) that the offender have been aware of that provision. United States v. Curran, 20 F.3d 560 (3d Cir. 1994). Given Ickes' sophistication in the nuances of federal election campaign law, satisfying these additional elements would not be likely to present a problem insofar as his activities are concerned.

The 'community of unlawful intent' does not rise to the level of agreement." Id. "Participation" requires that the defendant commit an act designed to aid in the commission of the offense. Id.

In section 2(b), the statutory language that the defendant willfully "cause" the act to be done requires that the defendant "bring about" or "procure" the illegal act. United States v. Kenofskey, 243 U.S. 440, 443 (1917); United States v. Levine, 457 F.2d 1186, 1188 (10th Cir. 1972); United States v. Inciso, 292 F.2d 374, 378 (7th Cir.), cert. denied, 368 U.S. 920 (1961); United States v. Leggett, 269 F.2d 35, 36 (7th Cir.), cert. denied, 361 U.S. 901 (1959).

Section 2(b) covers those cases where culpable defendants use innocent intermediaries to commit a crime -- thus, the principal is not guilty. See United States v. Tobon-Builes, 706 F.2d 1092, 1099 (11th Cir. 1983) ("§ 2(b) was designed to impose criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged."); United States v. Lester, 363 F.2d 68, 73 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

Sections 2(a) and 2(b) require some conduct by the defendant: either an act or willful causation. Thus, Ickes' failure to act, regardless of his possible intention to conceal the truth, does not constitute aiding or abetting or willfully causing the conduit scheme.

Ickes may have engineered an effort to consciously avoid learning the truth about the Trie donations. While such an effort would not provide a defense to a prosecution for any crime requiring the mens rea of knowledge,[5] without a criminal act, Ickes' guilty mind is irrelevant. With regard to Ickes' "engineering of an effort" to keep others from learning the truth, the evidence shows silence, not action.

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[5] A defendant's conscious decision to remain unaware of the illegality of his actions is sufficient to satisfy the requirement that the defendant act "knowingly," thus preventing the defendant from being rewarded for choosing to remain willfully blind. See United States v. Jewell, 532 F.2d 697, 700 (9th Cir.) ("knowingly" includes not only actual knowledge but also "awareness of a high probability of the existence of the fact in question"), cert. denied, 426 U.S. 951 (1976).

At the time Ickes allegedly committed the conduct at issue Section 1001 provided:[6]

§ 1001. Statements or entries generally

> 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 under this title or imprisoned not more than five years, or both.

The essential elements under the false representation prong of § 1001 are that:

> (1) The defendant knowingly made a false, fictitious, or fraudulent statement or representation to the government;
>
> (2) In making the false, fictitious, or fraudulent statement, the defendant acted willfully;
>
> (3) The statement was made within the jurisdiction of any department or agency of the United States; and
>
> (4) The statement made was material.[7]

To proceed under § 2(b) in tandem with § 1001, "[t]he prosecution must not only show that a defendant had the requisite intent under section 1001 (deliberate action with knowledge that the statements are not true), but must also prove that he 'willfully' caused the false representation to be made." United States v. Curran, 20 F.3d 560, 567 (3d Cir. 1994). There is no evidence that Ickes willfully caused a false statement to be made.

Simply put, there is no evidence that Ickes committed any affirmative act. Prosecutions where there has been no evidence linking the defendant to the false statement have failed. For example, in United States v. Aarons, 718 F.2d 188, 189 (6th Cir.

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[6] Section 1001 was amended on October 11, 1996. The revisions are not pertinent to our inquiry.

[7] 2 Edward J. Devitt, et al., Federal Jury Practice and Instructions § 37.07 (Supp. 1997).

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1983) (per curiam), the defendant was the chairman of the board of directors of a corporation. The corporation borrowed money from a bank, and both the borrower and the lender applied for a loan guaranty from the Small Business Administration. Id. In the loan application, the parties made false statements as to the disbursement of the proceeds of the loan. Id. In reversing the defendant's conviction, the court held that despite the defendant's knowledge of the false statements, in the absence of any overt acts by the defendant, "his mere failure to 'speak up' to the SBA is insufficient to punish him as a principal under 18 U.S.C. § 1001." Id. at 190; see also United States v. Lanier, 578 F.2d 1246, 1254 (8th Cir. 1978) (defendant food stamp vendor was pocketing money received from sales rather than depositing it in Federal Reserve Bank account; court suggested in dicta that while defendant was guilty under § 1001 for the forms that he signed, which falsely reported that deposits had been made properly, it was inappropriate for the trial court to submit Counts to the jury where the forms were filled out and signed by state employees assisting the defendant, despite the fact that (although unmentioned by the court) the defendant certainly knew the forms contained false statements), cert. denied, 439 U.S. 856 (1978). Thus, Ickes' failure to take any affirmative action does not provide a basis for prosecution under the false representation prong of § 1001.

The essential elements under the concealment prong of § 1001 are that the defendant:

(1) Knowingly and willfully;

(2) Concealed or covered up by trick, scheme, or device;

(3) A material fact;

(4) In any matter within the jurisdiction of a department or agency of the United States.[8]

Prosecution under this prong of § 1001 would also require proof of an affirmative act by Ickes. "By trick, scheme, or device" is an essential element for concealment. United States v. London, 550 F.2d 206, 212 (5th Cir. 1977). This element "implies the requirement of an affirmative act by which means a material fact is concealed." Id. at 213. "[T]he mere omission of failing truthfully to disclose a material fact, which is simply the negative aspect of the affirmative act of falsely stating the same material fact, does not make out an offense

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[8] United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir. 1985), cert. denied, 474 U.S. 825 (1985).

under the conceal or cover up clause of § 1001." Id. at 214; accord United States v. Shannon, 836 F.2d 1125, 1129-1130 (8th Cir.) (holding that the defendant's failure to alert a bank that a deposit was personal and thus required the filing of a CTR did not violate § 1001), cert. denied, 486 U.S. 1058 (1988); cf. United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir. 1985) (finding a trick, scheme, or device where the defendant used a false closing statement, caused the true closing statement to conceal his conversion of funds, and admitted that he willfully concealed the true purchase price of the property), cert. denied, 474 U.S. 825 (1985).

Silence is sufficient under the concealment prong only if there is a legal duty to speak. See United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994) (under concealment theory, government must prove the defendant had a legal duty to disclose the facts); United States v. Dale, 782 F. Supp. 615, 626 (D.C. D.C. 1991). Thus, in Curran, the Third Circuit held that a corporate CEO who made illegal campaign contributions could not be held liable under § 1001 because he had no duty to disclose the source of the campaign contributions. 20 F.3d at 567. Likewise, Ickes did not have a legal duty to disclose the source of the contributions under the FECA. See Curran, 20 F.3d at 566-67 ("[t]he duty to disclose the source of the contributions to the Federal Election Commission was that of the campaign treasurers, not that of defendant").

In the absence of a specific duty to disclose, courts have combined the concealment prong with § 2(b) to hold defendants accountable for another entity's failure to disclose only when the defendant engaged in affirmative conduct. See, e.g., United States v. Hernando Ospina, 798 F.2d 1570, 1581 (11th Cir. 1986) (affirming defendants' convictions where defendants paid a "commission" for the bank not to file CTRs); United States v. Tobon-Builes, 706 F.2d 1092, 1101 (11th Cir. 1983) (affirming defendants' convictions where they used false names and structured their transactions so as to cause the bank not to file CTRs).[9]

18 U.S.C. § 371

An agreement between two or more people to thwart the lawful statutory mission of a government agency -- including the FEC -- can be prosecuted as a conspiracy to defraud the United States. United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990); United

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[9] While other circuits refused to hold bank customers who structured their transactions liable for the bank's failure to file CTRs, see, e.g., United States v. Anzalone, 766 F.2d 676, 683 (1st Cir. 1985), Congress essentially adopted the Todon-Builes approach in enacting 31 U.S.C. § 5324.

States v. Curran, 20 F.3d 560 (3d Cir. 1994). An agreement to accept illegal contributions and to posture them as lawful by laundering them through conduits clearly impairs the FEC's statutory mission to detect violations of FECA and to render an accurate accounting of campaign committee contributions and expenditures to the public.

The essential elements of conspiracy, 18 U.S.C. § 371, are:

> (1) The conspiracy, agreement, or understanding to violate the federal criminal law or defraud the United States was formed, reached, or entered into by two or more persons;
>
> (2) At some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed an overt act in order to further or advance the purpose of the agreement; and
>
> (3) At some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement, or understanding.[10]

Conspiracy requires an "agreement on the essential nature of the plan, . . . and on the kind of criminal conduct . . . in fact contemplated." United States v. Gleason, 616 F.2d 2, 16 (2d Cir. 1979) (internal quotations and citations omitted). This agreement may be proven by circumstantial evidence. United States v. Puerto, 730 F.2d 627, 630 (11th Cir.), cert. denied, 469 U.S. 847 (1984).

Here, there is no information to indicate that Ickes agreed with anyone to commit a crime. Cf. United States v. Wrehe, 628 F.2d 1079, 1084 (8th Cir. 1980) (finding evidence insufficient to establish that defendant wife was part of conspiratorial agreement); United States v. Wieschenberg, 604 F.2d 326, 335 (5th Cir. 1979) (reversing convictions where defendants associated with each other and discussed selling munitions in Russia because the convictions were based on "mere discussions susceptible of either an illegal or a legal interpretation").

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[10] 2 Edward J. Devitt, et al., Federal Jury Practice and Instructions § 28.03 (4th ed. 1990).

18 U.S.C. § 1341 and § 1343

The essential elements of mail fraud, 18 U.S.C. § 1341, are:

(1) That the defendant knowingly devised or knowingly participated in a scheme or artifice to defraud;

(2) That the defendant did so with the intent to defraud; and

(3) That in advancing, or furthering, or carrying out this scheme to defraud, the defendant used the mails or caused the mails to be used.[11]

The essential elements of wire fraud, 18 U.S.C. § 1343, are:

(1) That the defendant knowingly devised or knowingly participated in a scheme to defraud;

(2) That the defendant did so with the intent to defraud; and

(3) That in advancing, or furthering, or carrying out this scheme to defraud, the defendant transmitted any writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of any writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.[12]

While Ickes did not prevent Trie's allegedly illegal conduct, there is no evidence that Ickes devised or participated in a scheme to defraud as required by the statutes. Cf. United States v. Sedovic, 679 F.2d 1233, 1239 (8th Cir. 1982) (affirming conviction for mail fraud where defendant joined in scheme and then played active decision-making role).

Diamond Walnut

It is alleged that at Ickes' behest United States Trade Representative Micky Kantor made a request by telephone to the management of Diamond Walnut, an agricultural company that was

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[11] Id. § 40.03.

[12] Id. § 40.07.

DOJ-02230

having labor relations problems. Ickes' request for Kantor's intervention to settle a labor dispute may have been premised on Ickes' desire to win over the support of the Teamsters Union and to entice the Teamsters into making political contributions and providing political support. The Teamsters, from their point of view, may have felt it worthwhile to contribute to or otherwise to provide political support to the DNC.

Because a telephone call from the United States Trade Representative to a domestic business dealing with a labor matter is arguably an "official act," conditioning such a telephone call on a political contribution could violate 18 U.S.C. § 201(b). However, there is no evidence of a specific quid pro quo relationship between Ickes' request to Kantor or Kantor's call to Diamond Walnut on the one hand, and anyone making political contributions on the other. As it stands now, the evidence reveals only politics as usual. That the Teamsters would contribute to candidates who support their needs or that a politician would seek to assist his supporters is hardly surprising. For such conduct to be considered criminal, the facts must bear out an agreement that one is being exchanged for the other. The facts do not evince such an agreement here.

We understand that at the time the Ickes/Kantor telephone call was made, the labor dispute that the call concerned was the subject of a pending administrative proceeding before the National Labor Relations Board. Thus, the events surrounding the Kantor call might theoretically be posited as a "corrupt endeavor to obstruct and impede the due administration of the law," in violation of 18 U.S.C. § 1505. Such an offense would require a corrupt intent to impair the NLRB's processing of the administrative matter. Yet there is no evidence suggesting that either Ickes or Kantor sought to affect the NLRB proceeding in any manner other than to try to encourage the parties to resolve it. Indeed, there is no evidence to suggest that the NLRB proceeding was even discussed. In the absence of any information that Ickes or Kantor sought to influence the NLRB itself, that they counselled the withholding or falsification of evidence from the NLRB, or that they induced the parties to the NLRB proceeding to forego the administrative proceeding in favor of a corrupt settlement of the dispute, there is no basis to believe that a violation of section 1505 occurred.

These facts also could theoretically implicate violations of 18 U.S.C. § 600 and § 601. Section 600 makes it a misdemeanor for any person to offer any "employment, position, compensation, contract, appointment, or other benefit provided for or made possible in whole or in part by any Act of Congress as consideration, favor, or reward for any political activity." Section 601 makes it a misdemeanor for any person to attempt to obtain a political contribution of money or services from another by threatening to terminate or to deprive the victim of any

employment, payment, or benefit of a program of the United States, a State or a subdivision of a State, which is funded in whole or in part by an act of Congress.

As to Section 601, there is no suggestion that Ickes threatened anyone (labor or management) with adverse consequences in relation to the Diamond Walnut matter in order to generate contributions. As to Section 600, the facts merely suggest that Ickes harbored an expectation, based in conversations he had with labor leaders, that settling the labor dispute at Diamond Walnut would ingratiate labor unions to the President's re-election campaign. There is no evidence that he specifically conditioned the call on obtaining political contributions.

In any event, if §§ 600 or 601 apply to the alleged facts, it must be because the call represented a "benefit" made possible in whole or in part by any Act of Congress. The legislative history of this term is clear; it was not intended to apply to the telephone call at issue.

Sections 600 and 601 were both originally enacted as Sections 2 and 3 of the Federal Hatch Act of 1939. This was a civil service law aimed at undoing aggravated and identified incidents of economic coercion that had been used by the managers of some federal relief programs to extract involuntary political activity (i.e., voting, making contributions, or performing political services) from subordinate public employees and federal relief recipients. Specifically, the Hatch Act arose as a response to allegations that forms of economic coercion had been used during the 1934, 1936, and 1938 congressional elections to force federal employees and the recipients of federal relief benefits such as the Work Projects Administration (WPA) to do involuntary political work and to vote for the candidates supported by their supervisors and political benefactors. In response to this situation, the Senate appointed a committee to study the problem during the 1938 elections, and to recommend legislation to the succeeding 76th Congress.

This Committee, which was popularly known as the "Sheppard Committee," held extensive hearings during the last months of 1938. The Committee also aggressively sought out complaints of abuses, and it sent investigators throughout the country to probe into allegations that federal funds and relief programs were being misused to influence the federal elective process in the Senate.[13] The Committee filed its Report on January 3, 1939.[14]

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[13] S. Res 283, as supplemented by S. Res 290, 75th Cong., 3rd sess, created a Special Committee to investigate Senatorial Campaign Expenditures and Use of Government Funds in 1938. This Special Committee was specifically empowered to inquire into campaign financing abuses arising under the 1925 Corrupt

In this Report, it made several specific recommendations calling for the reform of the reporting provisions of the Corrupt Practices Act, changes in statutes forbidding the solicitation of federal employees, and the adoption of new laws dealing with the misuse of federally funded benefits and employment to coerce employees and relief recipients into performing partisan political work and contributing to partisan causes against their will. This Report, in turn, led to the introduction of the Hatch Act in the Senate on March 20, 1939.

The Sheppard Committee Report contained an itemization of literally hundreds of incidents in which federal relief programs -- mainly the WPA -- had been transformed into instruments through which political contributions, political work, and votes had been extorted from the needy whom they were intended to benefit. All of these incidents had one thing in common: they involved the systematic use of relatively aggravated and clear economic duress to force victims to perform partisan political tasks (including registering and voting for particular candidates) against their will.[15]

Practices Act, as well as into "whether or not any funds appropriated by the Congress . . . were spent in such a manner as to influence votes cast in any primary, convention or election held in 1938 at which any candidate for the United States Senate was to be nominated or elected." See S. Rep. No. 1, 76th Cong. 1st sess, pp. 42-43.

[14] S. Rep. No. 1, 76th Cong., 1st sess.

[15] Most of the individual incidents reported by the Sheppard Committee concerned the use of economic threats -- principally loss of federally funded jobs or relief benefits -- to induce employees and recipients to make political contributions or to perform political tasks. On the subject of intimidation in voting, the Committee reported that WPA managers (working in concert with partisan campaign organizations) had canvassed WPA workers for their votes immediately prior to the 1938 general election, and that some WPA workers had been fired because they voted for the "wrong" party. Numerous WPA employees had been fired because they wore political buttons supporting the "wrong" candidates, or because they refused to register in the Democratic Party. See Sheppard Report at pages 11-18 and 21-30. In one incident, the Committee found that patients in a Soldiers Home had been given sample ballots by the Home's superintendent just before the 1938 primary election, and that these patients were told that the superintendent "expected" them to vote as indicated. Id. at page 20. In Northampton County, Pennsylvania, the Committee determined that "an atmosphere of fear appeared to exist among all WPA employees that . . . if they were to express themselves (politically) they would lose their jobs." Id. at 30.

Given these historical roots, it is clear that the concept of a "benefit - - made possible by Act of Congress" as used in what are today 18 U.S.C. § 600 and § 601 was intended to mean public assistance benefit offered through federal legislation to the public on the basis of need rather than politics. A telephone call made by a public official to a company experiencing labor problems is not such a "benefit." We applied the same "no benefit" analysis in determining that Section 600 did not apply to overnight stays in the White House that were given to persons who gave large contributions to the Democratic Party.

Conclusion

The issues discussed above do not provide a basis to believe that we have information of a possible criminal violation by Ickes. As to the Trie contributions, Ickes had no duty to disclose his knowledge or suspicions, and there is no indication that he took any affirmative action in connection with the matter. The Diamond Walnut matter likewise provides no basis for concluding that criminal conduct occurred.

U. S. Department of Justice

Campaign Financing Task Force
Criminal Division

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Washington, D.C. 20530

(202) 307-0655
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August 20, 1997

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

Mark M Richard
Deputy Assistant Attorney General
Criminal Division

FROM: Charles G. La Bella

I understand that the 30-day period on the reopened inquiry concerning the Vice President expires on August 26, 1998. My understanding is that the Attorney General has asked Public Integrity to submit its report to her by tomorrow. I would like an opportunity to see the report (and underlying documents) before they are given to the Attorney General.

As you know, I was concerned about the earlier decision in this matter, and expressed my views on this to the Attorney General in a memorandum dated November 30, 1997. My perspective on this investigation is different from that taken by Public Integrity and I feel a continuing obligation and responsibility to the Attorney General to weigh in on matters with which I have been involved. Moreover, I see my reputation as tied into these decisions; for that reason also I would like the opportunity to be heard.

I have been told that, at least at this point in time, there is a disagreement between the agents and the investigating attorney as to how to evaluate some of the evidence collected during this 30-day period. I know you believe, as I do, that the Attorney General is entitled to the full gamut of opinion before she makes her decision.

Once Public Integrity's draft has been completed, it can be e-mailed to me at the U.S. Attorney's Office in San Diego. Any accompanying documents can be faxed to me at 619-557-5782. Alternatively, the draft and documents can be given to Judy Feigin and she will get them to me.

DOJ-VP-00011

EXHIBIT
34

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States

PURPOSE: To recommend that the Attorney General not trigger a preliminary investigation in this matter.

TIMETABLE: The Attorney General has until August 26, 1998, to decide whether a preliminary investigation is triggered.

SYNOPSIS: New information regarding Albert Gore, Jr., and 1996 fundraising violations is insufficient and no preliminary investigation should be triggered.

DISCUSSION: (see attached)

RECOMMENDATION: I recommend that you not trigger a preliminary investigation in this mattter for the reasons set out in the attached memorandum to me.

APPROVE: _____ Concurring Components: None

DISAPPROVE: _____ Nonconcurring Components: None

OTHER: _____

Attachment

980007353

DOJ-VP-00463

EXHIBIT 35

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States

PURPOSE: To recommend that the Attorney General not trigger a preliminary investigation in this matter.

TIMETABLE: The Attorney General has until August 26, 1998, to decide whether a preliminary investigation is triggered.

SYNOPSIS: New information regarding Albert Gore, Jr., and 1996 fundraising violations is insufficient and no preliminary investigation should be triggered.

DISCUSSION: (see attached)

RECOMMENDATION: I recommend that you not trigger a preliminary investigation in this mattter for the reasons set out in the attached memorandum to me.

APPROVE: _____

DISAPPROVE: _____

OTHER: _____

Concurring Components:
None

Noncurring Components:
None

Attachment

DOJ-VP-00464

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U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

AUG 24 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States

The Public Integrity Section has conducted an initial inquiry into the question of whether there exists specific information from a credible source warranting further investigation into whether the Vice President of the United States, Albert Gore, Jr., a covered person under the Independent Counsel Act Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have provided one or more false statements, in potential violation of 18 U.S.C. § 1001, to attorneys and agents investigating his fundraising telephone calls last November. We have concluded that we have insufficient information upon which to base any further investigation, and therefore recommend that this matter be closed. We also have concluded that the new information we have received does not require the Attorney General's determination in the prior preliminary investigation to be reopened. This memorandum will summarize the information we received and the results of our review.

POTENTIAL SECTION 1001 VIOLATION

The Independent Counsel Act

When information is received suggesting that a person covered by the Independent Counsel Act may have committed a federal crime, the Department of Justice has 30 days to review the allegations. At the end of this period, a determination must

DOJ-VP-00465

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be made as to whether the information we have is sufficiently specific and credible to warrant further investigation, and whether in fact the allegations constitute a violation of federal criminal law. At the end of the 30 days, the matter must either be closed, or a preliminary investigation must be triggered. The purpose of a preliminary investigation, which is limited to 90 days, is to determine whether further investigation is warranted; if so, the Attorney General must apply to the Special Division of the Court for the appointment of an independent counsel.

If the Attorney General disagrees with our conclusion in this case and concludes that a preliminary investigation should be conducted, that decision must be made by August 26, 1998, 30 days after receipt of the information. In that event, the Special Division of the Court must also be notified that a preliminary investigation pursuant to the Independent Counsel Act has commenced.

The Facts

In the Fall of 1997, the Public Integrity Section conducted a preliminary investigation into the question of whether the Vice President may have violated 18 U.S.C. § 607 when he made fundraising telephone calls from his White House office. The investigation resulted in the Attorney General's conclusion that there were no grounds to seek appointment of an independent counsel for two independent reasons: first, the overwhelming weight of the evidence supported the Vice President's statement that he was soliciting soft money contributions, outside the scope of section 607's ban on political fundraising from the federal workplace, when he made the telephone calls; and second, established Departmental policy precluded prosecutions under section 607 in the absence of aggravating circumstances, such as coercion, that were absent there. Given this, the Attorney General decided that she need not resolve the substantial legal question of whether section 607 even applies to telephone calls from a federal office to a private citizen outside the federal workplace.

Statements made during the previous investigation: As set out above, the Vice President's explanation was that when he made the fundraising calls, he was seeking large, so-called soft money contributions to the DNC. During the previous preliminary investigation, we therefore explored the question of whether there was any evidence that would tend to cast doubt on the veracity of that explanation. One central event that led up to the fundraising calls was a meeting held at the White House on November 21, 1995.

As part of our preliminary investigation, the Vice President was interviewed on November 11, 1997, and was questioned about several documents, including memoranda, charts, and analyses, that are described in a Harold Ickes memorandum dated December 18, 1995, as having been "reviewed at the DNC budget and

fundraising meeting on 21 November 1995 in the map room." As we set forth in our investigative findings near the end of the preliminary investigation, the documents deal generally with the DNC media fund and specifically with plans to raise several million dollars for paid television ads through the end of 1995. Within this context, one of the documents, dated November 20, 1995, suggests fundraising phone calls by the "POTUS" and "VPOTUS" as an additional way to raise the media budget shortfall. The remaining pages make up four documents dealing with DNC media budgets and fundraising projections for the remainder of the year. The December 18 Ickes memorandum indicates that the President, Vice President, and David Strauss were among the attendees of the November 21, 1995 meeting where these documents were "reviewed".

The Vice President, when questioned about this set of documents and the November 21, 1995 meeting, stated that he did not recall a discussion at this or any other meeting about the DNC's specific need for both hard and soft money in late 1995 to keep the ads on the air. The Vice President said that he believed that the fundraising phone calls probably were discussed during the meeting. He also recalled that the general topic of the media fund budget being increased was raised and discussed. However, the Vice President recalled that he believed, at the time he made the calls, that the ads were paid for with soft or non-federal money, claiming that he was not aware that there was a hard money component to the media fund.

The Vice President stated that based on this erroneous belief, together with his equally erroneous belief that hard money contributions were limited to $2000, when he made telephone calls requesting large contributions to the DNC media fund, he subjectively believed that he was soliciting a soft money contribution by the very nature of the request.[1] In fact, the ads were financed pursuant to a complex regulatory formula apportioning their cost between hard and soft money, and individual donors are permitted to contribute up to $20,000 to the DNC in hard money, so long as their total hard money

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[1] As set out in our recommendation at the conclusion of the preliminary investigation in that matter, we did not, of course, rely solely or even give substantial weight to the mere fact of the Vice President's explanation. There was also substantial independent evidence confirming the Vice President's statements that he was in fact soliciting soft money, primarily the repeated statement from many of the donors that it was their explicit understanding that they were being requested to make a soft money donation. In addition, in some conversations, it was specifically suggested by the Vice President that the contributions could come from corporate funds, which can only be soft money.

contributions to all donees do not exceed $25,000. When asked about portions of other Ickes memoranda, unrelated to the November meeting, that showed a hard money component to the media fund, the Vice President said that as a rule he did not read the Ickes memoranda on these topics.

Recently produced documents: On July 27, 1998, the Vice President's counsel, Jim Neal, contacted the Public Integrity Section to inform it that six pages had been recently discovered that appeared to relate to the November DNC budget meeting.[2] Specifically, the documents were copies of documents already in our possession, with the addition of handwritten notations made by David Strauss, the Vice President's former Deputy Chief of Staff. The documents are attached at Tab A.

One of the documents, entitled "DNC 1995 Budget Analysis", upon which Strauss took notes, sets forth the current DNC budget, financial status including available loan capacity, and two options for funding an additional $3 million in media above and beyond the $10 million that had been designated for media in the 1995 budget. The document indicates that the party had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the ads (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion. Consistent with this interpretation of pages one and two of the document -- that the hard portion of the media budget could be borrowed leaving the soft portion to be raised -- the "fundraising projections" set forth on page 3 show that all recent past and future fundraising events planned for the media fund were designed to raise soft, not hard, money.

While the document itself does not break down the media fund into hard and soft components, the placement of the Strauss notes on the document raises a suggestion that the hard money component to the media fund may, in fact, have been discussed at the

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[2] All such documents were requested by us during the course of the preliminary investigation, but these documents were not produced at the time. Neal stated that he did not know why these documents were "missed" during the search for documents conducted last fall. The Campaign Finance Task Force is conducting an inquiry to determine whether an investigation is warranted into the failure to produce these documents previously.

November 21, 1995 meeting attended by the Vice President.[3] Specifically, Strauss's writing -- which notes "65% soft/35% hard" opposite the term "media fund" -- appears to reflect a phrase that may have been used at the meeting to describe the approximate proportions of hard and soft money used by the DNC to purchase television ads during this period.

The Strauss notes also include what may be a statement of the hard money limit for gifts to the DNC. Specifically, the note just below the "65%/35%" includes what appears to be an attempt to define soft money from the DNC's perspective as "corporate or anything over $20 k from an individual." In addition, while not clearly written, a second notation that appears to say "hard limit $20k" appears on page 2 of the "DNC budget analysis" document opposite option 2 in the Analysis document.

These new documents, then, raised some new questions concerning the Vice President's statements about his understanding of the DNC's efforts to fund the media campaign. The Strauss notes suggest that during the November 1995 meeting, both the fact that the hard money limit on donations to the DNC was $20,000, and that the media campaign was funded by a mix of hard and soft money may have been mentioned. Because the Vice President was present for a portion, if not all, of that meeting, and may have heard, understood and remembered these points, these notes thus suggest the possibility that his subsequent statements that he believed at the time that hard money donations were limited to $2000 and that the media campaign was funded only by soft money may have been false.

For example, the "65% soft/35% hard" note, if it reflects something that was said at the meeting about the media fund, may suggest that the Vice President was told in the course of the meeting that this fund, for which he was helping to raise money in part through the fundraising calls, had a hard money component. Moreover, the entries that seem to relate to the individual hard money limit -- "corporate or anything over $20K from an individual" and "hard limit $20K" --may indicate that the Vice President was told that individuals could give up to

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[3] Before receiving the documents, we knew from previous Strauss interviews that he took notes during meetings and often used quotation marks to indicate verbatim statements. He also told us that after he took his notes it was his practice to write a file title on the top of the document and give it to his assistant to file in the appropriate drawer in the Old Executive Office Building. This background and the fact that several phrases appear in quotation marks immediately suggested to us that Strauss's notes may reflect things that were said during the November 21, 1995 meeting.

$20,000, not $2000, in hard money per election cycle to the DNC at that same meeting.

We should make it clear at the outset that we did not view this matter as being one in which we were examining an allegation and evidence of a potential crime to determine whether facially sufficient information could be disproven, thus eliminating the need for a preliminary investigation, as has been the case in numerous independent counsel matters. Standing alone, the Strauss notes are not, in our view, sufficient to support a conclusion that the Vice President may have been making a false statement, though it does open that possibility. Rather, based on concerns created by the notes, we determined to reexamine the circumstances of the November 1995 meeting in the course of a 30-day initial inquiry to explore whether there might be additional evidence supporting the chain of inferences necessary to reach a conclusion that the Vice President may have lied, sufficient to warrant further investigation.

We specifically sought any information suggesting that the Vice President may in fact have heard and comprehended the facts noted by Strauss; such an inference would be supported, for example, by information that these facts were discussed in sufficient detail and focus at the meeting that many other attendees specifically recall them, or that the Vice President made comments or asked questions in the course of the discussion that would seem to reflect an active understanding of the details, or that the participants recall any affirmative discussion of a need to raise hard money for the media fund. We found no such evidence. Indeed, the range of impressions and vague misunderstandings about these matters among all the meeting attendees is striking, and virtually eliminates any reasonable inference that mere attendance at the meeting necessarily would have served to communicate an accurate understanding of the facts as reflected in the Strauss notes.

Subsequent investigation: In an effort to determine whether the apparent disparity between what the Vice President told us he believed at the time he made the calls and what the Strauss notes indicate may have been said at the meeting warrants further investigation, we set out to interview the attendees of the meeting.[4] As a threshold matter, the evidence we gathered

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[4] Of the 12 participants that Ickes identified in his December 18, 1995 memorandum, nine have been interviewed. A tenth, George Stephanopolous, has testified in a Senate deposition that he did not recall this meeting and, if he did attend, he would have left after 5 minutes. Of the remaining two, Don Fowler is scheduled to be interviewed the afternoon of August 24th and we are working on a proffer from the President.

during these interviews indicates that the Vice President did attend a meeting on November 21, 1998 where the DNC media fund was at least discussed.

Only the author of the notes, David Strauss, could confirm that the notes in fact reflected things that were said during the meeting, and Strauss's confirmation is based on his note-taking practices rather than on any independent recollection of what was said at the meeting. Neither Strauss nor any other attendee could explain the meaning of the phrases or otherwise provide a recollection of the meeting that could tie specific entries to a given topic.

While some of the meeting attendees had a vague recollection of some of the topics of discussion, only one, Leon Panetta, suggested that the use of hard money was discussed in connection with the media fund. Significantly, with the exception of the DNC officials and those few White House officials who had a prior working knowledge of the media fund, none of the attendees walked away from the meeting with an understanding that the media fund required a mix of hard and soft money. Moreover, no participant recalls a mention of $20,000 as the hard money limit for donations to the DNC.[5]

When asked about circumstances that might establish whether or not the Vice President comprehended the topics discussed, no one recalled a specific question or comment made by the Vice President. No one recalled whether or not he was there for the entire meeting; nor did anyone recall whether anyone interrupted the meeting to confer with him or to have him take a telephone call. Some volunteered that it was not unusual for the President

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In addition, we received on August 18, 1998, a copy of the President's unredacted schedule for this November date that lists a few more potential attendees. One, Doug Sosnich, had little recollection of this meeting and no recollection of a hard/soft money discussion in connection with the media fund. The remaining two Brad Marshall and David Gillette, are scheduled to be interviewed during the afternoons of August 24 and August 25.

[5] This does not mean that we conclude that this fact was not mentioned; indeed, we consider the Strauss note to be reasonably persuasive evidence that it was. Rather, it leads us to the conclusion that whether or not it was mentioned, it was not an issue sufficiently central to the meeting or discussed in sufficient detail that it made an impression on any of the attendees. Thus, there are no grounds to conclude that it is reasonable to believe that merely because the fact may have been mentioned in a meeting attended by the Vice President, he was lying two years later when he stated that his understanding at the time was to the contrary.

and Vice President to be interrupted during such meetings. One witness, Brian Bailey, recalled that the two may have conferred with each other a couple of times during the meeting.

The results of our interviews are set forth below:

David Strauss, Deputy Chief of Staff for the Vice President during this period, had no specific recall of the meeting held on Tuesday, November 21, 1995, in the Map Room at the White House.[6] He did confirm that the handwriting on the documents recently turned over is his. He also noted that, based on his habit and practice, he could say that the pages were part of a packet handed out during the meeting and the words noted in his handwriting were things said during the meeting that he recorded as they were said. Strauss said that he took notes during this and other meetings to assist him in his own role as "booking agent" or scheduler for the Vice President. The notes were not taken for the benefit of others and he does not believe that anyone else relied upon the notes that he took during the November budget meeting.

Turning to the notes themselves, Strauss could not recall, who might have uttered the words "65% soft/35% hard"; "corporate or anything over $20k from an individual"; or "hard money limit $20k" during the meeting. He was unable to provide an explanation about what each of the phrases might have meant within the context of the meeting. He did not recall the issue of "hard" and "soft" money discussed by those attending but noted that these issues were often discussed at DNC budget meetings. Strauss was also unable to say whether the words were used with regard to the media fund, the DNC's operating budget or something else. Finally, he could not recall whether the Vice President participated in the discussion regarding these topics, whatever the context might have been.[7]

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[6] While the FBI's 302 at several points attributes information imparted by the witness to his recollection, Strauss repeatedly said during the interview that he had no recollection of the meeting. Thus, many of the statements set forth in the 302 that appear to provide information about this meeting in fact were the witness's inferences based in whole or in part on the documents, his notes on the documents, and his general knowledge of the way things worked both at the White House and DNC.

[7] Strauss concluded, based on his handwritten notes with quotation marks opposite "VP", that the Vice President participated in the portion of the meeting that dealt with fundraising issues. Like everything else about the meeting, though, Strauss could do no more than confirm that, based upon his notetaking practices, the statements written on the page were made.

With regard to his own understanding of the DNC's use of funds, Strauss confirmed that he was aware that the DNC used a mix of hard and soft money in its budget. However, he said he was not familiar with the DNC media fund. He also said he had no knowledge of the ratio between hard and soft money in the fund, or even if the fund had a hard money component. Strauss learned of the DNC's overall need for a mix of hard and soft money because, as the Vice President's political scheduler, he was often told that the fundraising events that needed to be scheduled were either hard money events like the Saxophone Club meetings, designed to raise lots of smaller donations, or "high roller" fundraising events, designed to raise soft money.[8]

Leon Panetta, the President's Chief of Staff, recalls attending this and one or two other DNC budget meetings in 1995 also attended by the President and Vice President. While the earlier meeting or meetings dealt with the overall DNC budget, he indicated that the Ickes memoranda lead him to believe that the one in November was focussed on the need to raise additional money for the media fund. Panetta admitted that these were not the types of meetings where he paid a lot of attention to details. However, he was able to confirm that the Ickes memoranda was the kind of material usually passed out and the subjects covered were the kind of topics upon which the discussion would be based.

Panetta recalls a discussion of what would have to be raised both in hard and in soft dollars during the meeting. He added that since the Ickes memoranda clearly indicates that the major issue during the meeting was the media fund, he is able to say that these topics would have been raised in connection with the fund.[9] He has no recollection of whether it was mostly soft or

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[8] Strauss noted that this DNC budget meeting was a "big one" since the President and Vice President were in attendance. He distinguished it from regular Wednesday "money meetings" in the Ward Room of the White House that were attended by Strauss and others but not the principals. Strauss also attended the Wednesday "money meetings" in the Ward Room of the White House. Several witnesses who attended these Wednesday meetings on a regular basis confirmed that the DNC's specific needs for hard and soft money were typically discussed in some detail in this forum.

[9] Panetta was interviewed twice by telephone. In the first interview, he began by saying he had no specific recollection of the November meeting. Midway through the first interview, though, he stated that he recalled a discussion of hard and soft money but believed it was within the context of the overall DNC budget, not the media fund. When questions arose after this interview about whether Panetta recalled a hard money component

mostly hard that was needed at the time.[10] And while he had a "sense" that everyone in the room at the time understood what was being discussed, Panetta could not recall any particular detail that led to this conclusion. Panetta added that he thinks there was always a reference to what kind of money -- hard or soft -- needed to be raised at the time in the course of the other budget meetings attended by the Vice President. He believed these discussions included references to the media fund and other segments of the DNC budget.[11]

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being discussed at this meeting or at other meetings and private talks with Ickes, a decision was made to ask the witness to clarify his recollection in a second interview.

By the second interview, Panetta firmly stated that the discussion of hard and soft money was within the context of what needed to be raised for the media fund. When pressed to separate his recollection from the content of the Ickes memoranda, he admitted that he believed the topic of hard and soft money was made in the context of raising money for the media fund because the Ickes memoranda clearly indicated that this was the "main driving force" and "main topic" of the meeting.

[10] Panetta initially said that he recalled a discussion of how much soft and how much hard money was needed and what kind of fundraising events could be done to reach these goals. When asked what he specifically recalled about the phone calls and other events set forth on the back page of the Strauss notes (November 20, 1995 memorandum), Panetta said he recalled that the phone calls were one way to raise soft money. When asked whether he specifically recalls this being said in the meeting, though, the witness said it was only a "general memory" and added that it "seems to make sense". He then backed away from the statement saying he believes that there was not a "specific breakout" in the meetings but, instead, a general discussion about the need for a lot more money to be raised which could only mean a large time commitment from the President and Vice President. It should be noted that in the first interview, he did not recall any discussion concerning hard and soft money relating to the telephone calls.

[11] There is some question as to the accuracy of Panetta's memory in this regard. In his first interview, Panetta only ventured it was possible that the topic was raised during other meetings. While we have found one DNC budget meeting scheduled in the Map Room on June 8, 1995, the Vice President's schedule indicates he was not in attendance. Moreover, it appears the Media Fund was not an item in the DNC budget during the Spring and Summer of 1995. Documentary evidence indicates that the $10 million Media Fund, increased to $13 million in November 1995, was not added to the DNC budget until October 1, 1995. This is

Panetta said that while he does not recall a specific conversation about the limit on hard money contributions to the DNC, it would not surprise him if it was discussed.[12] When asked for his own understanding of these limits, he said he believed an individual could donate one thousand dollars to candidates but he was not sure how it applied to political parties.

Panetta does not recall specific comments being made by the participants, including the Vice President, but volunteered that it was his "impression" that they were following the discussion and that questions would have been asked by the principals. He noted that the Vice President's role was to listen and not actively discuss the topics at issue. Panetta had no recollection of the specific statements being made as set forth in the Strauss notes. In particular, he did not recall any of the statements that Strauss put in quotation marks, nor did he recall a particular discussion of what events to hold.[13]

Marvin Rosen, DNC Finance Chairman from September 1995 through January 1997, recalls the November meeting, which was memorable because he had just started working at the DNC, as focussed primarily on the issue of the overall DNC debt, not a distinct meeting on the media fund. By way of explanation, Rosen

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corroborated by witnesses who have noted that while the media campaign began to be discussed earlier, discussions over funding and raising money for the campaign did not begin until the Fall of 1995. Thus it appears to be very unlikely that Panetta attended meetings with the Vice President in the Spring and Summer of 1995 during which the hard/soft money split was discussed in connection with the media campaign.

[12] Panetta may have contradicted himself on this point. Page 3 of the 302 on the first interview notes that "Panetta did recall a discussion regarding the hard money limits on contributions". On page 4, though, it is noted that he had no specific recollection of the topic. In any event, we know that as of the date of the interview he was unaware of the legal limit.

[13] Because Panetta is the only attendee who recalls a discussion of hard and soft money in connection with the media fund, the clarity and consistency of his statements is particularly important in judging the weight they should be given here. We attach the first Panetta 302 at Tab 8 to assist you in your review. We have not received the 302 of the second interview conducted on August 18, 1998, and therefore the facts set out herein are drawn from [redacted] notes and memory of the interview. When we receive this second 302 we will forward it. ATTN NAM

said he never understood the difference between the media fund and the money needed to run the DNC overall operating account since there was not separate bank account for the media campaign only a designation on how much needed to be spent on advertising. Instead, he remembers the participants discussing the fact that a fundraising strategy was badly needed given the increasing debt caused, in part, by media spending. He recalls a discussion about paying the DNC bills and raising more money or acquiring more debt to pay for the extra television ads the White House had already said they may want.

Rosen did not recall a discussion of hard money with respect to the media fund. Moreover, he volunteered that these issues were not likely to have been discussed at this meeting since soft money, not hard money, was needed at the end of 1995. He recalls that the DNC Finance Division that he chaired was told, toward the end of 1995, that soft money for the media fund, not hard money, needed to be raised. He added that hard money was not an issue at the end of 1995 because the direct mail solicitation campaign, one of the major sources for hard money, normally sent out solicitations at the end of December and hard money would be coming in at the beginning of the year. Accordingly, the focus of the fundraising proposals presented to the President and Vice President during the November meeting was on raising soft money from large donors through the end of the year.[14]

Ronald Klain, Chief of Staff for the Vice President, confirmed his presence at the meeting but did not recall any discussions about the DNC media fund. In fact, Klain, who was attending one of his first meetings after taking the job of Chief of Staff, claimed that he was not aware of the media fund even after the meeting. He states that he learned that the fund was a means by which the DNC could buy commercials in meetings held after November. Instead, Klain recalled that the meeting focussed on the status of DNC fundraising and the need to raise additional money. Consistent with this memory, Klain recalled that the meeting participants, especially those from the DNC, were seeking to ensure scheduling commitments from the President and Vice President, for events and telephone calls, to help meet fundraising goals. Klain added that his role at the meeting was to accompany the Vice President and learn how the White House worked while Strauss, as Deputy Chief of Staff, was responsible

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[14] Rosen said that he helped put together the November 20, 1995 memorandum (See last page of Attachment at Tab A) that mentions telephone calls and additional events which required participation from the President and Vice President. The memorandum was generated because the White House wanted a proposal on what the DNC needed, in terms of a commitment of the principals, to raise more money to fund additional media ads.

for scheduling fundraising events that were discussed at the meeting with the DNC.

While Klain entered the meeting with a general understanding of the distinctions between hard and soft money and the DNC's need to raise both, he did not recall any discussion of hard and soft money issues during this meeting. Klain volunteered that it was not until the Spring of 1996 that he learned that the media fund had a hard money component, when Harold Ickes tied the need for the Vice President to participate in hard money fundraising such as Saxophone Club events to the DNC media campaign. Klain did not share this knowledge of the media fund composition with the Vice President. He is unaware of whether the Vice President knew that the media fund had a hard money component.

Klain had no specific recollection of any of the phrases contained in the Strauss notes being uttered during the meeting. He did state, though, that the phrase "need for 8 million in next 5 weeks" was consistent with his memory that the primary topic of the meeting was a need to raise additional money for the DNC.

Brian Bailey, formerly an Assistant to Erskine Bowles, Deputy Chief of Staff to the President, recalls both attending the meeting and preparing a document that may have been discussed by meeting participants. Bailey explained that because of his educational background in business and accounting, in the Summer of 1995 Ickes began assigning him the task of analyzing DNC budgetary information. Through at least the end of November, Bailey served as Ickes's assistant "working the numbers" provided by the DNC. In connection with this task, Bailey prepared a memorandum titled "DNC 1995 Budget Analysis". While he is not sure, he believes that this document may have been included in a handout given to the meeting participants. It was his role as Ickes's DNC budget analyst, though, that led to his attendance at the November meeting, the only meeting he attended with the Vice President and President.

Bailey recalls the purpose of the meeting was to present to the President and Vice President information regarding the status of the DNC budget generally including debt, borrowing capacity, and future expenditures, especially those involving the media buys. In this connection, Bailey recalls a discussion about future fundraising events and projections on how much money could be raised by these events. An important topic was the Media Fund and options for meeting projected shortfalls. According to Bailey, DNC personnel, including Don Fowler and Marvin Rosen, may have led this portion of the presentation.

Bailey also recalls a discussion of hard and soft money during the meeting, stating that Strauss's note setting forth a 65/35 split sounded familiar. Significantly, in spite of his familiarity with the DNC budget, he could not say what these

references to hard and soft money or the proportions might have related to. In fact, Bailey conjectured one of three possibilities. First, that the reference was to the composition of the media fund. Second, that the reference was to the total amount of hard and soft money that the DNC had on hand. Finally, he noted that the reference to hard and soft and the 65/35 proportions may have related to the rate or proportions that the DNC was raising their funds. Bailey eliminated the second possibility only after he was shown that the documents that he prepared clearly showed that the DNC's current funds were not in fact split 65/35 at the end of 1995.

Bailey stated that he did not recall any discussion of hard and soft money as it applied to the media fund or the Vice President's plans to make fundraising telephone calls. Bailey recalls that the media fund was discussed but he also said he did not know whether the media fund had a hard money component. He had no specific recollection of any of the other phrases in the Strauss notes. Bailey, like the Vice President and Panetta, did not leave the meeting with an accurate understanding of the $20,000 hard money contribution limit to political parties; he believed the limit was $1000.

Scott Pasterick, DNC Treasurer from May, 1995 through January, 1997, recalls the purpose of the November meeting was to discuss the overall budget of the DNC. He did not recall any of the phrases on Strauss's notes being said at the meeting. While he did recall a discussion regarding the amount of hard and soft money the DNC had in their accounts, he remembers this as directly related to the overall DNC budget. He also recalls a discussion about how the DNC could only spend soft money if they had a particular balance of hard money. Pasterick did not recall a discussion at this or any other meeting attended by the Vice President relating to hard and soft money issues as they applied to the media fund.[15]

Pasterick confirms what others have said about the meeting providing an opportunity for the DNC to give a presentation to the President and the Vice President on the topic of their

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[15] Pasterick stated his belief that two concepts were widely understood or "common knowledge" among White House officials: that every DNC expenditure during a federal campaign was required to have a hard money component and that soft money was corporate and anything over $20,000 from an individual. However, Pasterick was unable to provide any information to indicate that the Vice President was aware of these facts. Moreover, our interviews with other White House officials, including former politicians such as Leon Panetta, show that these concepts are in fact more commonly not known.

budget. He describes the role played by the principals as one of listening while DNC officials did the presenting.

Harold Ickes, the President's Deputy Chief of Staff in charge of political matters, recalls that he requested the November 21, 1995, meeting in order to establish the DNC's fundraising accomplishments and to review "budgetary assumptions". Ickes has no specific recollection of two memoranda that he wrote just before November 21st suggesting a meeting to "develop a fundraising program to raise additional funds for media for 1995 and early 1996". He noted, though, that it was "fair to say" that these two documents referred to the meeting eventually attended by the President and Vice President in the Map Room. To set up the meeting, Ickes cleared a "manifest" and list of attendees with Leon Panetta, who in turn cleared both with the President, before the meeting was put down on the final schedule.

Ickes recalls that he chaired this and similar meetings on DNC budget topics. He started by laying out the agenda and purpose of the meeting and defining the issues that needed to be discussed. He then made his presentation briefing the President and Vice President on the current financial status of the DNC and projected financial needs. According to Ickes, future fundraising issues were also discussed with the principals since the two were an integral part of the DNC fundraising effort and future events affected their schedules. During Ickes's presentation portion, attendees from the DNC would be called upon to present specific information on various topics.

When asked about the Strauss notes, Ickes not only did not recall the handwritten phrases being uttered at the meeting but also expressed doubt that these topics would have been discussed in the level of detail reflected in the notes. Specifically, Ickes recalls giving the opening statement and presenting "aggregate" information regarding the overall DNC budget as a prelude to a discussion of fundraising events that required the commitment of the President and Vice President. As a possible explanation for the Strauss phrases, Ickes ventured that Strauss may have been making notes to himself in greater detail than the actual discussion at the meeting since Strauss was very sophisticated on matters of hard and soft money and political contributions.[16]

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[16] As evidence of Strauss's sophistication, Ickes noted that Strauss was a regular at the Wednesday money meetings where discussions of DNC finances including soft and hard money was often discussed in detail. While his active participation in the meetings was infrequent, according to Ickes, when Strauss did speak up, it was clear that he understood the topics being discussed.

Finally, while Ickes claims he had no specific recollection of a discussion, he was sure that references were made to hard and soft money during the meeting. By way of explanation, he pointed out several references to this topic in the memoranda reviewed at the meeting. He noted, though, that this presentation was meant to be an overview and not a detailed "line by line" discussion of the budget. Importantly, Ickes does not recall a detailed discussion of the media fund, or the issue of hard and soft money as it applied to the fund, being discussed during the meeting.

Robert Watson, DNC Chief of Staff during this period, is certain that he attended only one meeting on the DNC budget with upper level White House officials. He recalls the meeting was attended by the President but did not recall whether the Vice President attended. Watson remembers that the meeting occurred during the Summer of 1995. Also in attendance were the First Lady, and Bruce Lindsay. He provided a photograph of a meeting dated June 8, 1995.

Watson did not recall a November meeting and did not recognize the Ickes memoranda or the Strauss notes. Watson was unsure whether the DNC media fund consisted of hard and soft money but believed it might since DNC expenditures generally required a mix.[17]

The Vice President, when interviewed, again confirmed that he attended the November meeting stating, again, that the overall status of the DNC budget was discussed as well as sources of income including direct mail and fundraising events and expenses such as the media campaign. In summarizing the purpose of the meeting, the Vice President said that the presentation was aimed at showing that the DNC had predictable expenses such as payroll, travel, and overhead and, if they were also expected to pay for issue-related television commercials, they would need some fundraising help from the principals. He noted that he and the President did not often attend these types of meetings but they

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On the other hand, as noted above, Strauss in his interview claimed he knew very little about DNC budgetary matters, stating unequivocally that he took down what was said at this meeting without understanding many of the topics being discussed.

[17] After Watson's interview, we learned that his recollection is at odds with photographs and Secret Service records that establish his presence at the November meeting. His interview makes it clear that he has no memory of the November meeting, however, and it is possible that he was only present for a short time. As noted above, the Vice President's schedule indicates he was not at the June meeting.

were present at this meeting to participate in the discussions and to give guidance on the topics being discussed.

The Vice President was unable to refresh his memory by reviewing the Strauss notes and, consistent with his last interview, he again stated that he has no specific recollection of things that were said at the meeting.[18] Again, he did not recall a discussion of hard and soft money in connection with the media fund. While he was aware that other parts of the DNC's budget had hard and soft components, he heard nothing during this meeting, or in any other setting during this period that challenged his belief that the media campaign was being paid for by soft money. Instead, the Vice President remembers being told that the DNC needed soft money to keep the commercials on the air. He also recalls a general discussion relating to the need to raise more money for television and other DNC expenditure items to avoid going deeply into debt. He left the meeting with the goal and intention of raising this money for the DNC.[19]

In an attempt to explain why Strauss may have heard certain things during this meeting that he did not, the Vice President noted, consistent with the statements of other witnesses, that he was often interrupted during these meetings. He also noted that he would typically sit next to the President and often consulted with him on topics other than what was being discussed at the meeting in front of him, which corresponds with Bailey's memory of what happened during this meeting. He admitted that the DNC budget was not a topic that interested him noting that this could explain why he did not hear, or comprehend, some of the items discussed during the meeting. Finally, the Vice President said he knows Strauss to be a truthful and diligent person but, nevertheless, affirmed that he did not hear the things written in Strauss's notes during the November 21, 1995 meeting.

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[18] After reviewing the statements attributed to him and set apart by quotation marks, the Vice President could not recall saying these words but confirmed that at least two of the statements were the kind of thing he would have said since he believed his job was to ease the burden on the President by taking more of the fundraising responsibilities.

[19] When asked where his belief that the media fund was only composed of soft money originated, the Vice President recalls that the notion may have arisen from something he heard at the Wednesday night "residence" or strategy meetings. He speculated that it may likely have come from things said by Dick Morris, who was an advocate of the media campaign and actively pushed the television ad initiative by pointing out that soft money could be used to buy the air time.

Legal Analysis

The false statement statute provides, in pertinent part:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be [guilty of a felony].

18 U.S.C. § 1001. To obtain a conviction under § 1001, the government must prove (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction. United States v. Herring, 916 F.2d 1543, 1546 (1990).

Turning to the facts developed in our 30 day inquiry, the "statement"; "materiality"; and "agency jurisdiction" elements for each of the statements at issue in the allegation are easily established. Clearly, the words uttered by the Vice President during the interview qualify as statements for purposes of section 1001. As noted above, the subject matter -- hard money component to the media fund and legal limits for hard money gifts to the DNC -- are relevant, and therefore material, since they describe the state of mind or intent of the Vice President at the time he made the fundraising telephone calls from his West Wing Office. Finally, because the agents and attorneys to whom the Vice President made his statement were investigating federal law violations, the "agency jurisdiction" element is met. The issue of specific intent cannot be considered during the initial inquiry.

The element of falsity should not be confused with the element of the state of mind required to commit the offense in this case. The question we have explored during the initial inquiry is whether there is sufficient information that the Vice President's statements -- (1) that he believed the media fund was financed with soft money and (2) that he believed the hard money donation limit was $2000 -- were false to warrant further investigation. The state of mind required to commit a violation of section 1001 is "knowingly and willfully," and whether the Vice President made an otherwise false statement knowingly and willfully is something we cannot explore in the course of the initial inquiry. In the words of the Act, we are not permitted to close a matter at the end of the initial inquiry period based on a determination that the subject "lacked the state of mind required for the violation of criminal law." 28 U.S.C. § 592(a)(2)((B)(i). However, whether or not the Vice President believed at the time that the hard money limit was $2000 and that the media fund was financed through soft money goes to the element of falsity, and can thus be explored under the normal

standards of information sufficient to warrant further investigation.

We note that were explorations of the truth or falsity of statements about beliefs considered to be subject to the state of mind restrictions in the Act, the Act would require that every such statement trigger the Act, whether or not the underlying belief was true, since it is the truth or falsity of the statement of belief that is at issue, not the underlying fact. Furthermore, we could only close the investigation without appointment of an independent counsel if we could develop "clear and convincing evidence" that the subject in fact had such a belief -- a standard that would be virtually impossible to meet in most cases. If we were barred from exploring whether there was evidence that a statement concerning ones belief was false on the theory that it is a matter of state of mind, we would be in the bizarre situation in which we could assess the truth or falsity of a statement such as "my assistant called and cancelled the appointment," but not "I believed my assistant called and cancelled the appointment." We would have to trigger on the latter statement whether or not the assistant in fact called, and furthermore would not be able to close without appointment of an independent counsel without affirmative, clear and convincing evidence that in fact the witness believed his assistant made the call.

Thus, the question here relates to the statutory element of falsity -- whether the evidence uncovered during the investigation is sufficiently specific and credible to support a conclusion that further investigation is warranted into whether the Vice President's statements concerning his beliefs about the media fund's financing and limitations on hard money contributions were false. Specifically, because no one interviewed could remember, let alone explain, the use of Strauss's terms "hard limit $20k" and "corporate or anything over $20k from an individual" in the meeting attended by the Vice President, we are left with no evidence to support a conclusion that the Vice President's statement that he believed the legal limit for hard money gifts to the DNC was the same as the limit for individual candidates -- $2000 per election cycle -- is false.[20]

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[20] As noted above, Panetta, who claimed at times to have a recollection of the meeting, is unaware that individuals can give up to $20,000 in hard money to the party per election cycle. When interviewed, he admitted he was only knowledgeable about the limit of $1,000 imposed on gifts to individual candidates.

Furthermore, like Panetta, Gore's background is as a congressional candidate, and he explained that from that experience he gained his understanding of the hard money

On the second statement, the only evidence that the Vice President's statement regarding his belief that hard money was not used to purchase DNC media ads is false rests on Strauss's belief that the words "hard" and "soft" were uttered in a meeting attended by the Vice President, and Panetta's memory that the raising of hard money was discussed in what must have been the media fund context. We have uncovered no evidence that the Vice President heard or understood the reference.

Moreover, the documents reviewed at the meeting show that soft, not hard, money was needed at the time the phone calls were discussed, which would suggest that raising soft, not hard, money would have been the major focus of discussion at this meeting. Finally, these same documents provide a strong indication that the Vice President lacked any motive to lie in his interview. The DNC was poised to borrow virtually all the hard money necessary for the ads, leaving only soft money to raise in the phone calls and other events through the end of the year. Thus, even if the Vice President knew that both soft and hard money were used to pay for the media campaign, the fundraising telephone calls upon which he was about to embark were needed to raise soft money, and he would have had no need to misrepresent the facts in order to support his statement that the calls were soft money fundraising calls.

Thus, it is our conclusion that the initial inquiry did not develop sufficient evidence to warrant further investigation into the question of whether the Vice President's statements, in his interview, regarding his state of knowledge or belief at the time he made the fundraising calls were false. First, the evidence that statements were in fact made during the November meeting that contradict the Vice President's interview statements is weak. Taken alone, Strauss's notes are both cryptic and ambiguous, and not even clearly from the meeting. He has no independent memory of what was said or what his notes mean. While we believed, upon our first review of the notes, that they indicated that both the split of hard and soft funds used to finance the media campaign and the $20,000 hard money contribution limit to the DNC were discussed at the meeting, it is telling that the actual attendees at the meeting either do not recall such a discussion, believe that these comments were not made, or offer a different explanation for the notes.

Panetta's statement is also far from unambiguous. He changed his statement concerning the meeting three times in the course of two interviews. He began the interview with no specific recollection of the meeting. His first impression was that there would have been references to hard money during the meeting because, he said, the Ickes memoranda had references to

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limitations, an explanation we find plausible.

hard money. He went on to state that the references would have been to the overall DNC budget. Later, in his second interview, Panetta offered another explanation, claiming now that the references to hard money had to be in connection to the additional funds needed for the media fund. When asked about the change in his rendition of the meeting, he admitted that he was relying on what the Ickes memoranda told him the meeting was about rather than his recollection.

Weak as the evidence is, we do conclude, however, that the notes, together with Panetta's evolving memory, support a conclusion that some sort of statement may have been made by someone at the meeting to the effect that the media campaign was funded by a mix of hard and soft money and that individuals could give up to $20,000 in hard money to the DNC. Even assuming this, however, we have developed no evidence that the Vice President heard the statements, understood the statements, or retained the information imparted. No one recalls him participating when these topics may have been discussed. Moreover, no one recalls him saying or doing anything outside of this meeting that would indicate that indeed he knew, whether because he attended the November meeting or some other way, that the media fund was not all soft money or the hard money limit to the DNC was $20,000.

Conversely, our inquiry has uncovered a wealth of evidence that other meeting participants, most of whom had more involvement in DNC budget topics and fewer other issues to concern themselves with than the Vice President, also failed to hear, understand, or retain the meeting statements. No one but Panetta recalled a mention of hard money in connection with the media fund. The list of people who attended the meeting yet failed to comprehend this hard money component included Brian Bailey, who spent several months crunching the DNC budgetary numbers for Ickes, Robert Watson, Chief of Staff at the DNC, Ron Klain and David Strauss, both with extensive political backgrounds. It is worthy of note that if the existing information is sufficient to warrant investigation of the Vice President based on his statements concerning his understanding of the hard money component of the media fund and the hard money contribution limits, each of these other meeting attendees have provided statements concerning their own understanding which is also at odds with the Strauss notes, and thus would have to be investigated as well for making false statements.

At least two inferences may be drawn from the consistent inability of the meeting participants to recall a mention of hard money in connection with the media fund. First, contrary to Panetta's statement, there may not have been such a discussion. The notes may have been a general discussion of the hard versus soft components of the overall DNC budget. Alternatively, the discussion may have been so brief that all but one participant

failed to hear or retain the significance of the point being made.[21]

An analysis of the documents passed out at the meeting offers additional support for the second possibility. It suggests that the need for soft money, as opposed to hard money, was the primary focus of this meeting. As noted above, the "DNC 1995 Budget Analysis" indicates that the party had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the adds (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion.

In conclusion, it should be noted that the documents and Marvin Rosen's recollection that soft money needed to be raised for the media fund at the end of 1995 leaves little motive for the Vice President to provide a false statement about the media fund. Stated differently, the Vice President had little reason to lie about his mistaken belief since the documents apparently discussed during the November meeting appear to show that soft money was what he needed to raise in the events and calls being planned for him.

REOPENING OF PREVIOUS DETERMINATION

As a necessary corollary to the conclusion reached above, the notes do not provide any more evidence that the Vice President violated section 607 when he made the calls, and thus it is our view that there is no necessity to reexamine the conclusion reached by the Attorney General last year that no independent counsel need be appointed to determine whether the Vice President violated section 607 when he made fundraising telephone calls from his White House office. There is no information in these notes that would tend to suggest the Vice President was in fact soliciting hard money contributions when he made the calls. Moreover, the recently produced evidence has no effect on the determination, made last December, that pursuant to

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[21] A related possibility is that the connection between the "issue ads" and soft money was so pervasive by the late Fall of 1995 that those meeting participants not familiar with the details of the DNC budget failed to pick up on the fact that there was a hard money element. This strong association between the concept of soft money and this media campaign is evidenced by public references to the television spots as "soft money ads" by a variety of public figures, including Representative Dan Burton.

established Department of Justice policy the absence of an aggravating circumstance makes prosecution for a section 607 violation unwarranted.

New Evidence and Results of Section 607 Investigation

When on December 2, 1997, the Attorney General notified the court of her determination not to seek an independent counsel, she cited two reasons. First, she noted that evidence that the Vice President may have violated section 607 is insufficient to warrant further investigation. Second, she told the court that even if the evidence suggested a violation, established Department of Justice policy required that there be aggravating circumstances before a prosecution under this statute is warranted. No aggravating circumstance was uncovered during our investigation.

In summarizing the basis for her finding that the evidence was insufficient to warrant further investigation, the Attorney General, in her Notification to the court, cited a "wealth of affirmative evidence" that had nothing to do with the Vice President's understanding of the media fund but, nevertheless, demonstrated that the Vice President was not soliciting hard money in his telephone calls. Noted was the fact that no evidence was uncovered that indicated that the Vice President knew of the Democratic National Committee's (DNC) practice of reallocating a portion of large contributions to hard money accounts. Also cited was the absence of evidence showing that the Vice President asked for funds to support the election of any federal official, including himself. It was further noted that donors who understood the concepts of hard and soft money interpreted the Vice President's request to be for soft money and many of the these donors recall that the conversations focussed on soft money. In addition, the amounts requested by the Vice President suggested a soft money request and, in some cases, his requests focussed on corporate contributions which could only be soft money contributions. Finally, the Attorney General noted that the donations made in response to the Vice President's calls were, in the vast majority of cases, handled by the DNC as soft money.

It remains undisputed that a major share of the media campaign was, in fact, funded by soft money. Moreover, documentary evidence uncovered during our investigation clearly indicates that the need for soft money, not hard money, was most critical at the time that the Vice President volunteered to make the phone calls.[22]

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[22] Documents indicate that at the end of 1995, when the party was in need of at least $3 million dollars to stay "on the air", the DNC had the capability of borrowing hard money but not

Turning to the policy ground cited by the Attorney General in her notification, the recently produced evidence in no way affects the previous finding that no aggravating circumstances have been established in this matter. We do believe that evidence of a concerted coverup of a section 607 violation might provide the necessary aggravating circumstances to warrant bringing a prosecution under that section, but any such evidence should be substantial, enough to persuade us that we are in fact dealing with an effort to obstruct the investigation, not a mere hypothetical possibility with no concrete support.

Absent new evidence of an aggravating circumstance, then, the policy finding, as described in the Notification, remains an independent dispositive ground for declining to seek an independent counsel to pursue a section 607 violation.

CONCLUSION

It is our recommendation that the newly discovered documents provided to us by the Vice President's counsel do not provide sufficient information to warrant further investigation of whether the Vice President may have made a false statement in the course of our previous preliminary investigation, and thus no preliminary investigation should be triggered. Furthermore, we conclude that the previous preliminary investigation into whether the Vice President violated section 607 in the course of making campaign fundraising telephone calls from his White House office need not be reopened based on this new information.

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soft money. It was in this context--the need to make up a shortfall of mostly soft money through the end of the calendar year--that the phone call project was conceived. This factor was given very little emphasis during our preliminary investigation because the Vice President claimed both that he did not read the documents and that he erroneously believed that the media campaign was run entirely with soft money.

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: [redacted] Attny Name

Re: Independent Counsel Matter: Al Gore, Jr.

I have reviewed the Public Integrity memorandum we received today on the Independent Counsel matter concerning the Vice President. I have also spoken with Chuck La Bella and the agents who worked on the investigation. Although we have had limited time to consider the matter, we have the following immediate observations:

1. The Section 1001 question as set forth in the memorandum (p. 18) turns on whether the Vice President believed the media fund was financed with soft money and whether he believed the hard money donation limit was $2,000. The first question however is more properly whether he believed the media fund was financed exclusively with soft money. This is not simply a semantical difference since there is no doubt that the media fund was financed with soft money and that he knew it to be so. But whether there was a hard money component is the issue.

2. Brad Marshall of the DNC has been interviewed since the draft was written. His recollection is the same as Leon Panetta's i.e., that the 65/35 split was discussed at the November 21 meeting in the context of the media fund. In fact the statement was made by him. In response to a question, he said something to the effect that on the spending side of the media fund, we are averaging 65% soft and 35% hard.

Thus, we now have Panetta, Marshall and the contemporaneous Strauss notes (with quotation marks suggesting direct statements) all indicating that this topic was raised. On the other side is a group of people who basically "don't recall". This is a classic white collar scenario. Yet the memorandum gives more credence to the "don't recalls" than to the explicit memories. Certainly, a lineup like this (although at the time the memo was written Brad Marshall had not been interviewed) warrants additional inquiry. Some of those relied on e.g., Rosen, have their own credibility problems. (The La Bella Report makes reference to some behavior by Marvin Rosen that is, at the very least, quite questionable.) As for Strauss, the memorandum seems to rely more on his faulty recollection than on his contemporaneous notes.

3. The memorandum does not reference the Vice President's press conference wherein he made a statement to the effect that the phonecalls were designed to solicit money for the campaign. That statement stands in stark contrast to his later comments when interviewed for this investigation. And in placing all this in context, it has to be remembered that the phonecalls were made with a Clinton/Gore credit card. That suggests that it was indeed campaign related.

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4. The agents' notes and recollections of various interviews differs in some important respects from the memorandum. This is most pronounced as to Leon Panetta, who the agents view as a very credible witness, but who is pictured in the memorandum as having an "evolving memory" (p.21) and therefore lacking all credibility. To give just a few examples of the disparity between the agents and the memo:

a. The memo (p. 11) says Panetta's "impression" was that the Vice President was following the hard money discussion. The agents' notes reflect that Panetta said the Vice President was listening attentively.

b. Page 10, fn. 11 suggests that the Media Fund was not an item in the DNC budget during the Spring and Summer of 1995. However Watson recalled the agenda of the June 8, 1995 meeting included the Media Fund.

c. Page 11, fn. 12 says that Panetta may have contradicted himself. The agents notes do not support this. Panetta recalled the general topic discussed though not the specific details.

d. Page 12: The memo suggests that Rosen recalled the focus of the fundraising proposals presented to the President and Vice President during the November meeting was on raising soft money. The agents' notes indicate that Rosen had no recall whether the events were intended to raise soft or hard money.

e. Page 14, n. 15: The footnote concludes that Panetta, among others, did not understand the statement made by Pastrick at the top of the footnote. In fact, Panetta understood clearly the first part of the statement, i.e., that every DNC expenditure during a federal campaign is required to have a hard money component. The only thing Panetta did not know was the $20,000 limit.

f. Page 15, n. 16 The memo quotes Ickes' statement that Strauss was very sophisticated in matters of soft money/hard money, and therefore may have written notes of greater detail than actually discussed. However, the memo does not mention Strauss' own statement (reflected in agents' notes) that he was not familiar with these issues as they pertained to the White House and the DNC. Strauss was adamant that those notations reflected comments made at the meeting.

g. Page 16: The memo says that Gore stated he and the President did not often attend DNC budget meetings like that held on Nov. 21. In fact, the agents report that most witnesses indicated that the President and Vice President generally did attend the DNC budget meetings.

5. The memorandum at least twice refers to the fact that the Vice President might well have left the meeting at the point in which the hard money media fund discussion took place. Not

only is there no evidence that this occurred (i.e., no witness recalls his leaving) but the agents notes reflect that Ickes told them that when he conducted meetings (and he was conducting the meeting on November 21), he would halt the proceedings if the President or Vice President stepped out of the room; the meeting would resume when they returned. Therefore, rather than presume the Vice President was not present, the presumption must be that he was..

6. The memorandum notes (p. 15, n. 16) Ickes' speculation that Strauss may simply have been penning his own thoughts rather than recording statements made at the meeting. The memorandum does not mention that the Vice President conceded that if the statement were in the Strauss notes he presumes the statement was made; he simply has no recollection of it.

7. The agents disagree vehemently with the characterization of the Panetta interviews as set forth on pp. 20-21. Specifically, they assert that he did not change his statement, although the memo says he did so three times. He began his interview, as did all the witnesses, stating he had no specific recollection of the meeting. In both interviews he indicated that there was a discussion at the Nov. 21 meeting concerning the hard and soft components of the media fund. His recollection was not derived solely from the Ickes memorandum, although the Ickes memorandum supported his recollection.

On behalf of both Chuck and myself, we have some observations on the overall inquiry[1]:

As the memo recognizes, there are two separate questions to be resolved, one involving 607 and the other involving 1001. To some extent of course they are intertwined. As to the 607, given a policy of non-prosecution absent aggravating circumstances, the question is whether the information we now have presents any aggravating circumstance. Certainly a possible false statement on the issue could be seen as such.. Therefore, unless we can dismiss absolutely the claim that there was a false statement, the 607 issue at least must be considered.

In sum, we think given the new evidence i.e., Marshall, Panetta and the Strauss contemporaneous notes, along with some preexisting evidence, including the Vice President's press conference, his use of the Clinton/Gore credit card, and the incredibility of his claim not to recall memos sent to him and topics discussed in his presence, it is impossible to close out this case. Given the failing recollection of so many witnesses, at the very least one would want to put into the grand jury several of these witnesses before closing out an investigation. A grand jury appearance under oath may well jog one's vague recollections as recounted in a voluntary interview. Grand jury is not an option during this stage of the investigation, but would be if this were turned over to an independent counsel.

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[1] Both Jim De Sarno and Jeff Lampinski are out of town today and could not weigh on this. Therefore, the limitation of the concluding portion of the memo is not meant to indicate that the FBI would not be in agreement if Jim and/or Jeff were available. We simply do not know and therefore do not include them in this final portion.

There is a sense we all share that at the end of the day the facts involving the Vice President's calls and statements would not warrant prosecution. But that is not the question we face at this point. The question we now face is whether further inquiry is warranted on both 607 and 1001. The answer we believe is yes.

DOJ-VP-00492

Copy 1 of 8
3/31/2000

"ROBINSON MEMO"
August 25, 1998

Redacted to delete information the disclosure of which could adversely affect
a pending criminal investigation or prosecution
or would violate Rule 6(e) of the Federal Rules of Criminal Procedure
Redactions completed on March 24, 2000.



U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

August 25, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Analysis of Interim Report to Attorney General Reno and FBI Director Freeh from Charles LaBella and James DeSarno dated July 16, 1998, including related written submissions and oral discussions.

PURPOSE: To provide the Attorney General with recommendations as to whether to commence preliminary investigations under the Independent Counsel Act (ICA) as a result of recommendations contained in the Interim Report submitted by Charles LaBella and James DeSarno concerning the work of the Campaign Finance Task Force.

TIMETABLE: As soon as possible.

INTRODUCTION

This memorandum sets forth my recommendations with respect to the issues raised in the July 16, 1998, Interim Report to Attorney General Reno and FBI Director Freeh from AUSA Charles LaBella and SA James DeSarno (including the August 12, 1998, Addendum to

Interim Report). The recommendations made herein are based upon the information and arguments in the Interim Report (including its Addendum) (hereinafter "Interim Report" and "Addendum"). I also considered additional information and arguments contained in submissions concerning the Interim Report by the Criminal Division's Public Integrity and Appellate Sections, as well as submissions by the Campaign Financing Task Force. As background, I also reviewed most of the prior written submissions dealing with the Common Cause allegations including Director Freeh's November 24, 1997, letter to the Attorney General, and Principal Assistant Deputy Attorney General Litt's February 6, 1998, memorandum concerning "Common Cause Allegations."

My recommendations are also based upon a review of the two Exit Conference Memoranda of the Federal Election Commission's Audit Division and the July 29, 1998, consolidated Response of Clinton/Gore '96 Primary, Inc. and Clinton/Gore '96 General Committee, Inc. to the Exit Conference Memoranda of the Audit Division. In reaching my recommendations, I also considered the August 11, 1998, Submission on Behalf of the Democratic National Committee and Clinton/Gore '96 Regarding Issue Advertising in 1995 and 1996.

The recommendations made herein reflect my factual evaluation and legal analysis based upon the foregoing written submissions, and based upon my extensive discussions of the relevant issues with the attorneys within the Department most directly involved in the subject matter of the Interim Report and its Addendum, particularly discussions with Charles LaBella, James DeSarno, Mark Richard, Lee Radek, [redacted], David Vicinanzo and [redacted]. My recommendations also took into consideration my discussions with Neal Gallagher, Larry Parkinson and Jeff Lapinski from the FBI. My recommendations also present what I consider to be the consensus or near consensus views which emerged from the meeting with the Attorney General held on August 14, 1998, to discuss the Interim Report.

ATTY NAME

ATTY NAME

THE APPROPRIATE TRIGGERING STANDARD UNDER THE ICA

The Interim Report and the Public Integrity Section's Review of Interim Report (hereinafter "Review of Interim Report") present quite different views with respect to when a preliminary investigation is triggered under the ICA. The resolution of this

analytical disagreement is essential to a proper application of the ICA to the matters raised in the Interim Report, the Review of Interim Report and the Addendum to the Interim Report.

The trigger for determining whether to conduct a preliminary investigation under the Independent Counsel Act (ICA) is the receipt by the Attorney General of "information sufficient to constitute grounds to investigate whether [a covered person or a non-covered discretionary person] may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction. . . ." (Emphasis added.) 28 U.S.C. §591(a) and (c). Under 29 U.S.C. §591(d)(1), in "determining ... whether grounds to investigate exist, the Attorney General shall consider only — (A) the specificity of the information received; and (B) the credibility of the source of the information." (Emphasis added.)

In determining the trigger for a preliminary investigation under the ICA, the Interim Report argues (at page 11) that because the Campaign Task Force "has commenced criminal investigations of non-covered persons based only on a wisp of information," the "standard for triggering a preliminary investigation under the ICA should be identical. . . ." I disagree. Furthermore, as a result of my discussions with Messrs. LaBella and DeSarno (including the discussion at the August 14, 1998, meeting with the Attorney General), there seems to be a general consensus that the trigger for a preliminary investigation under the ICA must be found in the standard set by the ICA itself -- regardless of different "rules of engagement," if any, employed by the Campaign Task Force to trigger its investigations.

The trigger for a preliminary investigation suggested by the Public Integrity Section (at pages 7-8 of its August 5, 1998, "Review of Interim Report"), particularly with respect to the Common Cause allegations, is that "the Act is to be triggered only when the Department receives specific and credible information that an individual, either covered by the Act or as to whom it would be a conflict of interest for the Department to investigate, may have committed a violation of federal criminal law. . . ." (Emphasis added.) While Public Integrity acknowledges (at pages 8-9) that the trigger for a preliminary investigation under the ICA Is "an extremely low threshold," it asserts that: "Public servants covered by the Act do, however, have the statutory protection that the

provisions of the Act will not be triggered absent specific and credible information that they may have violated the law." (Emphasis added.) This approach has led Public Integrity to be of the consistent view that the Common Cause allegations fail because they do not involve "potential violations of federal criminal law." Specifically, Public Integrity has consistently asserted that "given the state of the law, [the Common Cause] alleged conduct could not have been a willful violation of the law, and thus could not be prosecuted criminally." As such, under its view, the Common Cause allegations, regardless of the specificity of the information supporting them, or the credibility of the source of the information, cannot constitute information presenting the possibility that a criminal violation "may have [been] committed." This continues to be the view of Public Integrity, a view which it believes is not in any way altered by the information contained in the recently received FEC Audit Division memoranda.

It occurs to me that Public Integrity, in insisting upon a "may have violated the law" standard which includes a consideration of the "state of the law" at the time of the conduct in question, and which also addresses the issue of "willfulness," is applying a higher trigger standard than the one called for by the ICA.

The ICA states that a preliminary investigation is warranted upon receipt of "information sufficient to constitute grounds to investigate whether [a covered or non-covered discretionary person] may have violated any Federal criminal law. . . ." (Emphasis added.) In Public Integrity's version of a "may have violated the law" standard, in my view, issues of "the state of mind required for violation of criminal law involved" (specifically, that any violation "could not have been a willful violation") necessarily have become implicated. Considering the "state of the law" at the time of the acts in question itself bears greatly upon a target's contemporaneous knowledge of possible unlawfulness and implicates due process notice issues which, again, implicate state of mind considerations.

Consideration of such matters, however, are prohibited by the ICA until such time as a preliminary investigation has been commenced. Under Section 592(2)(B)(i), state of mind considerations are not even to be considered by the Attorney General in basing "a determination under this chapter that information with respect to a violation of criminal law by a person

is not specific and from a credible source." Section 592 (B) (ii) further provides that during the preliminary investigation phase "[t]he Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind." (Emphasis added.)

The Public Integrity Review memo (at pages 16-17) quoted the following language from the Attorney General's recent oversight testimony:

> "We have brought criminal prosecutions only where the law is clearly established and clearly violated. To establish a criminal violation, we have to show that the defendant acted knowingly and willfully, that he consciously violated the law. The law governing these allegations is far from clear and it is impossible to conclude on what we know that anyone could have violated it knowingly and willfully. At the same time, the FEC is pursuing this and if they determine that there is evidence, they will refer it to us and if it reflects on a covered person and is specific and credible with respect to a covered person, I will trigger the Act."

One concern I have in using this approach with respect to the new information presented by the FEC Audit Division memoranda is that state of mind considerations, and considerations based on Departmental prosecution policies, while they would be pertinent (indeed, as to Departmental policies mandated[1]) during a preliminary investigation, cannot be used by the Attorney General in deciding whether to commence a preliminary investigation.

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[1] 28 U.S.C. §592(c) ("Determination that further investigation is warranted") provides: "In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations." (Emphasis added.)

It seems to me that Departmental policies such as those reflected in the Memorandum of Understanding between the Department and the FEC, and considerations of knowledge and willfulness are appropriate under the ICA only after a preliminary investigation has been commenced following receipt by the Attorney General of "information sufficient to constitute grounds to investigate whether any [covered person or non-covered discretionary person] may have violated any Federal criminal law. . . ." The fact that the Department (absent the ICA) would not commence an investigation of a potential violation of the FECA, or that it is highly unlikely that knowledge and willfulness would be found during such an investigation, cannot, in my view, be the basis for deciding against conducting a preliminary investigation under the ICA when presented with the potential violations suggested by the information in the FEC Audit Division memoranda and considered in light of the information available to the Campaign Finance Task Force.

I understand the position taken by Public Integrity, in effect, to be that not only is it highly unlikely that knowledge and willfulness would be found for these FECA violations, it is legally impossible. This is certainly an arguable position; however, I do not believe it can be reached without the additional flexibility available to the Attorney General during a preliminary investigation under the ICA. If, during a preliminary investigation, it is determined (based on clear and convincing evidence of the lack of the requisite state of mind) that criminal violations are legally impossible, there will be no need for "further investigation" and thus no grounds to seek appointment of an independent counsel.

RECOMMENDATIONS

With the foregoing ICA "triggering" discussion as a predicate for my view of how the ICA triggering question should be approached, I now proceed first to address the preliminary issue of whether Harold Ickes is a "covered person" under the ICA, and then to outline my specific recommendations with respect to the other recommendations made in the Interim Report and its Addendum.

1. **Is Harold Ickes a "covered person" under the ICA?**

Based upon the extensive discussion within the Department on this question, there is, in my view, a consensus that Harold Ickes is not a "covered person" under the ICA. While Mr. LaBella continues to assert that there is a reasonable argument to be made that Harold Ickes could be considered a covered person based on the "de facto" status argument made in the Interim Report, he conceded at the August 14, 1998, meeting with the Attorney General that it would not be enough "to hang your hat on." Larry Parkinson agreed that Mr. Ickes is not a "covered person" under the ICA during the August 14, 1998, meeting.

2. Should the Attorney General invoke the discretionary provision of the ICA and commence an ICA preliminary investigation with respect to whether Harold Ickes may have made false statements under oath in his Senate deposition, perhaps in violation of 18 U.S.C. §§1001, 1621?

In a July 20, 1998, memo, David Vicinanzo concluded that, based upon information available to the Campaign Financing Task Force, it appears likely that Mr. Ickes made false statements to the Senate, perhaps in violation of 18 U.S.C. §1001, 1621. Since Mr. Ickes is not a "covered person" under the ICA, the question is whether the Attorney General should determine that the further investigation and possible prosecution of this matter as to Mr. Ickes "may result in a personal, financial, or political conflict of interest" such that the Attorney General should begin a discretionary preliminary investigation of this matter as authorized by 28 U.S.C. §591(c).

For purposes of this discussion it should be assumed (based on a thoughtful August 17, 1998, research memo from the Appellate Section, a copy of which is attached) that in invoking the discretionary provision of the ICA, the Attorney General must conclude that there is an "actual" conflict of interest, not merely an "appearance" of a conflict of interest. There appears, however, to be little guidance on what might "result in" an "actual" "political conflict of interest" within the meaning of 28 U.S.C. §591(c).

In the April 14, 1997, letter from the Attorney General to Senator Hatch (page 9), she said:

> "Should [the Task Force] investigation develop at any time specific and credible evidence that a crime may have been committed by a 'very senior' White House official who is not covered by the Act, I will decide whether investigation of that person might result in a conflict of interest, and, if so whether the discretionary clause should be invoked."

Among the factors to be considered in invoking the Attorney General's discretionary authority to commence a preliminary investigation, the Attorney General, in her April 14, 1997, letter to Senator Hatch (page 3), made the point that:

> "This provision gives me the flexibility to decide whether, overall, the national interest would be best served by the appointment in such a case, or whether it would be better for the Department of Justice to continue a vigorous investigation of the matter."

The Criminal Division, as noted in the Review of Interim Report (page 10), "has always considered the decision whether to invoke the discretionary clause to be a personal decision of the Attorney General." The Review does note that "the argument [in the Interim Report] that because of Mr. Ickes' exercise of power and authority with respect to campaign matters, together with his high level (though again not covered) former position as a White House staffer, he should be found to be covered under the discretionary clause" is "more persuasive" than the argument that Mr. Ickes should be considered a "covered person." Public Integrity, however, has not recommended that the Attorney General apply the discretionary clause to Mr. Ickes. The attached August 21, 1998, memo from Campaign Task Force Supervising Attorney David Vicinanzo presents a "Summary of Relationship with the President, the Administration and the Democratic Party Between 1992 and the Present" which is useful in assessing whether the further investigation of Mr. Ickes presents an actual "political conflict of interest."

The August 5, 1998, Review of Interim Report by the Public Integrity Section (at page 11) appropriately urges caution as to the timing of triggering any discretionary preliminary investigation of Mr. Ickes "[e]ven should the Attorney General ultimately decide to exercise the discretionary clause with report to Ickes. . . ," noting, inter alia, that under 28 U.S.C. §592(2),

during a preliminary investigation the Attorney General has no authority to convene grand juries, plea bargain, grant immunity or issue subpoenas.

The Attorney General's determination as to whether the further investigation and possible prosecution of Mr. Ickes for false statements "may result in a personal, financial, or political conflict of interest" is a difficult one. While the arguments in the Interim Report that Ickes is a "de facto" covered person falls short of making him an actual covered person, these considerations are appropriate to weigh in determining that perhaps the discretionary provisions of the ICA should be invoked in his case because an investigation or prosecution of Mr. Ickes may result in a "political conflict of interest."

Nevertheless, if the only potential criminal violation of Harold Ickes was whether he made false statements to the Senate, it would be my recommendation that no discretionary preliminary investigation be triggered as to him. He is no longer a White House official and this discrete matter does not necessarily impact, let alone implicate, covered persons. If, however, the Attorney General should decide that the Common Cause/FEC Audit Division issues involving Mr. Ickes warrants an independent counsel as to him, the Clinton/Gore Campaigns, the DNC and others, perhaps even covered persons, I would recommend that the discretionary clause be invoked to refer the possible false statements by Mr. Ickes to such an independent counsel as well.

Another possibility for handling the potential false statements of Mr. Ickes would be to refer the matter to the Babbitt Independent Counsel Ms. Bruce. She recently met with the Campaign Task Force and expressed interest in looking at the Diamond Walnut matter as it involves Mr. Ickes as a matter potentially related to her current investigation.

I recommend that the Attorney General delay triggering the discretionary clause as to Mr. Ickes' possible false statements until a final decision is made whether to seek an independent counsel for Mr. Ickes, et al as to the Common Cause/FEC Audit Division issues. If an independent counsel is sought as to those issues, it would make sense to refer the Ickes false statements matter as well. I also recommend that the possibility of referring

the Ickes/Diamond Walnut false statement matter to IC Bruce be explored further with her by the Department.

3. **Should an ICA preliminary investigation be commenced with respect to whether President Clinton, Vice President Gore, Harold Ickes, the Clinton/Gore '96 Campaigns, and the Democratic National Committee (DNC) committed the violations of Federal criminal law alleged by Common Cause and in the Interim Report in light of the FEC Audit Division Exit Memoranda Received by the Department on August 7, 1998?**

In the Attorney General's recent oversight testimony with respect to the Common Cause allegations (quoted in the August 5, 1998, Public Integrity Review at page 17), she made these points: 1) "the FEC has primary responsibility under the law for interpreting the election laws and for investigation of violations of those laws," 2) the Department has "brought criminal prosecutions [in this area] only where the law is clearly established and clearly violated," and 3) that the Department must "show that the defendant acted knowingly and willfully." She stated that as of the date of her testimony "it [was] impossible to conclude on what we know that anyone could have violated it knowingly and willfully." Nevertheless, she went on to point out that:

> "[T]he FEC is pursuing this and if they determine that there is evidence, they will refer it to us and if it reflects on a covered person and is specific and credible with respect to a covered person, I will trigger the Act."

The receipt of the FEC Audit Division Exit Conference Memoranda after the Attorney General's testimony (and after the Interim Report) raises the question whether the Attorney General has now received "specific" information from a "credible" source which is "sufficient to constitute grounds to investigate whether any [covered person or non-covered discretionary person] may have violated any federal criminal law. . . ." (Emphasis added.)

While the FEC Audit Division Exit Conference Memoranda does not constitute a criminal referral from the FEC, it does contain information which is specific and it cannot be said that it is not from a credible source. It occurs to me that the Attorney General

cannot now, as she said the Department would at her recent oversight testimony (Review at p. 17), simply await a possible FEC criminal referral based on the possibility of the FEC uncovering "a knowing and willful violation of the election laws" "under established procedures" [i.e., the process contemplated by the DOJ/FEC Memorandum of Understanding]. Statute of limitations concerns also militate in favor of proceeding to address these matters as expeditiously as possible. If the FEC Audit Division Exit Conference memoranda include specific information from a credible source which is sufficient to constitute grounds to investigate whether any covered or non-covered discretionary person "may have violated" applicable Federal criminal law, the Attorney General is required by the ICA as to covered persons (or at least has the discretion as to non-covered persons with whom a conflict exists) to conduct a preliminary investigation.

The FEC Audit Division Memoranda certainly represents an important step toward the possibility of at least civil FECA violations by the Clinton/Gore Campaigns.

The Audit Division Exit Conference memoranda concluded that, unless otherwise demonstrated by Clinton/Gore '96, expenditures for DNC issue advocacy media ads would be treated as excessive in-kind contributions in violation of the FECA to either the Primary Committee or the General Committee.

A conspiracy to violate the FECA knowingly and willfully by Mr. Ickes and others, including the President, has been strongly argued to be worthy of further investigation in the Interim Report. Whether civil violations of the FECA by covered persons or non-covered discretionary persons are criminal, depends upon whether the violations were committed "knowingly and willfully," factors which may be assessed by the Attorney General only during a ICA preliminary investigation. While in determining "whether reasonable grounds exist to warrant further investigation" on a covered or non-covered discretionary person, the Attorney General "shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations," such considerations (such as prosecuting "only where the law is clearly established and clearly violated") may factor into the analysis of whether further investigation is warranted only during a ICA preliminary investigation.

I recommend that the Department proceed to conduct a preliminary investigation under the ICA of the Common Cause/FEC Audit Division issues at least as to Mr. Ickes, Clinton/Gore '96 and the DNC because, with the addition of the recently received information in the FEC Audit Division memoranda and the information already known by the Campaign Finance Task Force, I believe there now exists specific information from a credible source that "constitute[s] grounds to investigate" whether Mr. Ickes, the Clinton/Gore '96 campaigns and the DNC "may have violated [applicable] Federal criminal law."

In making this recommendation, I appreciate that during the ICA preliminary investigation the Attorney General may very well conclude, under 28 U.S.C. §592(c)(i), that based upon "the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations," "reasonable grounds" do not "exist to warrant further investigation." The Attorney General may also agree with the well considered Public Integrity analysis and conclude, pursuant to 28 U.S.C. §592(B)(ii), that "clear and convincing evidence" exists that the persons subject to the ICA preliminary investigation "lacked the state of mind required for the violation of law involved."[2] Nevertheless, these are considerations which, in my view, may be considered only during an ICA preliminary investigation in determining "whether further investigation is warranted."

The question of whether the FEC Audit Division memoranda may reflect on covered as well as non-covered discretionary persons is a difficult judgment call. The Interim Report and its Addendum certainly argue that covered persons are implicated, specifically the President and perhaps the Vice President. A very strong case exists that if the ICA can be triggered at all for the Common Cause/FEC Audit Division issues as to non-covered discretionary persons, there is no principled basis for not including at least the President and perhaps the Vice President as well. While Public Integrity believes that no ICA independent investigation is warranted as to the Common Cause/FEC Audit memoranda issues, it

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[2] See also the attached August 14, 1998, memorandum from [redacted] of the Appellate Section concerning the significance of the Exit Conference Memoranda prepared by the FEC's Audit Division.

believes that if the ICA is triggered at all for these allegations, it must be triggered as to at least the President.

Even if one were to conclude that the information received to date is not "sufficient" as to any covered person, the FEC Audit Division memoranda, coupled with information known to the Task Force, clearly does reflect on Mr. Ickes, Clinton/Gore and the DNC. I recommend that, at a minimum, the preliminary investigation be commenced under the discretionary clause of the ICA based on these non-covered "persons," understanding that the investigation may develop specific information from credible sources that could implicate covered persons as well and could thus result in an expansion of the jurisdictional grant to any independent counsel named under the ICA. While 28 U.S.C. §591(c) uses only the term "person," and makes no reference to corporations, associations or societies, 1 U.S.C. §1 provides that: "In determining the meaning of any Act of Congress, unless context indicates otherwise - . . . the words "person" and "whoever" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals."

Given the current state of this matter, including the publicity given to Director Freeh's position recommending appointment of an independent counsel for campaign finance matters, and to Mr. LaBella's position that the available specific information from credible sources support triggering the ICA, and the new information received through the FEC Audit Division memoranda, I believe the Attorney General now has the grounds to invoke a preliminary investigation under the ICA of the Common Cause/FEC Audit Division matter as to the President, Mr. Ickes, the Clinton/Gore '96 campaigns and the DNC.

The Attorney General closed her April 14, 1997, letter to Senator Hatch saying (page 10):

> I want to emphasize . . . that the task force continues to receive new information (much has been discovered even since I received your letter), and I will continue to monitor the investigation closely in light of my responsibilities under the Independent Counsel Act. Should future developments make it appropriate to invoke the procedures of the Act, I will do so without hesitation."

In my opinion, the Attorney General should conclude that a "political conflict of interest" exists for the Department further to investigate Mr. Ickes, the Clinton/Gore campaigns, and the DNC on the Common Cause/FEC Audit Division memoranda matters. Given the receipt of "information sufficient to constitute grounds to investigate whether [they] may have violated [applicable] Federal criminal law," I recommend that an ICA preliminary investigation be initiated by the Department. I also agree with Public Integrity that if a preliminary investigation is deemed to be warranted as to these non-covered persons, there would be no principled basis for not including at least the President, thereby making the trigger a mandatory one.

Among the very first actions taken as to the Common Cause/FEC Audit Division memoranda matter during a preliminary investigation should be to request, pursuant to the spirit of paragraph 3 of the DOJ/FEC Memorandum of Understanding, that the FEC advise the Department whether the potential FECA violations noted in the Audit Division memoranda represent -- in the view of the FEC itself -- actual violations of the FECA, and, if so, whether the FEC believes any such violations are "significant and substantial." If they are, the FEC should be asked (pursuant to the DOJ/FEC Memorandum of Understanding) to "endeavor to expeditiously investigate and find [or at least attempt to determine based on available information] whether clear and convincing evidence exists to determine probable cause to believe the violation was knowing and willful."

Negative answers to these questions from the FEC during the ICA preliminary investigation may be sufficient to permit (indeed, could require) the Attorney General to conclude that the Common Cause/FEC Audit Division memoranda matters do not warrant further investigation by an independent counsel under 28 U.S.C. §592. If, however, it is not possible to reach such a determination within the time permitted under the ICA, the Attorney General will be required to apply to the special division for the appointment of an independent counsel to continue the investigation.

In addition to seeking further input from the FEC, during the preliminary investigation, the Campaign Task Force should be directed to conduct a thorough investigation of the Common Cause/FEC Audit Division matters independent of the FEC. During the preliminary investigation phase, the Department should also afford the possible subjects of a further independent counsel

investigation the opportunity to provide information and arguments pertinent to the Attorney General's decision as to whether, under 28 U.S.C. §592, further investigation by an independent counsel is warranted. Public Integrity has already been asked for an opportunity to be heard by attorneys representing Mr. Ickes and the DNC. We have also received further written submissions from the Clinton/Gore '96 campaigns.

If it is determined that a referral to an independent counsel is required, the possibility exists that this matter could be referred, along with the Ickes false statement matter, to Babbitt IC Bruce rather than seeking a new independent counsel from the special panel.

4. Should an ICA preliminary investigation be commenced with respect to the "new information" concerning Vice President Gore?

The Addendum to the Interim Report (page 15) notes the receipt of "new evidence" with respect to the Vice President's role in fund-raising. The Addendum states that this new information "resurrects the question of the Vice President's knowledge that his solicitations within the White House were designed, at least in part, to raise hard money." A recommendation from Public Integrity with respect to this matter is attached. A decision whether to trigger a preliminary investigation under the ICA must be made by August 26, 1998.

The Public Integrity memorandum concludes (page 20) that its "initial inquiry did not develop sufficient evidence to warrant further investigation into the question of whether the Vice President's statements, in his [November 11, 1997] interview, regarding his state of knowledge or belief at the time he made the fund raising calls were false." In reaching this conclusion, Public Integrity noted (at page 20): 1) the evidence that statements were made by others at the November 21, 1995, White House meeting which contradict the Vice President's November 11, 1997, interview statement to Public Integrity is weak, 2) the statements of those attending the November 25, 1995, meeting are so confused, contradictory and uncertain as to negate the inference "that mere attendance at the meeting necessarily would have served to convey an accurate understanding of the facts as related in the

Strauss notes" (page 6), and 3) the Vice President "lacked any motive to lie in his interview."

In my view, it is difficult to conclude, without the flexibility of a preliminary examination, that one can find lack of possible falsity based on the inconsistency of the statements of those who attended the November 25, 1995, meeting. The recommendation of Public Integrity concerning the Vice President's possible false statement on November 11, 1997, is also premised on its conclusion (at page 20) that on the element of "falsity," the evidence uncovered during the investigation is insufficiently specific and credible to support a conclusion that further investigation is warranted." Public Integrity makes the point (at page 18) that: "The element of falsity should not be confused with the element of the state of mind required to commit the offense in this case." This distinction, while intellectually defensible, appears to me to be a very fine one in this context.

When the "falsity" of a statement is addressed to the belief of the declarant about his own knowledge or prior belief, as distinguished from a statement about some objective external fact, in my view, the element of falsity becomes inextricably intertwined with issues of specific intent. It appears that while the recollections of the participants in the November 21, 1995, White House meeting about the nature of the hard money/soft money discussions are mixed, the Strauss notes and the Panetta interview constitute specific information from credible sources supporting the possibility that the Vice President may have had knowledge or had beliefs which are at odds with his November 11, 1997, statements. Indeed, Public Integrity concluded (page 21) "that the [Strauss] notes, together with Panetta's evolving memory, support a conclusion that some sort of statement may have been made by someone at the meeting to the effect that the media campaign was funded by a mix or hard and soft money and that individuals could give up to $20,000 in hard money to the DNC."

Public Integrity expressed the concern that: "[W]ere explorations of the truth or falsity of statements about beliefs considered to be subject to the state of mind restrictions in the Act, the Act would require that every such statement trigger the Act, whether or not the underlying belief was true, since it is the truth or falsity of the statement of belief that is at issue, not the underlying fact." This may be true for cases such as this one

where the issue involves material statements of belief made by a covered person within agency jurisdiction in possible violation of 18 U.S.C. §1001.

To the extent that triggering a preliminary investigation in such circumstances may result in the need to do so more frequently than Public Integrity considers to be wise or even appropriate, the fault may simply be in the architecture created by the ICA itself. The ICA insists that to close a matter concerning a covered person without appointment of an independent counsel in cases involving elements of state of mind, the Department must do so by finding lack of the relevant state of mind by "clear and convincing evidence." I do not share the Public Integrity view (page 19) that this standard would be "virtually impossible to meet in most cases." Indeed, it occurs to me that the standard may very well be met in this case during a preliminary investigation where the Attorney General is permitted to consider whether the Vice President lacked the requisite state of mind under the clear and convincing evidence standard.

Accordingly, I believe a preliminary investigation is required properly to resolve this matter.

5. **Should an ICA preliminary investigation be triggered at this time with respect to the other matters covered by the Interim Report?**

In addition to recommending that an ICA preliminary investigation be triggered with respect to Harold Ickes for false statements to the Senate, and with respect to the Common Cause/FEC Audit Division memoranda allegations, the Interim Report (page 20) identified other "individual areas" as to which it was believed there was "information sufficient to trigger a preliminary investigation and support a determination that further investigation is warranted under the ICA." At the August 14, 1998, meeting to discuss the Interim Report, there was general, albeit not unanimous, agreement that as to these other matters, while there was a good deal of specific information from credible sources, the information as to any covered person was not yet "sufficient to constitute grounds to investigate" (emphasis added) under the ICA whether such person "may have violated [applicable] Federal criminal law." As to these matters I believe it would not be appropriate to trigger an ICA preliminary investigation. The

Campaign Financing Task Force should continue to investigate these matters which are discussed in the Interim Report. At such time that it is felt by the Task Force and the Public Integrity Section that the information raises to the level "sufficient to constitute grounds to investigate" as to any covered person or any non-covered discretionary person, the issue should be revisited as to whether the Attorney General should then trigger an ICA preliminary investigation.

The attached August 17, 1998, memorandum from Lee Radek addresses certain of the additional potential criminal violations by Harold Ickes with respect to Charlie Trie and Diamond Walnut, discussed in the Interim Report. It concludes, consistent with the direction of the discussion at the August 14, 1998, meeting with the Attorney General, that:

> "The issues discussed [in the August 17, 1998, Public Integrity memorandum] do not provide a basis to believe that we have information of a possible violation by Mr. Ickes. As to the Trie contributions, Ickes had no duty to disclose his knowledge or suspicious, and there is no indication that he took any affirmative action in connection with the matter. The Diamond Walnut matter likewise provides no basis for concluding that criminal conduct occurred."

The Campaign Task Force is also researching the potential criminal violations related to Mr. Ickes and others with respect to whether there were legal duties to disclose possible violations to the Clinton/Gore '96 campaigns and the DNC. We should review the fruits of this research as soon as it is completed.

CONCLUSION

1. I recommend that the question of whether to conduct an ICA investigation for possible false statements to the Senate by Harold Ickes be deferred pending a final decision with respect to whether the Attorney General should apply to the special division to appoint an independent counsel for the Common Cause/FEC Audit memoranda allegations as to Mr. Ickes and others. If such an application is made, I recommend that the possible false statements by Mr. Ickes to the Senate be included in the jurisdictional mandate to the Independent Counsel. If no such application is

made, I recommend that the Campaign Task Force continue to investigate and, if appropriate, prosecute the false statements matter as to Mr. Ickes. Another possibility worthy of serious consideration is to refer the Ickes false statements matter to IC Bruce, the Babbitt IC. The Campaign Task Force has recently been advised by IC Bruce that she is looking at Mr. Ickes' conduct in connection with her work, and she is seeking information from the Task Force concerning Mr. Ickes with respect to the Diamond Walnut matter.

2. I recommend that an ICA preliminary investigation be commenced on a discretionary basis with respect to the Common Cause/FEC Audit Division memoranda issues as they reflect on possible criminal violations by Harold Ickes, the Clinton/Gore '96 campaigns and the DNC. I believe that a mandatory referral as to at least President Clinton, and perhaps Vice President Gore, with respect to these issues is also required.

I also recommend that the Department promptly seek the FEC's views as to: 1) whether it agrees with its Audit Division that there may have been violations of the FECA by the Clinton/Gore '96 campaigns, 2) whether it believes that if violations occurred, were they "significant and substantial," and 3) whether it believes any such violations were knowing and willful. During the preliminary investigation the Department should also proceed as expeditiously as possible -- independent of the FEC -- to ascertain: A) "whether further investigation is warranted" in light of the "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations" [particulary under the DOJ/FEC Memorandum of Understanding], and B) whether "there is clear and convincing evidence that [the persons subject to the preliminary investigation] lacked [the relevant] state of mind ["required for the violation of criminal law involved."] In addition, attorneys for the subjects of a possible further IC investigation should be afforded an opportunity to be heard on whether a further IC investigation is warranted under 28 U.S.C. §592. The Department should solicit information which would shed light on the question of whether there is "clear and convincing evidence" that violations of the FECA, if any, were committed without the requisite state of mind to violate Federal criminal law.

3. I recommend that we evaluate the report from the Public Integrity Section as to whether to commence an ICA preliminary investigation with respect to the new information concerning Vice President Gore. However, based upon my review of the memorandum, it appears to me that the resolution of the matter will require an analysis of whether the Vice President possessed a criminal state of mind in making his statements on November 11, 1997. In my view this question can only be resolved under the ICA during a preliminary investigation.

4. I recommend that we continue the Campaign Task Force investigations with respect to the other matters covered by the Interim Report because the Attorney General has not yet received "information sufficient to constitute grounds to investigate whether [covered persons or non-covered discretionary persons] may have violated any Federal criminal law." As before, if the Task Force receives "information sufficient to constitute grounds to investigate whether [covered persons or non-covered discretionary persons] may have violated any Federal criminal law," the possibility of triggering the ICA through an ICA preliminary investigation should be promptly revisited.

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

September 1, 1998

EXECUTIVE SUMMARY

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States.

PURPOSE: To provide the Deputy Attorney General with the Criminal Division's plan for conducting the preliminary investigation commenced on August 26, 1998, under the Independent Counsel Act of possible false statements made by Vice President Gore.

TIMETABLE: As soon as possible.

DISCUSSION: See attached memorandum.

RECOMMENDATION: See attached memorandum.

Attachments

EXHIBIT 38

DOJ-VP-00493

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

September 1, 1998

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States.

PURPOSE: To provide the Deputy Attorney General with the Criminal Division's plan for conducting the preliminary investigation commenced on August 26, 1998, under the Independent Counsel Act of possible false statements made by Vice President Gore.

TIMETABLE: As soon as possible.

INTRODUCTION

On August 26, 1998, the Attorney General, following an initial inquiry, commenced a preliminary investigation under the Independent Counsel Act (the ICA), 28 U.S.C. §§ 591-599, with respect to whether further investigation is warranted into whether the Vice President of the United States, Albert Gore, Jr., a covered person under the ICA, may have provided one or more false

statements in violation of 18 U.S.C. § 1001.[1] The statements in question were made by the Vice President in November 1997 to attorneys and agents conducting an earlier ICA preliminary investigation with respect to fundraising telephone calls made from the White House during the 1996 presidential election campaign.

The background concerning this matter is set forth in the attached memorandum of Lee J. Radek, Chief of the Public Integrity Section, Criminal Division, to James K. Robinson, Assistant Attorney General, Criminal Division. Following an initial inquiry, the Public Integrity Section recommended that this matter with respect to the Vice President be closed without a preliminary investigation under the ICA; however, the Attorney General, acting on the recommendation of the Assistant Attorney General, Criminal Division, and with the concurrence therein of the Deputy Attorney General, determined that a preliminary investigation under the ICA was required. Accordingly, on August 26, 1998, the Special Division of the Court was notified that a preliminary investigation pursuant to the ICA had been commenced.

The purpose of this memorandum is to set forth the Criminal Division's plan for conducting the preliminary investigation, and the timetable for forwarding a recommendation to the Attorney General, through the Deputy Attorney General, as to whether to seek an independent counsel to investigate this matter further.

ATTN NAME

ATTN NAME

CRIMINAL DIVISION PLAN

On Friday, August 28, 1998, I met with Lee Radek, and [redacted] of the Public Integrity Section (PIS), [redacted] of the Campaign Financing Task Force, and Criminal Division Chief of Staff Richard A Rossman, to devise a plan to conduct the preliminary investigation. PIS agreed to (and did) forward to me the file with respect to the previously closed preliminary investigation concerning the Vice President, including the

[1] In the event a referral under the ICA of the 18 U.S.C. § 1001 matter is deemed appropriate, the issue of whether there might be "aggravating circumstances" with respect to a possible violation of 18 U.S.C. § 607 may also need to be revisited.

pertinent 302s. Copies of all 302s and any other pertinent information developed during the initial inquiry leading to the current preliminary investigation will also be forwarded to me. In addition, the transcript of a Vice Presidential press conference at which the Vice President made statements which may be relevant to his knowledge of the type of money he was raising with his White House telephone calls will also be forwarded. The press conference is mentioned in the attached August 25, 1998, memorandum to me from [redacted] which offers her views, and those of Chuck LaBella, with respect to the PIS memorandum recommending that the initial inquiry concerning the Vice President be closed without a preliminary investigation.

ATTY NAME

Approximately a dozen persons attended the November 21, 1995, meeting at the White House during which statements may have been made in the presence of the Vice President which could have provided the basis for knowledge on his part which would be inconsistent with his interview statements of November 11, 1997. Everyone present at the November 25, 1995, White House meeting has been interviewed during the initial inquiry except George Stephanopolus and President Clinton. Mr. Stephanopolus has, however, testified under oath to Congress that he has no recollection of any meeting attended by the Vice President at which there was a discussion of hard/soft money. We do not feel it would be productive to interview Mr. Stephanopolus in light of his sworn testimony that he remembers no such meeting. Likewise, an interview of the President on this issue at this time was considered to be unproductive. In a proffer PIS obtained from the President through his counsel he stated that he has no recollection of the meeting.

It was determined that re-interviews of the previously interviewed witnesses would not be productive and, in the event an independent counsel is sought, it was felt that such re-interviews would hamper the work of the independent counsel. Mr. Panetta has already been interviewed twice, albeit by telephone. Although a live interview would have been preferable (he is in California), a third interview runs the risk of added inconsistent statements which are not likely to advance the investigation into issues of falsity, state of mind and other issues pertinent to a preliminary investigation. We are satisfied, for purposes of a preliminary investigation, with the interviews as they currently stand. It also appears that PIS has adequately explored the existence of tangible

evidence such as notes taken by the participants to the 1995 meeting. It was decided that further effort in this regard is unlikely to bear fruit.

One possible avenue of investigation worth exploring with those who witnessed the Vice President's November 11, 1997, statements, however, is his demeanor during his interview. The Vice President's demeanor is relevant to his knowledge at the time he made the telephone calls from the White House and his state of mind on November 11, 1997, in determining a possible violation of §1001. It has been reported to me that the persons attending the 1997 interview may have come away with different perceptions of the Vice President's demeanor during the interview. I propose that interviews be conducted of each FBI agent and Department attorney who witnessed the Vice President's demeanor at the time of the statements in question. Each of these persons should be asked about his or her perceptions of the Vice President's demeanor and the objective basis for such observations should be probed. I propose that these interviews be conducted by Deputy Assistant Attorney General Kevin Di Gregory. We plan to complete these interviews by September 4, 1998, and include the findings in my final recommendations to the Attorney General.

We have solicited the views and written submissions of James Neal, counsel for the Vice President, as soon as possible, including any information they may wish to submit on the question of the Vice President's knowledge when he made the telephone calls, as well as his state of mind and intent on November 21, 1997, when he made the statements in question. We expect to hear from Mr. Neal within two weeks.

It is our goal to submit a recommendation to the Attorney General through you as soon as possible. We believe we can do so by no later than September 25, 1998. I have asked PIS and the Campaign Financing Task Force to submit their respective reports and recommendations to me by no later than September 18, 1998. My final report and recommendation will follow one week later. As the additional tasks required are not extensive, additional staffing is not required. I am satisfied, unless additional evidence is discovered, that I will be prepared to make my recommendation within the first 30 days of the 90 day preliminary investigation period, after a complete review of the existing investigative files, a review of the transcript of the Vice President's press

conference, interviews of those Department personnel who observed the Vice President's demeanor during the 1997 interview and any submissions by the Vice President's counsel.

We will make every effort to include our review in a timely and thorough fashion and endeavor to submit our recommendation at an even earlier date.

A key legal issue relevant to my recommendation to the Attorney General and to her determination of whether further investigation is warranted by an independent counsel, is the standard by which the Attorney General is to determine, under 28 U.S.C. § 592(2)(B)(ii), whether the Vice President "lacked the state of mind required for the violation of criminal law." Under this section, the Attorney General is not to "base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of the criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind." I have asked PIS to research whether this standard is a personal determination to be made by the Attorney General in light of her own evaluation of the evidence before her during the preliminary investigation, or whether the language addresses the objective existence, to the mind of a reasonable person, of "clear and convincing evidence that the person lacked such state of mind." The answer to this question could make a significant difference in the Attorney General's determination of "whether further investigation is warranted" in this matter.

My preliminary analysis of the section leads me to believe that the state of mind determination is a personal one to the Attorney General rather than an objective question of what reasonable persons could conclude, based on the evidence available to the Attorney General at the conclusion of the preliminary investigation, as to whether "there is clear and convincing evidence that the person lacked such state of mind." Throughout the ICA reference is made to the Attorney General's "determination . . . whether further investigation is warranted." Under 28 U.S.C. § 592(c)(1)(A), the Attorney General is to apply to the special division for the appointment of an independent counsel "if--(A) the Attorney determines that there are reasonable grounds to believe that further investigation is warranted." This "determination,"

under 28 U.S.C. § 592(F) "shall not be reviewable in any court." It appears to me that the ICA contemplates that the determination of the covered person's state of mind is a personal one for the Attorney General to make, and that if, on the basis of the evidence available to her, she determines, using a 'clear and convincing evidence" standard, that the Vice President lacked the required state of mind for the offense, she should determine that there are not "reasonable grounds to believe that further investigation is warranted."

If it is believed that additional or different steps should be taken with respect to this matter, please let me know.

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

September 8, 1998

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Recommendation for the initiation of a preliminary investigation under the Independent Counsel Act (ICA) of allegations of potential Federal Election Campaign Act violations by President William Jefferson Clinton.

PURPOSE: To provide the Attorney General with a recommendation as to whether to commence a preliminary investigation under the ICA as a result of allegations contained in the Federal Election Commission Audit Division Exit Conference Memorandum on the Clinton/Gore 1996 Primary Committee, Inc.

TIMETABLE: September 8, 1998

DISCUSSION: See attached memorandum.

RECOMMENDATION: See attached memorandum.

Attachments

EXHIBIT
39

R:EHH:JKR:LJR [redacted]mcw
yped: 9/8/98
[redacted]ecords/Section Chron

Attorney's initials

DOJ-P-00730

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

SEP 08 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Recommendation for the initiation of a preliminary investigation under the Independent Counsel Act of allegations of potential Federal Election Campaign Act violations by President William Jefferson Clinton.

PURPOSE: To provide the Attorney General with a recommendation as to whether to commence a preliminary investigation under the Independent Counsel Act (ICA) as a result of allegations contained in the Federal Election Commission Audit Division Exit Conference Memorandum on the Clinton/Gore 1996 Primary Committee, Inc.

TIMETABLE: The Independent Counsel Act requires a decision by September 8, 1998.

INTRODUCTION

This memorandum sets forth my recommendation that a preliminary investigation under the Independent Counsel Act, 28 U.S.C. §§ 591-599, be commenced into allegations that President William Jefferson Clinton, a covered person under the Act, may have violated federal criminal laws in connection with the production of issue advocacy advertisements by the Democratic Party between June 1995, and August 1996.[1]

On August 7, 1998, the Department of Justice received the Federal Election Commission's (FEC) Audit Division Exit Conference Memorandum on the Clinton/Gore '96 Primary Committee, Inc. (ECM), which concludes that, unless otherwise demonstrated

[1] John C. Keeney, Deputy Assistant Attorney General, Criminal Division, is recused from this matter.

by Clinton/Gore '96, expenditures for Democratic National Committee (DNC) issue advocacy media ads should be treated as excessive in-kind contributions to both the Clinton/Gore primary and general campaigns, in violation of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-455. The Department is also aware of specific and credible information from multiple sources suggesting that President Clinton personally participated in aspects of the DNC's issue advocacy advertisement program.

In light of the FEC Exit Conference Memorandum, I now believe that specific and potentially credible information exists "sufficient to constitute grounds to investigate" whether President Clinton may have violated federal criminal law by "knowingly" and "willfully" violating federal election law. 2 U.S.C. § 437g(d)(only knowing and willful violations are potentially criminal). Although there is evidence suggesting that the President's potential violations of law may not have been willful or knowing, in determining whether to initiate a preliminary investigation under the Independent Counsel Act the Attorney General may not consider an apparent lack of criminal intent. Nor may she consider at this early stage established policies and practices of the Department governing criminal prosecution of FECA violations. Both intent and Department policy, however, are issues that may be taken into account during a preliminary investigation.

Accordingly, I recommend that the Attorney General initiate a preliminary investigation pursuant to the Independent Counsel Act of potential criminal FECA violations by the President associated with his involvement in the DNC's issue advocacy advertisements.

The Attorney General must reach her decision on this matter no later than September 8, 1998, the first business day 30 days after the Department of Justice became aware of the information contained in the ECM. I have attached the necessary paperwork to be filed with the Special Division of the Court of Appeals (Attachment A), should the Attorney General decide that further investigation is warranted in this matter. Should she decide that no further investigation is warranted, no paperwork is required.

BASIS FOR RECOMMENDATION

My recommendation is based upon a review of the FEC Audit Division Exit Conference Memorandum. I have also considered: the July 16, 1998, Interim Report to Attorney General Reno and FBI Director Freeh from AUSA Charles LaBella and SA James DeSarno (including the August 12, 1998, Addendum to Interim Report) (hereinafter "Interim Report" and "Addendum"); additional information and arguments contained in submissions concerning the Interim Report by the Criminal Division's Public Integrity and

Appellate Sections; and submissions by the Campaign Financing Task Force. As background, I also reviewed most of the prior written submissions dealing with the Common Cause allegations including Director Freeh's November 24, 1997, letter to the Attorney General, and Principal Assistant Deputy Attorney General Litt's February 6, 1998, memorandum concerning "Common Cause Allegations."

In reaching my conclusions, I also considered recent submissions from the Democratic National Committee, Clinton/Gore '96 (including a September 4th, 1998, letter, with attachments, from Lynn Utrecht, General Counsel for Clinton/Gore '96), and President Clinton's private counsel, David Kendall.[2]

FACTUAL BACKGROUND

Allegations of FECA Violations Associated with Issue Advocacy Ads

The FEC Audit Division's ECM evaluated the Clinton-Gore '96 campaign's compliance with the Presidential Primary Matching Payment Account Act (PPMPAA), 26 U.S.C. Ch. 96.[3] The ECM contains a discussion of the general allegation that the President and his senior campaign advisors illegally circumvented the expenditure limits to which Clinton-Gore '96 had agreed as a condition of receiving federal funding under the PPMPAA. The ECM also constitutes a preliminary internal conclusion within the FEC -- albeit at a low level -- that the expenditures for DNC issue advocacy ads during the 1996 campaign violated the FECA.

The ECM alleges that campaign agents developed advertising strategy and content, including writing and editing ads, and worked closely with the DNC to achieve maximum benefits for the re-election campaign. The DNC paid for these ads from funds raised outside the limitations imposed by FECA, i.e., with "soft money." The premise of the allegation is that given the control that the President and his campaign staff exercised over the nominally DNC ads, the content of the ads was sufficiently related to advancing the President's re-election to render the payment of their cost "expenditures" on behalf of Clinton-Gore '96 subject to regulation by FECA and the PPMPAA. The statutes were allegedly violated by: 1) using "soft money" to pay for

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[2] The submissions on behalf of the Clinton/Gore '96 Campaign, President Clinton (in his private capacity), and the Democratic National Committee are at Attachment B hereto.

[3] All presidential primary campaigns that elect to participate in the PPMPAA are subject to audit by the Federal Election Commission, and this audit was conducted routinely under this authority. 26 U.S.C. § 9038.

the ads, and 2) by causing Clinton-Gore '96 to accept excessive "contributions" from the DNC.

The specific findings of the ECM include:

1) between June 1995, and August 26, 1996, $46.5 million was expended by the DNC on issue advocacy ads that met the FEC's "electioneering message" content test for coverage as "expenditures" under FECA and PPMPAA;

2) during the 1996 election cycle, "coordinated expenditures" by political parties to presidential candidates affiliated with them were permitted, but they were limited to $12 million;[4]

3) under 2 U.S.C. § 441a(a)(7)(B)(i), all additional DNC "expenditures" that were coordinated with President Clinton represented a grossly excessive -- and illegal[5] -- in-kind "contribution" to Clinton-Gore '96; and

4) after factoring-in the excessive in-kind contribution made to Clinton-Gore '96 by the DNC in the form of the issue ads, Clinton-Gore '96 had made "expenditures" well above the limit to which it had agreed to be held as a condition of receiving federal funding under the PPMPAA and was thus in violation of the PPMPAA.

Additional Allegations: Presidential Involvement

The ECM's factual findings about the President's personal involvement in DNC issue ad expenditures are consistent with information previously described in Common Cause's complaint letters dated October 7, 1996 and April 22, 1997. Allegations about the President's role have also been set forth to various degrees in Dick Morris's book ("Behind the Oval Office"), Bob Woodward's book ("The Choice"), and in recent news articles.

The information from these additional sources, which is set forth below, specifically and credibly indicates that the President was personally involved in the production of the issue advocacy ads. The information we are aware of includes the following:

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[4] 2 U.S.C. § 441a(d)(1).

[5] Under 2 U.S.C. § 441a(a)(2)(A), contributions by political organizations such as the DNC to federal candidates are limited to $5,000 per calendar year.

Morris's book:

> Week after week, month after month, from July 1995 more or less continually until election day '96, sixteen months later, we bombarded the public with ads. The advertising was concentrated in key swing states.
>
> * * * * * * *
>
> [Clinton] worked over every script, watched each ad, ordered changes in every visual presentation, and decided which ads would run where and when. He was as involved as any of his media consultants. The ads became not the slick creations of admen but the work of the president himself. * * * * Every line of every ad came under his informed, critical and often meddlesome gaze. Every ad was his ad.[6]

Woodward's book:

> Morris wanted more money from the Clinton-Gore campaign to run television advertising emphasizing Clinton's policy of protecting Medicare, not cutting it. The crime ads which had run earlier in the summer (of 1995) had been a giant smash hit. Morris was still arguing.
>
> Clinton liked the idea and wondered aloud why they were not up on the air talking about his agenda.
>
> Terry McAuliffe argued strenuously against spending more money on ads. "They'll be using our [precious] money," he said, since by law they could only raise about $30 million, which was going to be an absolute legal ceiling. The $1,000 limit on direct individual contributions to the presidential race made that money the hardest to get.
>
> * * * * *
>
> Clinton wanted an ad campaign. Morris was pressing. There was only one other place to get the money: the Democratic National Committee, which functioned as the unofficial arm of the Clinton campaign. And Clinton, as the head of the party, directed the committee's efforts. The committee could launch a new fund-raising effort as it had in 1994 when millions had been raised in a special effort to televise pro-Clinton health care

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[6] Dick Morris, Behind the Oval Office, 138 and 144, (1997) (emphasis in the original).

reform ads. Though opponents of his health care reform plan had spent much, much more, the idea was sound. Clinton said he was not going to be drowned out this time, and directed a special fund-raising effort.

McAuliffe knew that if the president was behind a special fund-raising drive by the party, the money would be raised. Clinton did not make the fund-raising calls himself, but Vice President Gore made about 50 personal calls, and the party's chairman and entire fund-raising apparatus were turned loose. Because the money supposedly would be for the party, there were no limits on contributions for general operations. A number of large contributions in the $100,000 range were received.

Of course the distinction between Clinton-Gore money and Democratic Party money existed only in the minds of the bookkeepers and legal fine-print readers. It was all being raised and spent by the same people -- Clinton, Gore, Morris and the campaign apparatus. In all, some $10 million was raised in the special fund-raising effort, and the Democratic Party went another $5 to $6 million in debt -- drawing on its bank line of credit -- to finance what eventually became a $15 million advertising blitz."[7]

The New York Times:

The [recently released Ickes] documents add to a growing body of evidence that undercuts the President's early efforts to draw a distinction between his activities on behalf of his campaign and those of the party. The documents reveal that President Clinton personally authorized the program to provide meals, coffees, golf outings and morning jogs with him, and overnight stays in the Lincoln Bedroom, to raise funds which were used to finance the ad campaign.[8]

The Washington Post:

Far from holding the DNC at arms length, the [Ickes] documents show the White House was deeply involved in its fund-raising operation and romancing of suspect campaign contributors. The President's top political lieutenant, Harold Ickes, oversaw the DNC's fundraising

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[7] Bob Woodward, The Choice, 235-36 (1996).

[8] "Memos to Clinton Kept Him Informed on Fund-Raising," New York Times, April 3, 1997.

> drive from his basement office in the Executive Mansion. The President himself encouraged the dragnet for contributions, scribbling his approval of proposals to use the Executive Mansion to win over donors.[9]

Woodward's piece in the Post:

> By Spring 1996, Clinton personally had been controlling millions of dollars worth of DNC advertising. This enabled him to exceed the spending limits and effectively rendered the DNC an adjunct to his own reelection effort. For practical purposes, Clinton's control of the Party advertising -- and his aggressive use of it going back to the first Medicare ads the previous August -- gave him at least $25 million more money for the primary period. This was in addition to the $37 million the Clinton-Gore campaign was authorized to spend under the law.[10]

LEGAL DISCUSSION

The trigger for determining whether to conduct a preliminary investigation under the Independent Counsel Act (ICA) is the receipt by the Attorney General of "information sufficient to constitute grounds to investigate whether [a covered person or a non-covered discretionary person] may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction. . . ." (Emphasis added.) 28 U.S.C. §591(a) and (c). Under 29 U.S.C. §591(d)(1), in "determining ... whether grounds to investigate exist, the Attorney General shall consider only -- (A) the specificity of the information received; and (B) the credibility of the source of the information." (Emphasis added.)

In determining the trigger for a preliminary investigation under the ICA, the Interim Report argues (at page 11) that because the Campaign Task Force "has commenced criminal investigations of non-covered persons based only on a wisp of information," the "standard for triggering a preliminary investigation under the ICA should be identical. . . ." I disagree. Furthermore, as a result of my discussions with Messrs. LaBella and DeSarno (including the discussion at the August 14, 1998, meeting with the Attorney General), there seems

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[9] "The Undoing of White House Damage Control," Washington Post, April 6, 1997.

[10] Bob Woodward, "Clinton's Called the Shots for Party Ad Blitz," Washington Post, June 25, 1996.

to be a general consensus that the trigger for a preliminary investigation under the ICA must be found in the standard set by the ICA itself -- regardless of different "rules of engagement," if any, employed by the Campaign Task Force to trigger its investigations.

The trigger for a preliminary investigation suggested by the Public Integrity Section (at pages 7-8 of its August 5, 1998, "Review of Interim Report"), particularly with respect to the Common Cause allegations, is that "the Act is to be triggered only when the Department receives specific and credible information that an individual, either covered by the Act or as to whom it would be a conflict of interest for the Department to investigate, may have committed a violation of federal criminal law. . . ." (Emphasis added.) While Public Integrity acknowledges (at pages 8-9) that the trigger for a preliminary investigation under the ICA Is "an extremely low threshold," it asserts that: "Public servants covered by the Act do, however, have the statutory protection that the provisions of the Act will not be triggered absent specific and credible information that they may have violated the law." (Emphasis added.) This approach has led Public Integrity to be of the consistent view that the Common Cause allegations fail because they do not involve "potential violations of federal criminal law."

Specifically, Public Integrity has consistently asserted that "given the state of the law, [the Common Cause] alleged conduct could not have been a willful violation of the law, and thus could not be prosecuted criminally." As such, under its view, the Common Cause allegations, regardless of the specificity of the information supporting them, or the credibility of the source of the information, cannot constitute information presenting the possibility that a criminal violation "may have [been] committed." This continues to be the view of Public Integrity, a view which it believes is not in any way altered by the information contained in the recently received ECM.

It occurs to me that Public Integrity, in insisting upon a "may have violated the law" standard which includes a consideration of the "state of the law" at the time of the conduct in question, and which also addresses the issue of "willfulness," is applying a higher trigger standard than the one called for by the ICA.

The ICA states that a preliminary investigation is warranted upon receipt of "information sufficient to constitute grounds to investigate whether [a covered or non-covered discretionary person] may have violated any Federal criminal law. . . ." (Emphasis added.) In Public Integrity's version of a "may have violated the law" standard, in my view, issues of "the state of mind required for violation of criminal law involved" (specifically, that any violation "could not have been a willful

violation") necessarily have become implicated. Considering the "state of the law" at the time of the acts in question itself bears greatly upon a target's contemporaneous knowledge of possible unlawfulness and implicates due process notice issues which, again, implicate state of mind considerations.

Consideration of such matters, however, is prohibited by the ICA until such time as a preliminary investigation has been commenced. Under section 592(2)(B)(i), state of mind considerations are not even to be considered by the Attorney General in basing "a determination under this chapter that information with respect to a violation of criminal law by a person is not specific and from a credible source." Section 592 (B) (ii) further provides that during the preliminary investigation phase "[t]he Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind." (Emphasis added.)

The Public Integrity Review memo (at pages 16-17) quoted the following language from the Attorney General's recent oversight testimony:

> "We have brought criminal prosecutions only where the law is clearly established and clearly violated. To establish a criminal violation, we have to show that the defendant acted knowingly and willfully, that he consciously violated the law. The law governing these allegations is far from clear and it is impossible to conclude on what we know that anyone could have violated it knowingly and willfully. At the same time, the FEC is pursuing this and if they determine that there is evidence, they will refer it to us and if it reflects on a covered person and is specific and credible with respect to a covered person, I will trigger the Act."

One concern I have in using this approach with respect to the new information presented by the ECM is that state of mind considerations, and considerations based on Departmental prosecution policies, while they would be pertinent (indeed, as to Departmental policies mandated[11]) during a preliminary

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[11] 28 U.S.C. §592(c) ("Determination that further investigation is warranted") provides: "In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with

investigation, cannot be used by the Attorney General in deciding whether to commence a preliminary investigation.

It seems to me that Departmental policies such as those reflected in the Memorandum of Understanding between the Department and the FEC, and considerations of knowledge and willfulness are appropriate under the ICA only after a preliminary investigation has been commenced following receipt by the Attorney General of "information sufficient to constitute grounds to investigate whether any [covered person or non-covered discretionary person] may have violated any Federal criminal law. . . ." The fact that the Department (absent the ICA) would not commence an investigation of a potential violation of the FECA, or that it is highly unlikely that knowledge and willfulness would be found during such an investigation, cannot, in my view, be the basis for deciding against conducting a preliminary investigation under the ICA when presented with the potential violations suggested by the information in the FEC Audit Division memoranda and considered in light of the information available to the Campaign Finance Task Force.

I understand the position taken by Public Integrity, in effect, to be that not only is it highly unlikely that knowledge and willfulness would be found for these FECA violations, it is legally impossible. This is certainly an arguable position; however, I do not believe it can be reached without the additional flexibility available to the Attorney General during a preliminary investigation under the ICA. If, during a preliminary investigation, it is determined (based on clear and convincing evidence of the lack of the requisite state of mind) that criminal violations are legally impossible, there will be no need for "further investigation" and thus no grounds to seek appointment of an independent counsel.

RECOMMENDATION

In the Attorney General's recent oversight testimony with respect to the Common Cause allegations (quoted in the August 5, 1998, Public Integrity Review at page 17), she made these points: 1) "the FEC has primary responsibility under the law for interpreting the election laws and for investigation of violations of those laws," 2) the Department has "brought criminal prosecutions [in this area] only where the law is clearly established and clearly violated," and 3) that the Department must "show that the defendant acted knowingly and willfully." She stated that as of the date of her testimony "it [was] impossible to conclude on what we know that anyone could

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respect to the conduct of criminal investigations." (Emphasis added.)

have violated it knowingly and willfully." Nevertheless, she went on to point out that:

> "[T]he FEC is pursuing this and if they determine that there is evidence, they will refer it to us and if it reflects on a covered person and is specific and credible with respect to a covered person, I will trigger the Act."

The receipt of the ECM after the Attorney General's testimony (and after the Interim Report) raises the question whether the Attorney General has now received "specific" information from a "credible" source which is "sufficient to constitute grounds to investigate whether any [covered person or non-covered discretionary person] may have violated any federal criminal law. . . ." (Emphasis added.)

While the ECM does not constitute a criminal referral from the FEC, it does contain information which is specific, and it cannot be said that it is not from a credible source. Since we are unable to conclude that the FEC Audit Division is not a credible source, further review is required. The Attorney General cannot now, as she said the Department would at her recent oversight testimony (Review at p. 17), simply await a possible FEC criminal referral based on the possibility of the FEC uncovering "a knowing and willful violation of the election laws" "under established procedures" [i.e., the process contemplated by the DOJ/FEC Memorandum of Understanding]. Statute of limitations concerns also militate in favor of proceeding to address these matters as expeditiously as possible. If the ECM includes specific information from a credible source which is sufficient to constitute grounds to investigate whether any covered or non-covered discretionary person "may have violated" applicable Federal criminal law, the Attorney General is required by the ICA as to covered persons (or at least has the discretion as to non-covered persons with whom a conflict exists) to conduct a preliminary investigation.

The FEC's ECM certainly represents an important step toward the possibility of at least civil FECA violations by the Clinton/Gore Campaigns.

The ECM concludes that, unless otherwise demonstrated by Clinton/Gore '96, expenditures for DNC issue advocacy media ads would be treated as excessive in-kind contributions in violation of the FECA to either the Primary Committee or the General Committee.

A conspiracy to violate the FECA knowingly and willfully by Mr. Ickes and others, including the President, has been strongly argued to be worthy of further investigation in the Interim Report. Whether civil violations of the FECA by covered persons

or non-covered discretionary persons are criminal, depends upon whether the violations were committed "knowingly and willfully," factors which may be assessed by the Attorney General only during a ICA preliminary investigation. While in determining "whether reasonable grounds exist to warrant further investigation" on a covered or non-covered discretionary person, the Attorney General "shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations," such considerations (such as prosecuting "only where the law is clearly established and clearly violated") may factor into the analysis of whether further investigation is warranted only during a ICA preliminary investigation.

I recommend that the Department proceed to conduct a preliminary investigation under the ICA of the Common Cause/ECM issues as to President Clinton because, with the addition of the recently received information in the ECM and the information already known by the Campaign Finance Task Force, I believe there now exists specific information from a potentially credible source that "constitute[s] grounds to investigate" whether the President "may have violated [applicable] Federal criminal law."

In making this recommendation, I appreciate that during the ICA preliminary investigation the Attorney General may very well conclude, under 28 U.S.C. § 592(c)(i), that based upon "the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations," "reasonable grounds" do not "exist to warrant further investigation." The Attorney General may also agree with the well considered Public Integrity analysis and conclude, pursuant to 28 U.S.C. § 592(B)(ii), that "clear and convincing evidence" exists that the persons subject to the ICA preliminary investigation "lacked the state of mind required for the violation of law involved." Nevertheless, these are considerations which, in my view, may be considered only during an ICA preliminary investigation in determining "whether further investigation is warranted."

Specific Aspects of the Preliminary Investigation

Among the very first actions taken as to the Common Cause/ECM matter during a preliminary investigation should be to request, pursuant to the spirit of paragraph 3 of the DOJ/FEC Memorandum of Understanding, that the FEC advise the Department whether the potential FECA violations noted in the ECM represent -- in the view of the FEC itself – actual violations of the FECA, and, if so, whether the FEC believes any such violations are "significant and substantial." If they are, the FEC should be asked (pursuant to the DOJ/FEC Memorandum of Understanding) to "endeavor to expeditiously investigate and find [or at least attempt to determine based on available information] whether

clear and convincing evidence exists to determine probable cause to believe the violation was knowing and willful."

Negative answers to these questions from the FEC during the ICA preliminary investigation may be sufficient to permit (indeed, could require) the Attorney General to conclude that the Common Cause/ECM matters do not warrant further investigation by an independent counsel under 28 U.S.C. § 592.

In addition to seeking further input from the FEC, during the preliminary investigation, the Campaign Task Force should be directed to conduct a thorough investigation of the Common Cause/ECM matters independent of the FEC. During the preliminary investigation phase, the Department should also afford the possible subjects of a further independent counsel investigation the opportunity to provide information and arguments pertinent to the Attorney General's decision as to whether, under 28 U.S.C. § 592, further investigation by an independent counsel is warranted.

CONCLUSION

I recommend that an ICA preliminary investigation of the President be commenced with respect to the Common Cause/ECM issue advocacy ad allegations as they reflect on possible criminal violations of federal election law.

I also recommend that the Department promptly seek the FEC's views as to: 1) whether it agrees with its Audit Division that there may have been violations of the FECA by the Clinton/Gore '96 campaigns, 2) whether any of the potential violations were "significant and substantial," and 3) whether it believes any such violations were knowing and willful.

During the preliminary investigation the Department should also proceed as expeditiously as possible -- independent of the FEC -- to ascertain: A) "whether further investigation is warranted" in light of the "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations" [particularly under the DOJ/FEC Memorandum of Understanding], and B) whether "there is clear and convincing evidence that [the persons subject to the preliminary investigation] lacked [the relevant] state of mind ["required for the violation of criminal law involved."]

In addition, attorneys for the subjects of a possible further IC investigation should be afforded an opportunity to be heard on whether a further IC investigation is warranted under 28 U.S.C. § 592. The Department should solicit information which would shed light on the question of whether there is "clear and convincing evidence" that violations of the FECA, if any, were

committed without the requisite state of mind to violate federal criminal law.

Attachments

EXHIBIT 40

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September 15, 1998

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Re: ICA

Dear Mr. Robinson:

At our September 2 meeting with Senator Hatch and others, it was suggested that the La Bella Report urged that in the area of campaign financing investigations - because of the "leave no stone unturned" approach adopted by the Task Force - the Attorney General should adopt a lower threshold than that prescribed in the ICA. As I said at our follow-up meeting, I do not believe that this is an accurate characterization of the position advocated in the Report or the Addendum. Because this issue is so crucial, I believe it is important to have the argument clarified.

In the Report we make it clear that we do not believe that the ICA's triggering provisions have been uniformly interpreted or applied. In particular, the quantum of information deemed sufficient to constitute grounds to investigate has differed depending on the nature of the allegation and the target of the would-be investigation. The Report does not (and we do not) advocate that the ICA triggering provisions be diluted or otherwise altered because of the Task Force's work. Rather, we urged that the ICA does not itself create an independent quantum of information sufficient to constitute grounds to investigate.[1]

A. The ICA's Triggering Mechanism

At the heart of the disagreement is the application of the ICA to information suggesting a potential criminal violation. The Report urges (and we continue to urge) that the determination as to whether there is sufficient information to constitute grounds to investigate (the threshold to commence an investigation) is identical regardless of whether the ICA is involved or not. The quantum of information deemed sufficient to commence a criminal investigation is a matter within the sole discretion of the Department of Justice. The ICA merely limits the factors which the Attorney General may consider in

[1] The ICA was designed, as the 1987 legislation history makes clear, to assure that the

determining whether there is sufficient information to commence an investigation of a covered person. The view articulated at our meeting, and the one advocated by the Department, is that the ICA establishes its own independent threshold for the commencement of a criminal investigation which bears no relation to the quantum of information sufficient to commence an investigation in a non-ICA matter. That is, the Department's position is that the ICA establishes an independent threshold or quantum of information to be evaluated by the Attorney General in determining whether there is sufficient information to constitute grounds to investigate a covered person. The ICA standard, previously stated within the Department as specific and credible evidence, is now articulated as specific and credible information of a potential federal violation.

Section 591 of the ICA provides that "whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any (covered person) may have violated any Federal Criminal law," she shall conduct a preliminary investigation. Reference to the specificity of the information and the credibility of the source modifies the factors which the Attorney General may consider in determining if there is information sufficient to constitute grounds to investigate. This modification does not, however, establish or create an independent threshold (much less a higher one) for the commencement of a criminal investigation.[2] The quantum of information that is sufficient to constitute grounds to investigate is not altered by this statutory modification. Rather, the quantum of information deemed sufficient to constitute grounds to investigate is and remains within the parameters established by the Attorney General (and the Department) as to whether a criminal investigation should be commenced. Clearly Citizen A should not be subjected to a criminal investigation based upon a quantum of information less than that deemed sufficient to commence an investigation of Citizen B simply because Citizen B is a covered person.[2]

Whatever constitutes information sufficient to constitute grounds to investigate allegations of campaign violations must be the same for covered and non-covered persons. There must be a consistence - at a minimum - under a single Attorney General in determining if this quantum of information has been satisfied. (With respect to a covered person, the only factors to be considered are whether the information is specific and from a credible source.)

[2] Theoretically, one could argue that there is a somewhat higher standard for covered persons, since an investigation could be begun on a non-covered person even if there were not specific information of a potential wrongdoing which came from a credible source. However, absent the most extraordinary circumstances, it is hard to imagine a federal prosecutor opening a criminal investigation without specific information from a credible source. Clearly this is the least common denominator of all federal criminal investigations. Absent this minimum standard, questions of due process and allegations of a fishing expedition would be raised.

The central problem addressed in the Report and Addendum is that in certain instances we could not get past the "grounds to investigate" when a covered person was involved. To that extent, we believe the Act was misapplied. For example, prior to the Report, information the Department had in its possession concerning PLET was never given serious consideration. As we pointed out in the Report, before we came to the Task Force a decision had been made to close the PLET investigation. Although we have never uncovered a formal declination memorandum, we were told that this matter was closed because PLET did not have to file with the FEC and therefore no potential violation was perceived. The PLET facts are set out in detail in the Report. Suffice it to say, we have every reason to presume that Ickes, as the President's agent, and the First Lady, as his wife, would have told the President about the problems with Trie's "contributions." Under traditional principles of agency law, the President may be accountable. Although he has a fiduciary relationship with both the DNC and Clinton/Gore, the President failed to warn either entity and permitted Trie to "contribute" more than $100,000 in conduit "contributions" to his Birthday Gala despite the clearest warnings from the PLET fiasco. The question therefore must be asked whether the President's failure to advise the DNC and Clinton/Gore of the Trie "contribution" problems, constituted a fraud on one or both of these organizations. The answer may be no, but we have never seriously discussed it, and to that extent, we have applied a different standard to whether there are grounds to investigate PLET (potentially involving a covered person) than we have to other investigations. (I understand the Task Force is now reviewing the PLET facts in order to identify a potential violation. It seems that the facts previously outlined set forth information sufficient to constitute grounds to investigate a covered person (the President) as well as two who, at least arguably, fall under the discretionary provision (Ickes and the First Lady).)

The same problem was evident with the Common Cause allegations, although now with the FEC Audit Memoranda, the issue has finally come to a head. But until the Audit Memoranda we were consistently told, alternatively, that there were no grounds to investigate the issue itself (independent of its impact on current investigations)[4] or we could not determine if there were grounds to investigate. As a result, we never even got to the question of whether there was specific information from a credible source. While the Audit Memoranda has new information -- because it has more information -- the outlines of the charge have been with us for two years.

The problem, once again, is that given the "no stone unturned" policy -- which we believe is the proper one -- how can an allegation as serious as Common Cause not have presented information sufficient to constitute grounds to investigate?

Perhaps the clearest example of the disparity between ICA and non-ICA campaign investigations is Loral. Reasonable minds can differ on whether this investigation should have been opened. Having done so, however, (as I understand it, because the consensus was that the charges were, in essence, deemed sufficiently specific and from a credible source), how can we say that Common Cause and PLET are less specific and credible? And, exacerbating the disparity, how can it be that there is sufficient information to constitute grounds to investigate a non-covered person (Bernard Schwartz), but not

[4] The tie to current investigations effectively precluded us from examining in any manner [illegible] Republican campaign, even though the Common Cause

sufficient information to constitute grounds to investigate a covered person (the President)? The allegations completely intertwine the activities of the two men; if it is appropriate to open an investigation relating to Schwartz, a preliminary inquiry should have been opened relating to the President.

B. DOJ Policy And The Decision As To Whether Further Investigation Is Warranted

The second separate, yet related, consideration is what effect our established rule of engagement ("leave no stone unturned") concerning information sufficient to constitute grounds to investigate potential campaign violations has upon the decision as to whether further investigation is warranted (See 28 U.S.C. § 592). That is, following a preliminary investigation, what is the proper standard to establish if further investigation is warranted. Here, the "leave no stone unturned" policy takes on a different but equally significant meaning. Under the ICA, the Department's written or established policies are grafted onto the Act and govern the determination as to whether further investigation is warranted. Again, under the rules of engagement established by the Department in the area of potential campaign finance violations, our publicly acknowledged "leave no stone unturned" policy is the controlling one. In the Report, we suggest that this policy must be considered in reaching a determination covering the need for further investigation.

I understand that our reading of the ICA is different from that which was articulated at the September 2 meeting and the net result is that you may still disagree with our position. However, it is important to me that our position be properly characterized.

Very truly yours,

CHARLES G. LA BELLA
United States Attorney

MEMORANDUM

TO: The Deputy Attorney General

FROM: Bob Litt

RE: Vice President Gore

DATE: September 16, 1998

I agree with your assessment, in your short note, of the Feigin/LaBella analysis of the Gore independent counsel issue. But that memorandum had nothing to do with my conclusion that we should commence a preliminary investigation into this matter. Here are my reasons:

1. I have been influenced by Jim Robinson's memorandum of August 25, in which he discussed his view of the appropriate steps to be taken in deciding *whether* to commence a preliminary investigation, and in the actual *conduct* of such an investigation. When the Department is deciding whether to commence a preliminary investigation, we are limited by statute, I believe, to analyzing two questions:

- Is the information sufficient to constitute grounds to *investigate* whether a covered person *may have* violated federal law?
- Is the information specific and from a credible source?

While I believe that the Department can conduct a certain amount of investigation during the 30-day period to assist in answering these questions, I also believe that we should be careful to avoid engaging in too much fact-finding during that period, given the limited nature of the inquiry we are to be conducting.

2. In this case, the Vice President told the Department, during the earlier preliminary investigation, that he believed he was soliciting soft money rather than hard money. In support of that, he told us that, at the time he made the telephone calls, he believed that the media fund was entirely funded with soft money, and that he understood that the hard money limit was $2000.

The 30-day review was triggered by a document indicating that at a November 1995 meeting attended by the Vice President, the participants may have discussed the fact that the media fund was paid for in part with hard money, and that the hard money limit was in fact $20,000. During the course of the investigation, we identified and interviewed a person who acknowledged that in fact he had discussed these matters at the meeting.

3. I believe that this constitutes "specific information from a credible source" that is "sufficient grounds to investigate" whether the Vice President "may have" lied to us. The



statement of a person without apparent reason to lie, corroborated by notes taken by an aide to the Vice President, form a basis for concluding that the Vice President did know what he claimed he did not know – or certainly for investigating whether he may have.

I understand that these facts are not dispositive, either of the Vice President's knowledge in 1995 or of his knowledge when he made the statements in 1997, for many of the reasons set forth in the Public Integrity Section's memorandum. These include the lapse of time, the difficulty in determining whether the information was actually heard and retained by the Vice President, and the apparent lack of motive to falsify. But I view these as defenses, not as sufficient grounds to foreclose even an investigation. It is not uncommon for us to bring a perjury case where the defendant's statements are contradicted by documents that were sent to him, or statements at a meeting he attended, and for the defendant to claim that he did not read the document or pay attention during the meeting.

Were I the prosecutor in charge of this matter, I might well decline the matter after an investigation, based on the inferences to be drawn from the facts set forth above. But for us to decline even to investigate this matter based on these inferences seems to me inconsistent with the Independent Counsel Act. Rather, these types of conclusions are more properly drawn, if at all, during the course of a preliminary investigation. Moreover, during a preliminary investigation we will be free to consider Departmental policies and the Vice President's state of mind when he was interviewed in 1997.

4. This incident, like others with which we are familiar, highlights the difficulty of dealing with false statement cases under the Act. To require a preliminary investigation we need nothing more than evidence suggesting that a statement made by a covered person (under circumstances which implicate federal criminal jurisdiction) was inaccurate – since we are precluded from considering state of mind in determining whether to commence a preliminary investigation. Given the number of statements covered persons make to Congress and to federal officers, I am afraid that this low threshold will have us tripping over the need for preliminary investigations.

5. Finally, of course, my analysis of this matter was no more influenced by politics or the press than any of my other analyses of independent counsel issues. I try to determine what the law requires and recommend that cause of action. I would, however, appreciate your providing a copy of your memo to Orrin Hatch on my behalf.

U. S. Department of Justice

Washington, D.C. 20530

SEP 18 1998

EXHIBIT 42

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

SUBJECT: DNC Ads ICA Preliminary Investigation: Investigative Plan

This is a preliminary investigation under the Independent Counsel Act to determine whether President Clinton or others may have violated federal criminal law in connection with the production and dissemination of broadcast media advertisements financed by the Democratic National Committee during the 1996 election cycle. The Attorney General must reach her decision in this matter no later than December 7, 1998.

On August 7, 1998, the Department of Justice received the Federal Election Commission's Audit Division Exit Conference Memorandum on the Clinton/Gore '96 Primary Committee, Inc., and Audit Division Exit Conference Memorandum on the Clinton/Gore '96 General Committee, Inc., and Clinton/Gore '96 General Election Legal and Accounting Compliance Fund (collectively "ECMs"). In those memoranda, the Audit Division concluded, albeit preliminarily, that certain expenditures by the Democratic National Committee for broadcast media advertisements during the 1996 election cycle constituted in-kind contributions by the DNC to the Clinton/Gore '96 Primary Committee or the Clinton/Gore General Committee, in violation of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-455, the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031 et seq. (PPMPAA), and the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 et seq. (PECFA). At the time the ECMs were received, the Department was also aware, based on both the ECMs and other information gathered by the Campaign Financing Task Force investigation, that specific and credible information suggested

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that the President personally participated in the conception and implementation of this DNC ad project.[1] Based on this information, and inasmuch as a knowing and willful violation of the FECA, PPMPAA, or the PECFA could constitute a criminal offense, the Attorney General triggered this preliminary investigation. The applicable standard under the ICA is whether with respect to these allegations "there are reasonable grounds to believe further investigation is warranted," 28 U.S.C. § 592(c)(1)(A), thus requiring the appointment of an Independent Counsel.[2]

The potential criminal violations here all revolve around the question whether the costs of the ads, under the particular legal standards of the FECA, PPMPAA, and PECFA are attributable to the campaign committee, such that these costs constituted "contributions" by the party to the candidates and "expenditures" by the candidates themselves (as distinguished from party expenditures not made "in connection with" the candidates' campaign). If these advertising expenditures were, in fact, contributions to and expenditures by the campaign committee, they were undoubtedly unlawful, in that they would have violated, among other things, the FECA's limits on contributions to candidates by political parties and the PPMPAA's and PECFA's expenditure limits on publicly financed elections. Any such violations made knowingly and willfully would potentially be criminal.

Whether the costs of these ads are in fact attributable to the campaign committee turns on the content of the ads and whether the ads refer to a clearly identified candidate and contain an electioneering message. In its memoranda, the Audit Division determined, among other things, that these ads are attributable to the campaign committee, as they referred to a clearly identified candidate and contained an electioneering message, and hence did violate the FECA, PPMPAA, and PECFA. Given that determination, the primary focus of the preliminary

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[1] During the course of this preliminary investigation, we will also seek to determine whether the Vice President was similarly involved in the DNC ad project. We note that the President and the Vice President submitted a letter agreement and certification to the FEC promising that in exchange for public funds, they will comply with the relevant federal election campaign laws and regulations.

[2] The FEC conducted a similar audit involving similar expenditures by the Republican National Committee during the 1996 election cycle. We are seeking to obtain a copy of that report as it may contain relevant background information and a discussion of the legal and factual issues involved in the Clinton/Gore audit and this preliminary investigation.

investigation will be to consider the "knowing and willful" intent element of a potential criminal offense. In the context of this Independent Counsel inquiry, we will seek to ascertain whether there is clear and convincing evidence that President Clinton, Vice President Gore, or others lacked the state of mind necessary to make out an offense. As a secondary matter, we will also examine the ECMs' conclusions that the ads contained an electioneering message.

Willfulness in the context of a criminal statute means an intentional violation of a known legal duty. In the context of these potential offenses, we see two (somewhat overlapping) aspects to that inquiry, one relating to the clarity of the law at the time of the conduct in question and the other relating to any advice of counsel the President or others may have received. With respect to the first aspect of this inquiry, we will examine the legal standards in place at the time the ads were run and whether there was a known legal standard one could have intentionally violated. Criminal Division Attorneys [redacted] will research this.

Attorney's initials

With respect to the advice of counsel aspect of this inquiry, we anticipate doing the following. First, we will contact the President's counsel to secure any necessary attorney-client privilege waivers and invite counsel to make a written submission to the Department on the advice of counsel issue. We have already contacted the President's personal attorney, David Kendall, about this. Second, we will seek the voluntary production of all relevant documents concerning the conception and implementation of the ad project, funding decisions, legal issues, etc., in the possession or control of the President, White House, DNC, Clinton/Gore Committees, and all other participants in the DNC ad project. We will also seek certifications from those entities and persons that all relevant documents have been produced. Third, we will interview Clinton/Gore and DNC counsel Lyn Utrecht, Eric Kleinfeld, Joseph Sandler, Judah Best, Paul Palmer, and any other counsel regarding when and how the media fund project first arose, what counsel was told and by whom, how the ads were reviewed, what counsel's advice was, etc. Fourth, to the extent not already fully covered by previous interviews and Senate depositions (the FBI is gathering all relevant 302s/depositions now) we will interview Harold Ickes, Richard Morris, and the various media consultants about the conception and implementation of the media fund project, what they represented to counsel, what counsel advised them, any discussions they had with the President, and the nature and extent of the President's involvement in the project. Fifth, if necessary because open questions remain, we will seek to interview the President, the Vice President, and Harold Ickes regarding their roles in the media project and the advice they received. Our goal is to have all the relevant preexisting 302s and depositions organized and analyzed by the middle of next week

and to start the interviews no later than the week of October 5th.

This willfulness inquiry will necessarily require some limited review of the actual ads themselves for the following reason. No matter how murky the definition of "electioneering message" may be, persons of common intelligence would have no difficulty understanding that certain ads contain an "electioneering message" (such as an ad containing words of express advocacy; or, as in the Colorado GOP case, an ad explicitly linking an attack on the record of an opposing candidate with an ongoing Senate campaign). We may accordingly need to confirm that the DNC ads at issue here did not fall into this area of what would constitute a clear electioneering message, because if they did, the ads would have violated a known legal standard irrespective of whether the precise boundary has been clearly defined, and any advice of counsel to the contrary that the President may have received would not have been objectively reasonable. We are still considering whether we should conduct any such review of the ads ourselves or hire an expert to conduct this analysis.

In addition, even aside from the willfulness inquiry, it may be necessary to conduct our own review of the ads to assure ourselves that there is an adequate factual basis supporting the auditors' conclusions that the ads contained an electioneering message, particularly in light of the tentative and preliminary nature of the auditors' conclusions. Similarly, we will seek to confirm the auditors' conclusions that many of the ads purchased by the DNC were similar -- if not identical -- to those purchased by the committee.

To further explore the basis for the ECMs' findings that the ads contained electioneering messages, we will ask the FEC for some guidance as to how authoritative the conclusions of auditors are and whether any deference is owed to auditors' opinions both in general terms and in the context of these specific audits. We will also undertake immediately to look at the methodology used by the auditors to determine the basis for their findings. The results of this investigation will help determine the precise nature of any content review of the ads to be conducted.

In their memoranda, the auditors also suggest that irrespective of the content of the ads, the costs incurred by the DNC constitute contributions to and expenditures by the campaign committee because the media program was coordinated with the committee. Irrespective of whether that is an accurate statement of the law, the issue of coordination and control is relevant to other aspects of this inquiry. In any event, as a <u>factual</u> matter, the facts surrounding the amount of control and coordination exercised by the President and his campaign committee over the DNC media project have already been fairly

substantially fleshed out, though there may be some limited additional investigation to do, including obtaining and analyzing the scripts and polls containing the President's handwriting. The FBI is in the process of assembling all the existing factual material (302s, deposition testimony, etc.) addressing the coordination/control issue.[3]

Finally, the other substantial issue that we anticipate addressing during this preliminary investigation is whether "further investigation is warranted" in light of the "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations" (particularly under the DOJ/FEC MOU). This legal issue will include a discussion of the circumstances under which the DOJ would proceed to investigate and prosecute a matter without deferring to the FEC. [redacted] will be handling the research and writing of this. In addition, the Attorney General has written to the FEC to request its view as to (1) whether it agrees with its Audit Division that there may have been violations of the FECA, PPMPAA, and PECFA by the campaign committee, (2) whether any such potential violations were "significant and substantial," and (3) whether it believes any such violations were knowing and willful. [redacted] is also in informal contact with the FEC on these issues and hopes to received some guidance within six weeks.

We anticipate having our investigation completed, including a draft memorandum setting forth our conclusions, on November 6, 1998, which will enable us to have a final written recommendation to the Attorney General no later than November 20, 1998. As the investigation progresses, we will be having weekly Tuesday meetings in the AAG's conference room at 10:30 to discuss our progress, and to the extent we can move up our deadlines, we will.

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[3] In its memorandum, the Audit Division noted, at pages 16-17, that polling data were shared by the DNC and the campaign committees as evidence of coordination between the committees and the DNC. The auditors expressly noted, at footnote 15, that FEC regulations provide for the sharing of poll results and the allocation of costs related thereto, and did not otherwise take issue with these expenditures. We will nevertheless consider the facts surrounding the funding of the polling as they pertain to the issue of coordination and control.

U. S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

September 25, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek LJR [redacted] attorney's initials
Chief
Public Integrity Section
Criminal Division

David A. Vicinanzo DAV [redacted]
Supervising Attorney
Campaign Financing Task Force

SUBJECT: DNC and RNC Political Ads during the 1996 Election Cycle: Investigative Plans

DNC Ads ICA Preliminary Investigation

This is a preliminary investigation under the Independent Counsel Act to determine whether President Clinton or others may have violated federal criminal law in connection with the production and dissemination of broadcast media advertisements financed by the Democratic National Committee during the 1996 election cycle. The Attorney General must reach her decision in this matter no later than December 7, 1998.

On August 7, 1998, the Department of Justice received the Federal Election Commission's Audit Division Exit Conference Memorandum on the Clinton/Gore '96 Primary Committee, Inc., and Audit Division Exit Conference Memorandum on the Clinton/Gore '96 General Committee, Inc., and Clinton/Gore '96 General Election Legal and Accounting Compliance Fund (collectively "ECMs"). In those memoranda, the Audit Division concluded, albeit preliminarily, that certain expenditures by the Democratic National Committee for broadcast media advertisements during the 1996 election cycle constituted in-kind contributions by the DNC to the Clinton/Gore '96 Primary Committee or the Clinton/Gore General Committee, in violation of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-455, the Presidential Primary

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Matching Payment Account Act, 26 U.S.C. § 9031 et seq. (PPMPAA), and the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 et seq. (PECFA). At the time the ECMs were received, the Department was also aware, based on both the ECMs and other information gathered by the Campaign Financing Task Force investigation, that specific and credible information suggested that the President personally participated in the conception and implementation of this DNC ad project.[1] Based on this information, and inasmuch as a knowing and willful violation of the FECA, PPMPAA, or the PECFA could constitute a criminal offense, the Attorney General triggered this preliminary investigation. The applicable standard under the ICA is whether with respect to these allegations "there are reasonable grounds to believe further investigation is warranted," 28 U.S.C. § 592(c)(1)(A), thus requiring the appointment of an Independent Counsel.

The potential criminal violations here all revolve around the question whether the costs of the ads, under the particular legal standards of the FECA, PPMPAA, and PECFA are attributable to the campaign committee, such that these costs constituted "contributions" by the party to the candidates and "expenditures" by the candidates themselves (as distinguished from party expenditures not made "in connection with" the candidates' campaign). If these advertising expenditures were, in fact, contributions to and expenditures by the campaign committee, they were undoubtedly unlawful, in that they would have violated, among other things, the FECA's limits on contributions to candidates by political parties and the PPMPAA's and PECFA's expenditure limits on publicly financed elections. Any such violations made knowingly and willfully would potentially be criminal.

Whether the costs of these ads are in fact attributable to the campaign committee turns on the content of the ads, and specifically whether the ads referred to a clearly identified candidate and contained an electioneering message. In its memoranda, the Audit Division determined, among other things, that these ads are attributable to the campaign committee, as they referred to a clearly identified candidate and contained an electioneering message, and hence did violate the FECA, PPMPAA, and PECFA. Given that determination, the primary focus of the preliminary investigation will be to consider the "knowing and

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[1] During the course of this preliminary investigation, we will also seek to determine whether the Vice President was similarly involved in the DNC ad project. We note that the President and the Vice President submitted a letter agreement and certification to the FEC promising that in exchange for public funds, they will comply with the relevant federal election campaign laws and regulations.

willful" intent element of a potential criminal offense. In the context of this Independent Counsel inquiry, we will seek to ascertain whether there is clear and convincing evidence that President Clinton, Vice President Gore, or others lacked the state of mind necessary to make out an offense. As a secondary matter, we may also have to examine the ECMs' conclusions that the ads contained an electioneering message.

Willfulness in the context of a criminal statute means an intentional violation of a known legal duty. In the context of these potential offenses, we see two (somewhat overlapping) aspects to that inquiry, one relating to the clarity of the law at the time of the conduct in question and the other relating to any advice of counsel the President or others may have received. With respect to the first aspect of this inquiry, we will examine the legal standards in place at the time the ads were run and whether there was a known legal standard one could have intentionally violated. Criminal Division Attorneys [redacted] will research this.

With respect to the advice of counsel aspect of this inquiry, we anticipate doing the following. First, we will contact the President's and the Vice President's counsel to secure any necessary attorney-client privilege waivers and invite counsel to make a written submission to the Department on the advice of counsel issue. We have already contacted the President's and Vice President's personal attorneys about this, and we have asked them to make any written submissions no later than October 30, 1998. Second, we will seek the voluntary production of all relevant documents concerning the conception and implementation of the ad project, funding decisions, legal issues, etc., in the possession or control of the President, the Vice President, White House, DNC, Clinton/Gore Committees, and any other participants in the DNC ad project; we will also seek certifications from those entities and persons that all relevant documents have been produced. We have sent out the appropriate letters requesting that any documents be produced no later than October 2, 1998. Third, we will interview Clinton/Gore and DNC counsel Lyn Utrecht, Eric Kleinfeld, Joseph Sandler, Judah Best, Paul Palmer, and any other counsel regarding when and how the media fund project first arose, what counsel was told and by whom, how the ads were reviewed, what counsel's advice was, etc. We expect to commence these interviews the week of October 5, 1998. Fourth, to the extent not already fully covered by previous interviews and Senate depositions (the FBI is gathering all relevant 302s/depositions now) we will interview Harold Ickes, Richard Morris, and the various media consultants about the conception and implementation of the media fund project, what they represented to counsel, what counsel advised them, any discussions they had with the President, and the nature and extent of the President's involvement in the project. Fifth, if necessary because open questions remain, we will seek to

interview the President and the Vice President regarding their roles in the media project and the advice they received.

This willfulness inquiry may necessarily require some limited review of the actual ads themselves for the following reason. No matter how murky the definition of "electioneering message" may be, persons of common intelligence would have no difficulty understanding that certain ads contain an "electioneering message" (such as an ad containing words of express advocacy; or, as in the Colorado GOP case, an ad explicitly linking an attack on the record of an opposing candidate with an ongoing Senate campaign). We may accordingly need to confirm that the DNC ads at issue here did not fall into this area of what would constitute a clear electioneering message, because if they did, the ads would have violated a known legal standard irrespective of whether the precise boundary has been clearly defined, and any advice of counsel to the contrary that the President or Vice President may have received would not have been objectively reasonable. We are still considering whether we should conduct any such review of the ads ourselves or hire an expert to conduct this analysis. In addition, even aside from the willfulness inquiry, it may be necessary to conduct our own review of the ads to assure ourselves that there is an adequate factual basis supporting the auditors' conclusions that the ads contained an electioneering message, particularly in light of the tentative and preliminary nature of the auditors' conclusions.

To further explore the basis for the ECMs' findings that the ads contained electioneering messages, we asked the FEC if we could interview the auditors or other FEC personnel for some guidance as to how authoritative the conclusions of auditors are, whether any deference is owed to auditors' opinions both in general terms and in the context of these specific audits, and what methodology was used by the auditors in making their findings. FEC counsel has informed us that they will not allow the auditors or other FEC personnel to be interviewed. We will further explore whether there are written audit protocols we might review.

In their memoranda, the auditors suggest that irrespective of the content of the ads, the costs incurred by the DNC constitute contributions to and expenditures by the campaign committee because the media program was coordinated with the committee. Irrespective of whether that is an accurate statement of the law, the issue of coordination and control is relevant to other aspects of this inquiry. As a factual matter, the facts surrounding the amount of control and coordination exercised by the President and his campaign committee over the DNC media project have been fairly substantially fleshed out, though there may be some limited additional investigation to do, including obtaining and analyzing the scripts and polls containing the

President's handwriting. The FBI is in the process of assembling all the existing factual material (302s, deposition testimony, etc.) addressing the coordination/control issue.[2]

Finally, the other substantial issue that we anticipate addressing during this preliminary investigation is whether "further investigation is warranted" in light of the "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations" (particularly under the DOJ/FEC MOU). This legal issue will include a discussion of the circumstances under which the DOJ would proceed to investigate and prosecute a matter without deferring to the FEC. [redacted] will be handling the research and writing of this. In addition, the Attorney General has written to the FEC to request its view as to (1) whether it agrees with its Audit Division that there may have been violations of the FECA, PPMPAA, and PECFA by the campaign committee, (2) whether any such potential violations were "significant and substantial," and (3) whether it believes any such violations were knowing and willful. [redacted] is also in informal contact with the FEC on these issues and hopes to received some guidance within six weeks.

We anticipate having our investigation completed, including a draft memorandum setting forth our conclusions, on November 6, 1998, which will enable us to have a final written recommendation to the Attorney General no later than November 20, 1998. As the investigation progresses, we will be having weekly Tuesday meetings in the AAG's conference room at 10:30 to discuss our progress, and to the extent we can move up our deadlines, we will.

RNC Ads Investigation

As we noted in our prior investigative plan on the DNC ads, we were seeking to obtain from the FEC copies of the Audit Division's Exit Conference Memoranda on the Dole for President and Dole/Kemp '96 committees, which we understood reached similar conclusions on the legality of issue ads run by the RNC during the 1996 election cycle. We have now received those memoranda, which similarly find that the costs of certain RNC ads should be

[2] In its memorandum, the Audit Division noted, at pages 16-17, that polling data were shared by the DNC and the campaign committees as evidence of coordination between the committees and the DNC. The auditors expressly noted, at footnote 15, that FEC regulations provide for the sharing of poll results and the allocation of costs related thereto, and did not otherwise take issue with these expenditures. We will nevertheless consider the facts surrounding the funding of the polling as they pertain to the issue of coordination and control.

attributed to Dole for President and Dole/Kemp '96, and that those costs would constitute unlawful contributions to and expenditures by the committees in violation of the FECA, PPMPAA, and PECFA. We have accordingly opened a criminal investigation.

The issues in the RNC investigation are largely identical to the issues in the DNC investigation. The principal difference between the two investigations is that the facts of the RNC media project have not been fleshed out as much.

Rule 6E [redacted] the RNC, the campaign committees, and the media consultants to assemble the relevant documents and determine who the principal participants were. As soon as possible, we will start interviewing persons associated with each of these entities to determine the genesis and implementation of the media project to determine who was controlling it, whether the ads should be attributed to the campaign committee as referring to a clearly identified candidate and containing an electioneering message, and whether any violation of the FECA, PPMPAA, or PECFA was knowing and willful. We will schedule these interviews as soon as possible after receiving and analyzing the relevant documentary evidence.

Rule 6E [redacted] We will reach out to RNC and campaign committee counsel and invite their written submissions as well. As suggested in the Audit Division memoranda, we anticipate an advice of counsel defense here.

U.S. Department of Justice

Criminal Division

Deputy Assistant Attorney General *Washington, DC 20530-0001*

November 6, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General

FROM: Kevin V. Di Gregory
Deputy Assistant Attorney General

SUBJECT: Interview of Campaign Finance Task Force Lawyers and Agents

During the week of August 31, 1998, and on Tuesday, September 8, 1998, I conducted a series of interviews with the lawyers and agents who were involved in the interviews of the Vice President of the United States, Albert A. Gore. The Vice President was questioned on November 11, 1997 and again on August 8, 1998 about fund raising telephone calls he made from his White House office on behalf of the Democratic National Committee (DNC). Of particular interest was whether the Vice President asked any prospective donor to make a "hard money" contribution (one intended to influence a federal election), or whether he intended to solicit non-federal, or,"soft" money.

My task was to specifically inquire of those attending the interviews of the Vice President on November 11, 1997, and August 8, 1998, what perceptions and observations they made and could recall of the Vice President's demeanor during those interviews. It was thought that this information might assist in determining the credibility of the Vice President. A total of four lawyers and three agents were interviewed. Only one of the lawyers and one of the agents participated in both interviews of the Vice President.

Conclusion

For the most part, the collective recollections of the Justice Department lawyers and investigators present for the interviews of Vice President Gore portray the Vice President as a

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Public Integrity Section

EXHIBIT
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calm and cooperative witness. Although those who participated in both interviews of the Vice President observed that he was less good-natured, smiled less, and engaged in less small talk in the August, 1998 session than the November, 1997 meeting, the differences in his overall demeanor in the second interview may have resulted from a variety of causes ranging from annoyance at being interviewed a second time to guilty knowledge, and, therefore, are of no evidentiary value. In some instances, the specifically noted changes in his demeanor during each interview were perceived and interpreted differently by people who were in a position to see and hear the same things in the same settings and contexts. The totality of the information gathered during the interviews I conducted lead to the conclusion that no inferences can be drawn from the Vice President's observable behavior during the interviews of November 11, 1997 and August 6, 1998 which would be helpful in determining whether he was truthful.

cc: Lee Radek
David Vicinanzo

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

THROUGH: Mark M Richard
Deputy Assistant Attorney General
Criminal Division

FROM: [redacted]
Special Assistant to the Supervising Attorney
Campaign Finance Task Force

DATE: November 13, 1998

Re: 90-day Vice President Preliminary Investigation

INTRODUCTION AND BACKGROUND

Earlier this year, after a 90-day preliminary inquiry, a determination was made not to appoint an Independent Counsel to investigate allegations that the Vice President had violated 18 U.S.C. § 607. That decision was based on a determination that even though some of the money raised by the Vice President from the White House had gone into hard money accounts, he had not known this would be the case. His belief that he was raising only soft money for the Media Fund provided clear and convincing evidence that he lacked the requisite intent to commit the violation. In addition, even had he known about the hard money component, Departmental policy precluded filing charges under § 607 unless there were aggravating circumstances. None were found to be present.

Subsequent to the close of the investigation, the White House provided the Task Force with an agenda, annotated by David Strauss, the Vice President's Deputy Chief of Staff, of a meeting held in the White House Map Room on November 21, 1995. The Vice President was in attendance. It was known from the first preliminary investigation that both the Media Fund and the General Operating Budget had been slated for discussion. We had no reason to believe however that there had been any mention of the fact that hard money went into the Media Fund.

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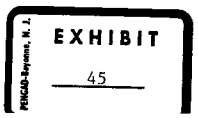
[1]This document has been discussed and shared with the FBI Task Force management. They concur in its conclusions. The memorandum has also been fully shared and discussed with Dave Vicinanzo. His analysis of the facts and law leads him to a different recommendation from that set forth in this memo.



The Vice President had said he had no recollection of this being raised at the November 21 meeting. The Strauss annotations suggest, however, that it was. The pertinent notations, written near the Media Fund on the agenda, are: "65% soft/35% hard"; "hard limit "$20K"; and "corporate or anything over $20K from an individual" (the latter being a definition of soft money).

In light of the Strauss annotations, the investigation was reopened to determine whether, during the § 607 inquiry, the Vice President gave false statements concerning his knowledge that the Media Fund involved, in part, hard money. The referenced statements were made during an interview on Nov. 11, 1997 when the Vice President said that he believed that the Media Fund was comprised solely of soft money and that he did not know there was a $20,000 hard money limit. We have developed no evidence relevant to the $20,000 limit other than the Strauss notation. Therefore there is no basis for consideration of an Independent Counsel on that prong of the Vice President's statement. The only question to be considered is whether there is reason to believe the Vice President was not truthful in his assertion that he believed the Media Fund was composed solely of soft money.[2]

It is very difficult to glean from the statute -- or its legislative history -- the proper standard for moving from a 90-day inquiry to appointment (or not) of an Independent Counsel. The analysis used in prior cases was summarized in the memorandum recommending the appointment of an Independent Counsel in the Herman matter:

> The standard for declining to move forward to seek appointment of an independent counsel at the end of a preliminary investigation is high.
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> * * *
>
> [W]e have only declined to proceed based on three conclusions.... The first is that the alleged facts, if proven, either do not violate federal criminal law or would not be prosecuted based on established Departmental policy. False statements are ... frequently prosecuted. The second is that the preliminary investigation firmly established that the alleged conduct did not occur.
>
> Finally, we have declined to recommend appointment of an independent counsel in cases where we have not conclusively disproven the allegations, but where all known witnesses have cooperated and their stories have been consistent and

[2] Necessarily intertwined with this, however, is the question of whether the Vice President violated 18 U.S.C .§ 607 itself: if there is reason to believe that he may have made a false statement, this could present the type of "aggravating circumstance" which warrants reconsideration of the § 607 issue. However, since the false statement is the driving issue (i.e., without it, there is no reason to reconsider the earlier § 607 determination), I deal with it first.

corroborated, all requested documents have been provided, and there is no substantial evidence to support the allegations.

(Herman memo, p. 3, emphasis in original.)

The reluctant recommendation for the appointment of an Independent Counsel to investigate Secretary Herman was made despite the fact that she had cooperated completely and seemed credible to the interviewers (id., p.6) whereas none of the investigators or prosecutors found her sole accuser, Laurent Yene, to be particularly credible. Indeed, the agents found him "patently not credible" (id., p.8). However other witnesses, both central and peripheral to the investigation, had declined to cooperate, provided limited cooperation, or spoke only through attorney proffers. Because of inherent inconsistencies among these witnesses, further investigation was deemed warranted.

THE CURRENT PRELIMINARY EXAMINATION

1. Section 1001. Adopting the analysis set forth above as it relates to the § 1001 inquiry, the first prong is immediately satisfied. As with Herman, we have an allegation that there has been a false statement. That would, if true, violate federal criminal law. The second prong requires a determination as to whether we have firmly established that the alleged violation did not occur. We cannot reach that conclusion here, although, as noted in Herman " it is as difficult to disprove allegations such as these as it is to prove them." (Herman memo, p.3)

In considering the second prong within the confines of the Independent Counsel Act,[3] two questions need be answered. First, is there specific information from a credible source that the Vice President's testimony was false in any material respect?[4] If so, is there clear and convincing evidence that the Vice-President did not make the false statement wilfully?

The evidence we now have, some of it newly developed during this phase of the investigation, and some of it developed earlier but given new context now that we have a more complete picture of the events, supports an argument that the Vice President *had to have known*

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[3] The third prong is not applicable in this case because, as is set forth more fully below, all known witnesses have not cooperated. More importantly, among those who did, their stories have not been consistent.

[4] Falsity is the only question here. Materiality is not at issue. The standard for materiality simply is whether the statement was "capable of influencing" the proceeding. If the Vice President knew that hard money was a component of the Media Fund, this would have been relevant to a determination on whether he had violated § 607. It was therefore material to the investigation at hand.

that hard money was a component of the Media Fund. At the very least, there is enough circumstantial evidence to make prosecution a plausible -- albeit unlikely -- option. The Vice President was, after all an "integral" part of fund-raising on behalf of the DNC and Clinton/Gore campaign. It was therefore important to keep him informed of the financial status of the DNC. (Ickes interview of Aug. 14, 1998) The November 21 meeting in the Map Room was one such effort. The agenda that day called for a discussion of the DNC budget and the DNC Media Fund.

Leon Panetta, then the Chief of Staff, was in attendance. Although he could not recall the specific percentages, he remembered a discussion of the hard/soft money components of the Media Fund and that certain types of events were needed to raise each component. Panetta had the impression that the Vice President was following along with the discussion. Indeed, he recalled the Vice President "walking through the papers" as the meeting moved along and also asking questions and making comments.[5] Panetta went on to say that he recalls several Map Room meetings at which the Vice President was present where the hard/soft breakdown of the Media Fund was discussed. (Panetta Interview of 8/18/98)[6]

Brad Marshall, Chief Financial Officer of the DNC, recalled answering a question regarding the split of 65% non-federal and 35% federal for Media Fund at the Nov. 21 meeting. He also recalls that at that meeting there were general discussions regarding the Media campaign, including how much soft and hard money was needed to fund the ads. There was discussion also about the expected influx of direct mail contributions and the fact that such contributions are hard money. The talk then turned to using direct mail contributions to fund the "hard cash" needed for the media campaign. (Marshall Interview of 8/24/98)

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[5] Interestingly, we have photographs of the Vice President looking at the documents during the meeting. The handouts for the Nov. 21, 1995 meeting have some information which suggests a hard money component to the Media Fund, although it is by no means clear. Thus, a listing of the Media checking accounts discloses $6,000 in federal and $35,000 in non-federal deposits. (Attachment 1). At another point the DNC funding lists a direct mail component and then goes on to note that one of the uses of DNC money is the Media Fund (Attachment 2). We know from his Nov. 11, 1997 interview that the Vice President understood that direct mail money was all hard.

[6] Jim Neal has advised Peter Ainsworth that his conversation with Leon Panetta was less conclusive. According to Neal, Panetta recalls only that hard and soft money was discussed in the context of the overall budget and the Media Fund was part of that budget. Neal's assertion of Panetta's recollection simply does not square with the two interviews he gave directly -- and without benefit of counsel -- to the FBI. (The memorandum opposing appointment of an Independent Counsel in this case suggests inconsistencies in Panetta's recollections to the government investigators and implies that his memory was changing and unreliable. As I read his 302s however, they seem not different from so many others upon which we rely: memory often needs to be coaxed and is refreshed by document review.)

Brian Bailey, Assistant to the then Deputy Chief of Staff Erskine Bowles, recalls the Media Fund being discussed on Nov. 21 and that the hard/soft split was a topic. He was not certain however whether the hard/soft split was in connection with the Media Fund or general DNC fundraising.

Richard Sullivan, DNC Finance Director, cannot recall specifically a conversation in the Vice President's presence about the hard money element of the Media Fund, but says the existence of this was well known. He does recall a meeting in May or June 1996 at which the Vice President was present where they discussed in great detail the hard/soft components of the DNC budget, including the Media Fund. (Sullivan Interview of 9/17/98)

The Vice President claims to have no specific recollection of anything discussed at the November 21 meeting. Vouching for Strauss' truthfulness and diligence, however, the Vice President said he would not dispute that the notes reflect what was said at the meeting; he simply did not hear the statements documented in Strauss' notes. He opined that his lack of memory might be due to the fact that the subject matter was of no interest to him. He also volunteered that it was not uncommon for him to arrive late, to leave a meeting to go to the restroom, to be diverted by side discussions with the President, or to be called out of a meeting to attend some other matter. He did not know if any of these things occurred on Nov. 21.

No one interviewed had a specific recollection of the Vice President leaving the meeting at any point. However, records we recently received show that the President was called away for a three-minute phone call about the Bosnia peace negotiations. There is no indication one way or another whether the Vice President left with him. Whether he did or not, however, Ickes claims that if there were any interruption involving the President or Vice President, the meeting would have been "suspended" until they returned. (Ickes interview, 8/18/98)

The Vice President denies reading the handouts at the November 21 meeting or any of the memoranda prepared by Ickes (before or after the meeting) which covered hard money/soft money components of the Media Fund. Some of these memos were short, pointed, and graphic. For example, a one and a half page memorandum on Oct. 20, 1995 went to the Vice President and referred to the "ratio of hard/soft for the media purchases" (Attachment 3). A Dec. 20, 1995 memo (Attachment 4) talks about "Direct mail that goes into the media fund. At its conclusion, it states that the DNC needs to borrow an "additional 3.0 million. Approximately $1.0 million, or 35%, of this money must be hard." (emphasis in original) A two and a quarter page Feb. 22, 1996 memo begins with the per centage and amount of federal and non-federal money for media buys (Attachment 5).[7]

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[7] As part of our 90-day investigation into the Common Cause allegations we have received various other memos sent to the Vice President concerning issues of moment related to the reelection. They were not reviewed with an eye toward the hard/soft Media Fund split. We are going through the documents with that in mind now and will be able to give an accurate

Of course there are arguably benign explanations for much of this.[8] Although the notations on Strauss' agenda are supported by the recollections of Panetta and Marshall, not everyone present at the meetings remembers the discussions. Indeed, the vast majority of those present have no recollection of the hard/soft discussion. Whether this is because it did not occur, or, more likely, because different people remember different portions of the meeting depending on their interests and responsibilities, is not our job to determine at this point. We are tasked only with deciding whether we can firmly establish that the Vice President did not know about the hard money component and therefore did not make a false statement when he denied that knowledge. We cannot conclude that because there is specific information from credible sources that suggests he did know -- the contemporaneous notes and subsequent recollections of some of the participants, along with the Ickes memos and Sullivan's statements that the topic was discussed with the Vice President at other meetings. Moreover, there is not clear and convincing evidence that he lacked the intent to make a false statement.[9] As to that, we have only the Vice President's claim that he did not recollect and his attorney's statement (after a limited waiver of attorney-client privilege) that the Vice President told him he did not recollect. Neither of these self-serving statements is clear and convincing evidence of lack of intent in light of the evidence which would suggest that the Vice President would have known.[10]

Beyond the evidence outlined above, there is also pertinent information we had at the time we closed our original § 607 investigation. This includes the Vice President's knowledge that a Clinton/Gore (hard money) credit card was used for some of the calls, the notation on one

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description of their contents by Monday.

[8] Ickes offered one such explanation when he opined during his interview that the Strauss notes were Strauss' personal musings. However, this speculation is refuted by Strauss himself who says that it was his practice to make notes of the events and statements at meetings.

[9] I agree with Public Integrity that the clear and convincing evidence of lack of intent merges with the wilfulness element of § 1001 so that the analyses really are of one piece. Nevertheless, I have viewed this in the traditional manner of specific information from credible sources and then clear and convincing evidence of lack of intent as was done in the Babbitt § 1001 analysis.

[10] Clear and convincing is a standard somewhere between beyond a reasonable doubt and preponderance. See, Santosky II v. Kramer, 455 U.S. 745, 756 (1982). It requires that the entire body of evidence "place in the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable'". Colorado v. New Mexico, 467 U.S. 310, 316 (1984).

of the call sheets that the person "has contributed no federal money this year",[11] the notation on another about the "legal limit" (there is none for soft money), and a reference on yet a third that "soft money is permitted". In addition, the Vice President stated at his press conference immediately after the § 607 story broke, that he had asked for "lawful contributions to the campaign". These facts, which were deemed insufficient before, are by themselves not compelling. For example, the word "campaign" is not a bright line demarcation between hard and soft money. In a press conference addressed to the laity, the Vice President could well use the word simply because it is the language of the people. Similarly, the notations may simply suggest, as was concluded when the first § 607 investigation was closed, that he believed this was all soft money. On the other hand, the notations on the call sheets could indicate that some of the donors had reached their legal hard money limit or that they were reluctant to give more hard money and so were told that this could be a soft contribution (i.e., not that it *necessarily* was soft money). Although this is the less likely alternative (given that only one of the donors (Noah Liff) directly mentioned hard money during his phone call with the Vice President), either theory is plausible.

Of course whether or not the Vice President actually asked for hard money is not dispositive of the question as to whether he knew about the hard money component. Since the Media Fund needed soft money more than hard at that time, asking for soft money doesn't establish much of anything one way or the other. We simply cannot "firmly establish" (the prong two standard) that the Vice President did not know about the hard money component and did not falsely deny that knowledge. In the face of specific information suggesting that he did know, we do not have clear and convincing evidence of lack of intent. To find clear and convincing evidence of lack of intent, one would have to accept at face value the Vice President's assertions that he had not read memos addressed to him, had not been attentive at a meeting he attended, and did not see a hard money notation on a call sheet because it was written *after* he had handed in the sheet. All this is possible, but not clearly and convincingly so. As in Babbitt, the controversy surrounding the underlying incident provided a political and personal motive for the Vice President to minimize his role. (Babbitt memo, p.30).[12]

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[11] The Vice President said in November 1997 that this must have been written after he used the call sheet because he has no recollection of such a notation.

[12] One argument which has been advanced to show lack of intent is that had the Vice President known that some of the contributions were put in a hard money fund unbeknownst to the contributor, he would have understood that this could place the contributor in a terrible predicament. The contributor unknowingly might have violated the hard money limit. No one who understood this would allow the patrons of the party to be so jeopardized. Therefore, the argument goes, the Vice President must have been ignorant about the hard money component to the Media Fund. This conclusion does not follow however. The argument establishes only that the Vice President did not know about the $20,000 skimming scheme; it says nothing as to whether he knew there was a hard money component to the media fund.

As always, one is struck by the fact that the underlying issue, i.e., the alleged § 607 violation, is so trivial and patently unworthy of prosecution. But that cannot be a factor in the analysis at this point. Given the information we have, we cannot firmly establish that the Vice President did not know that there was a hard money component to the Media Fund. It is certainly possible, some might say likely, but firmly established? The case is, admittedly, circumstantial. But that does not mean it cannot be made and that someone looking at it might not choose to do so. In this respect the case is reminiscent of the Babbitt inquiry, wherein the recommendation in favor of an Independent Counsel was based in part on the conclusion that it is not our role to exercise prosecutorial discretion once it is clear that a legally sufficient violation is potentially provable. (Babbitt memo, p. 29) There, as here, there is no reasonable likelihood that continuing the preliminary investigation would lead to information that would allow us to conclude for purposes of the Independent Counsel Act that the information establishing the potential falsity of the testimony is not specific or credible enough to at least warrant further investigation by an independent counsel. (id., p. 23)[13]

2. § 607. As in Babbitt, the recommendation of referral on the false statement necessarily warrants referral also of the underlying issue, i.e., the potential § 607 violation. In both cases the issues are "inextricably intertwined". Moreover, it is no longer clear, as it appeared to be when the original declination was made, that established Departmental policy would preclude prosecution in this case. The apparent false statement, although made long after the questionable phone calls, may be the type of aggravating circumstance that some prosecutors

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A second point raised as evidence of lack of intent is that the Vice President did not *have* to say that he thought there was no hard money component to the Media Fund. It was enough to avoid prosecution under § 607 that he believed he was raising soft money. This is so. But a reading of the Vice President's Nov. 1997 FBI 302 shows that his whole defense was that he thought the Media Fund was entirely soft money. This was not an afterthought to a statement about the solicitations in this case. Moreover, the fact that he might have said more than he needed to (presumably in order to solidify his contention) does not mean that his statement is not false. It is possible that he was "piling on".

[13] This case is not like the declination made in Spring 1997 on another matter involving a false statement before Congress. In that investigation the testifier had been recused from the matter about which he misspoke; the persons briefing him had admittedly (though unintentionally) misled him; and the Congress already had been briefed on the true facts so there would be no reason knowingly to testify differently. Moreover, although he too claimed that he had not read briefing papers prepared for him, there was support for this in the fact that he apparently is an inveterate margin marker and had stopped making notations on the documents many pages before the relevant information. Therefore, there was corroboration for his statement that he had not read the full document. In our case, we have only the Vice President's statement that the documents were placed in his Inbox and later removed without his ever having looked at them.

would consider warrants prosecution.

The § 607 question gets a bit more impetus from another matter which came to our attention during this preliminary investigation. An allegation concerning the Vice President surfaced as an outgrowth of an investigation being handled in the Southern District of New York. During the course of a proffer being made in New York by Ken Smith, a former vice-president of A.J. Contracting Company, a New York City construction firm, Smith made reference to a fundraising call by Vice President Gore. According to Smith, he had been in attendance at a meeting of company vice-presidents, when a call from Vice President Gore came through to Charles Uribe, the CEO of A.J. Contracting. Though Smith could not place a date on the call, he said that when Uribe got off the phone he mentioned that Gore was seeking money for the campaign and that it was needed to get matching funds. (This indicates that the call was likely placed before the Democratic convention at the close of August 1996.) Smith claims that Uribe then did what he had done often in the past: hit up company executives for the money and then reimburse them. Smith claimed that everyone present understood that the money to be donated was for Clinton/Gore.[14]

The evidence we have amassed so far does not much support Smith's claims, although we have found hard money donations to the DNC in August 1996 of $5,000 each by Uribe, Pradeep Desai and Ken Smith, all of whom were executives at A.J. Contracting. In addition, Integral Contracting, an A.J. subsidiary, made a $10,000 soft money contribution at the same time. In forwarding these monies to Peter Knight, Uribe references a call from the Vice President in "late Spring" as the motivating factor for the payments. The joinder of hard and soft contributions, and the uncertainty as to when the Vice President's solicitation was made, leave Smith's allegations quite suspect. However, many of the key people, including Pradeep Desai, Charles Uribe, Betty Ahern (Uribe's secretary) and Mary Dolan (who first took the Vice President's call and later typed the letter forwarding the checks to Peter Knight), have declined to be interviewed. As in Herman, these investigative difficulties may well have no relationship whatsoever to the covered person, but are more likely grounded in concern for personal criminal exposure (Herman memo, pp. 4-5). Nonetheless, in Herman these circumstances argued in favor of appointment of an Independent Counsel. Here, as there, the reluctant witnesses may need subpoenas and/or plea bargains, to be forthcoming. While the possibility of a § 607 violation based on the Uribe incident seems very unlikely, under the Herman standard it should not be foreclosed at this time.[15]

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[14] A second allegation, based on an assertion of a hard money solicitation to Nicholas Allard, was brought to our attention at approximately the same time as the Uribe matter. I agree with the analysis in Public Integrity's memo that there is simply nothing to support this allegation and it warrants no further investigation.

[15] Should further investigation put more flesh on the Uribe allegations, this could impact not only the § 607 allegation but also the § 1001. We know from the call sheets that the Vice

CONCLUSION

It is with the greatest reluctance that I recommend the appointment of an Independent Counsel. I do so because I think the statute compels it, not because I think this is a case which would ever be deemed worthy of prosecution. But mindful that that is not the standard, there are too many leaps of faith which would have to be made here to establish firmly that the alleged violation did not occur. It is a circumstantial case to be sure, but circumstantial cases are often filed. The § 607 allegation I think goes also, though more for context than substance.

President was soliciting Uribe for the Media Fund. If in fact he was requesting hard money (which the facts now certainly do not establish although some hard money was donated), then he would have known that hard money was a component of the Media Fund.

Recommendation to Seek Appointment of an Independent Counsel to Investigate Allegations against the Vice President of The United States

I. Introduction

In its memorandum to Assistant Attorney General James K. Robinson, the Public Integrity Section recommended against the appointment of an Independent Counsel based upon its conclusion that there is insubstantial evidence that the Vice President was aware of the hard money component to the media campaign, and therefore was unable to make a false statement when he denied that awareness. We disagree. We believe that the evidence - memoranda on the topic, witness statements of those who participated with the Vice President in meetings on the topic, and notations to some of the solicitation "callsheets" - is sufficient to support a finding that the Vice President knew that "hard" money was a component of the media fund, and that his denial of that awareness was false.

II. Relevant Memoranda on the Media Fund

Described below are thirteen memos deemed relevant to the knowledge of the Vice President. These memos, either directed to the VP, or "carbon copied" to him, detail discussions of "hard" money in relation to the media fund.

- 8/14/95 - Addresses issues relating, either directly or indirectly, to the 1996 Re-elect campaign which need to be focused on shortly after Labor Day. The issues include: Political Calendar; Electoral Map; Relationship between the White House and the DNC. "The DNC will pay for August 1995 MEDICARE spot time buy. Legally the funds paid by the DNC must be 60% hard or federal and 40% soft".

- 10/20/95 - The document summarizes a meeting regarding the DNC 1995 operation and media budgets held on 20 October. "The DNC has secured a 7 million dollar line of credit, of which 4 million is hard and 3 million is soft. Since the approximate ratio of hard & soft of the media purchases to date is app 40%/60% the $4.0 loan of hard dollars will cover the hard part of the 10 million for media".

- 11/20/95 - Self explanatory 23 October 1995 memorandum to Ickes from Don Fowler, et al., describing the source of funds for the calendar 1995 DNC operating budget and media fund. The attached document describes the total amount of money spent on the media fund thus far as being $3,400,000, which includes a breakdown of $2,400,000 coming from the operating budget and $1 Million in "federal" dollars being



borrowed.

- 11/28/95 - Document summarizes a meeting between Ickes, DNC, and White House officials regarding an assessment of the DNC's financial situation. "Thus if additional monies are to be spent for media beginning Monday 4 December (air time has been paid for media through Thursday 30 November), the DNC will either have to raise additional monies ("new money"), or borrow additional money from the bank (of the $7 million line of bank credit, the DNC has borrowed $5.5, leaving only $1.5 million (all hard) to borrow against)".

- 12/20/95 - 4 page document captioned "DNC 1995 Budget Analysis" which reflects the information presented at the DNC budget/fundraising meeting on 21 November 1995. Also attached is a 2 page document captioned "DNC 1995 Budget Analysis - 11/21/POTUS Presentation") which details the usage of hard/soft dollars as components of the media fund budget.

- 2/11/96 - Self-explanatory 21 February 1996 memorandum to Ickes from Brad Marshall, the DNC's Chief Financial Officer, attached to a February 22, 1996 cover memo to the Vice President. The media buys each week require the following mix of money, on the average: 34% federal; 31% non federal corporate; 35% non federal individual.

- 2/27/96 - This memorandum describes (1) the estimated spending by the DNC and C/G '96 Re-elect ("Re-elect") during calendar 1996 (which is only 10 months -- January - October); (2) a breakout of proposed expenditures for media, production and polling; (3) a breakout of costs involved in fundraising for the DNC; and (4) the impact the proposed media expenditures and fundraising costs will have on the Re-elect's pre-convention budget. Details the current required mix of funds for DNC Media as approximately 34% Federal; 31% nonfederal corporate; and 35% non-federal individual.

- 6/3/96 - Document summarizes the topics of discussion at the weekly DNC/fundraising meeting held on 5/30/96 to include estimates of the "federal" and "nonfederal" spending components of the media fund.

- 7/5/96 - Summary of our weekly DNC budget/fundraising meeting, held on 3 July, attended by Chairman Fowler, B.J. Thornberry, Doug Sosnik, Karen Hancox, David Strauss, Brad Marshall and Harold Ickes. Details projected fundraising for calendar 1996, describes a serious question of whether enough "federal" funds will be raised to permit spending full amount expected to be raised, and details estimated DNC budgets, including $36.8 Million for the Media Fund.

- 7/24/96 - Two documents, the first captioned "Federal dollars", dated 7/18/96. The second is captioned "Summary of DNC estimated expenditures Calendar 1996 (January - October); Fundraising to date (7/9/96); and federal dollars needed", dated 7/14/96. These documents reveal that in order to meet the $128 million fundraising goal for all DNC budgets for Calendar 1996 (January - October), including a Media Fund budget of $36.8 million, an additional $47 million needs to be raised from major donors during the less than 4 months period of 7/9/96 - 10/31/96, of which $28 million (59.5%) must be "federal" dollars.[1]

- 7/28/96 - Document (authored by Ickes) addresses a "very serious federal dollar deficit". Ickes also references his memorandum of 24 January, 1996, [we believe he meant July] "a copy of which is attached" (see synopsis of the 7/24/96 memorandum infra).

The Vice President has remarked in two interviews that he did not read these memos as he did not as a general rule read memos authored by Harold Ickes on DNC budgetary matters. He, nonetheless, said that "the subject matter of the memorandums would have already been discussed in his and the President's presence."

III. Key DNC Budget Meeting (11/21/95)

On 11/21/95 a meeting was held in the White House Map Room at which the President and the Vice President were present. The purpose of the meeting was to discuss the election budget and the media fund. Notes written by David Strauss on the prepared agenda and portions of the handouts indicate that a discussion regarding "hard" money occurred. This discussion is further substantiated by several persons in attendance at this meeting. Listed below are relevant excerpts from the interviews that were conducted:

David M. Strauss

Identified documents as packet from meeting he believed was held 11/21/95 in Map Room of the White House. Did not specifically recall meeting. Advised meeting addressed DNC fundraising issues and proposals. Identified handwritten notes on documents 070968-070973 as his own. Increase of media buys, $7 million DNC debt and a need to raise $8 million in 5 weeks were issues at meeting. Handwritten notes on documents were: "65% soft/35% hard corporate or anything over $20k from an individual. Identified handwriting as notes he took during the 11/21/95 meeting.

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[1] CAMPCON notes that this document was produced from the Office of the Vice President.

Strauss could not recall who made the comments noted during the meeting, nor the extent to which the issue of "hard" and "soft" money was discussed by those attending. Hard/soft ratios, fundraising events, and the DNC budget were normally discussed in these types of meetings. Not required to be familiar with such DNC finance issues to perform his duties and was writing down what was said during the meeting so he might better understand DNC finances. Strauss had no knowledge of "hard"/"soft" money ratios as it pertained to DNC Media Fund. Not aware if his notes "65% soft/35% hard corporate or anything over $20k from an individual", taken during the meeting specifically applied to the Media Fund.

Strauss was not aware if any "hard" contributions received by DNC were allocated to the DNC Media Fund, or if there was a "hard" money component of that fund. No recollection of ever discussing any hard/soft money issues or the DNC Media Fund with VPOTUS. Strauss had no reason to believe that VPOTUS or any other attendee of 11/21/95 meeting was not present for the duration of the meeting. Could not specifically recall whether the VPOTUS left at any time during the meeting. Based on his handwritten notes VPOTUS participated in discussions of 11/21/95 meeting. As a rule POTUS and VPOTUS participate the most during meetings of this nature. Strauss could not recall if VPOTUS participated in discussion noted by Strauss as "65% soft/35%hard corporate or anything over $20k from an individual."

Albert Arnold Gore, Jr.

VPOTUS has no independent recollection of whether or not his schedule for 11/21/95 was kept. Did recall DNC budget, sources of income such as direct mail campaign and media campaign. Advised he and POTUS were at this meeting to give guidance and participate in the discussions. Something was given out to everyone as sort of a "road map" for the meeting. VPOTUS does recall, in general terms, that the DNC budget was discussed, as well as their activities relating to commercials and the direct mail campaign. Does not know if he left meeting, while it was going on, for any reason. Unaware of the way DNC allocated hard and soft money. His impression at this time of the meeting was that they needed more soft money than hard money. Did not recall any discussion of 65% soft/35% hard or any of this relating to the media fund.

He was well aware that the DNC had hard/soft money components but it was his belief that only soft money was being used for media commercials. Did not recall statement "corporate or anything over $20k from an individual" at the meeting, nor any type of discussion concerning definition of soft money. As of 11/21/95 VPOTUS was not aware there was a hard money component to the DNC media fund. Knew DNC required and had, hard/soft money components. Also knew that some expenses were paid with hard money and some with soft money. It was his impression at the time of the this meeting that they needed more soft money than hard money. He was told they needed soft money, and they could spend

it to buy commercials. VPOTUS stated he was unaware of the way DNC allocated hard and soft money.

He was not well versed on DNC accounting methods and procedures. Attitude was that it was fine for them to handle the nuances of their accounting procedures. Pointed out that he had been a candidate for 16 years and thought he had a good understanding of hard/soft money. VPOTUS concluded that Strauss is a truthful and diligent person. If he took those notes at 11/21/95 meeting, the VPOTUS would not dispute that what is reflected in the notes was said at that meeting. VPOTUS simply did not hear those things said. VPOTUS observed that he drank a lot of iced tea during meetings, which could have necessitated a restroom break. Pointed out subject matter discussed at 11/21/95 meeting was of no interest to him, which could explain why Strauss heard it and he did not. Recalled that there were almost always interruptions at this type of meeting.

Brian Bailey

Beginning in Summer of '95, Bailey gradually became assistant to Ickes in order to "work the numbers" in regard to the DNC budget and upcoming election campaign. Recalled 11/21/95 meeting and prepared attachment to memo titled "DNC 1995 Budget Analysis." The purpose of the budget analysis was to "lay out" the overall DNC budget for the remainder of the year. The 11/21/95 meeting addressed DNC's borrowing capacity, debt and expenditures. Bailey recalled that DNC Media Fund was an important topic of discussion during the meeting. Discussions included increasing the DNC's media budget and possible options of meeting the projected shortfalls of money. Bailey was not particularly familiar with the DNC Media Fund and did not recall any specific discussion regarding how the Media Fund impacted on the overall budget of the DNC.

Present at entire meeting and did not recall anyone dismissing themselves including the POTUS and VPOTUS. Recalls individuals discussing "hard" and "soft" money at the 11/21/95 meeting and advised "65 and 35 seems to be right". Bailey could not remember which attendees discussed "hard" and "soft" money. Bailey opined the "hard" and "soft" money may have been presented in one of possibly three contexts: First as it applied to the Media Fund, which consisted of $10 million split 65% soft and 35% hard. Second, the total amount of money DNC had consisted of 65% soft and 35% hard. Finally, DNC would raise money at a rate of 65% soft and 35% hard. Upon further review of the budget analysis, Bailey eliminated his second explanation.

Bailey recalled Media Fund was discussed during the meeting. Did not recall VPOTUS asking any questions or participating in any specific discussion during meeting. He did not recall any discussion of "hard" and "soft" money as it applied to the DNC Media Fund or fundraising phone calls made by VPOTUS.

Leon Panetta (8/12/98)[2]

Although Panetta could not specifically recall the 11/21/95 meeting in the Map Room of the WH, he did recall attending several meetings in the Map Room where DNC budget issues were discussed. There was a discussion at this meeting of the hard/soft components of the media fund, and about the types of events needed to raise each component. Additionally, Panetta recalled private talks with Ickes about this subject. It is also possible that the topic was discussed at other meetings. He recalled legalistic discussions at this 11/21/95 meeting and other similar meetings, concerning the breakdown of hard/soft money as it applied to the media fund, and the amount of each that needed to be raised. Concerning the DNC splitting or allocating contributions, recalls in general terms discussions of how much had to be raised and that so much of it was hard and so much soft. He could not recall any specific conversations relating this (a DNC practice of splitting contributions) to the media fund.

Leon Panetta (8/18/98)

11/21/95 meeting was 1 of 3 meetings held in the Map Room to discuss DNC budget. Hard/Soft money breakdown of media fund discuss at all 3 meetings. There was always a discussion and examination of the overall DNC budget and, at a minimum, a reference to the hard/soft breakdown of the Media Fund. Recalls the VPOTUS being there for all these discussions as part of gearing up for the re-election campaign. Meetings were structured around making presentations to POTUS and VPOTUS. Both were provided with whatever documents were being discussed and both always had something to say. POTUS AND VPOTUS would comment on what was being presented to them. Media Fund was focus of 11/21/95 meeting and the purpose was to make sure POTUS and VPOTUS were aware of what was going on with the Media Fund.

The discussions at the meeting pertained to the media fund, and the acquisition of funds to pay for the media advertisements. Panetta's attention was drawn to the DNC `95 Budget Analysis (EOP 070968), specifically the handwritten note, "65% soft/35% hard." He could not recall anyone making this specific statement at the 11/21/95 meeting. There was a discussion of the hard and soft components of the media fund. They discussed how the hard/soft breakdown applied to the media fund, and how much of each kind of

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[2] Panetta was interviewed twice after a difference of opinion developed between agents and prosecutors over precisely what he said in his first interview regarding the "hard/soft" components to the media fund. While prosecutors suggest that Panetta's recollection on this topic evolved over a series of interviews; the interviewing agents maintain that he spoke consistently, and unambiguously, on this topic throughout both interviews.

money needed to be raised for Media Fund. They also discussed the differences between hard/soft money at 11/21/95 meeting. Panetta believed he probably knew the least concerning the particulars of what was being discussed.

Sensed everyone in the room knew what was being discussed concerning hard/soft limits and breakdowns. Recalled having the impression that both POTUS and VPOTUS were following along with the discussion. Recalled them "walking through the papers" as the meeting moved along and also asking questions and making comments. Fundraising discussion focused on the need to involve POTUS and VPOTUS because of the large amount of money they needed to raise. Panetta could not recall if POTUS or VPOTUS left the meeting on 11/21/95 for any reason. He was not sure if the meeting would have been stopped if either one did leave the meeting, but emphasized the purpose of the meeting was to "make sure they knew what the hell was going on."

Bradley Marshall

Chief Financial Officer, DNC. Attended 11/21/95 DNC budget meeting. Meeting purpose: briefing POTUS, VPOTUS & WH Principals on DNC budget. Made comments during the meeting in response to general questions raised by other attendees regarding the DNC media campaign. Marshall could not recall which attendees asked questions. Marshall answered a question regarding the DNC general budget and the "spending side" of the DNC media campaign, primarily as it related to federal and non-federal "splits." In answering the question, Marshall clarified how much of the media campaign was comprised of federal money or a federal component. Marshall specifically responded that the DNC media campaign was comprised of "35% federal 65% non-federal.

Marshall provided a "one sentence" answer that the "Media Fund" was averaging "35% federal 65% non-federal. Recalled general discussion regarding the Media Campaign including how much the DNC had spent to date, how much "hard" money was needed and how much "soft" money was needed to fund the media campaign. Recalled there was a discussion regarding federal component of the Media Fund. At time of meeting, DNC had a $1.8 million "hard" line of credit to fund the shortfalls in fundraising for the media campaign. Discussion regarding how much money was needed to finance media campaign. The DNC's borrowing capacity which could be used along with the DNC direct mail contributions to fund the "hard cash" needed for the media campaign.

Direct mail contributions would generate "hard" money and that this "hard" money could be used for Media Fund. In meeting DNC preferred not to use direct mail contributions to fund the federal money component of the Media Fund. Preferred to use their federal line of credit for that purpose. Recalled more than one attendee of the meeting participating in this discussion of whether the DNC should use direct mail contributions or utilize their line of credit to fund federal component of the Media Fund.

At 11/21/95 meeting it was pointed out that the DNC's direct mail contributions were "hard" contributions. Could not imagine anyone attending meetings considering direct mail contributions anything but federal or "hard" money.

It was decided during the meeting to raise the additional money needed as noted in the option "b" of document EOP 070969. DNC had enough federal money for media campaign. Borrowing of federal money was intended to be drawn on the lines of credit from "facilities in place." POTUS did not want to borrow money needed to meet the shortfalls, or not increase the already established lines of credit. He felt "relieved" during meeting to hear President's position on not increasing the line of credit. Marshall could not recall if the topics of discussion regarding "hard" money component of the Media Fund were discussed at any other meeting attended by POTUS and VPOTUS. He characterized 11/21/95 meeting as briefing for the POTUS, VPOTUS and other WH principals. Marshall could not recall specific comments or level of participation by the VPOTUS. He recalled the POTUS did participate in the discussions of the meeting.

IV. Evidence of the VPOTUS Chief of Staff's Knowledge:

On or shortly before 9/12/95, Lyn Utrecht, while preparing for a meeting that date with the DNC General Counsel and the media consultants involved in the issue ad campaign, drafted a memo outlining the law of issue-advocacy. This draft, a copy of which is attached, explicitly and repeatedly discusses the "hard" or "federal" money component of issue ads. Although Utrecht prepared the draft only so that she and Sandler could discuss the advice they intended to impart to the media consultants during the 9/12 meeting, she ultimately furnished it to at least Morris among the consultants, and to Jack Quinn by facsimile on 9/15/95. In sending a copy to Quinn, Utrecht referenced a telephone call from Quinn the previous evening, a call which Utrecht described to the Task Force as a late-night inquiry from a White House meeting (Utrecht heard the President in the background) in which Quinn sought to confirm the nature of the legal advice Utrecht had earlier furnished the media consultants (the date of the late-night White House meeting is in dispute as there is a Morris agenda for 9/13, and Quinn does not recall an instance of two consecutive evening residence meetings - it is likely Quinn's call occurred on 9/13 or 9/14, with a possible error in Utrecht's stated 9/15 transmittal date).

As part of a Media Fund investigative interview, Quinn did not dispute having received the draft memo, but purported not to have read it. On 11/17/98, he was re-interviewed with an emphasis on what, if anything, he discussed with the Vice President. Quinn indicated he wanted to make sure Utrecht was being consulted on "issue ad" matters. When she sent him the memo via facsimile, he was not interested in the details. Quinn did not recall this specific memo nor does he recall telling the VPOTUS about this memo. He advised as a normal course, he would not have provided this much detail to the VPOTUS.

V. Vice President Participation in Wednesday (Residence) Meetings

Various witnesses place the first Wednesday evening residence meeting in February or March 1995 (the earliest Morris written agenda we possess is dated 4/27/95). The meetings continued, on roughly a weekly basis, through the 1996 election (some witnesses, including the President and Doug Sosnik, have advised that they continue as regular political meetings to this day). The last Morris agenda we possess is dated 8/20/96.

Two of the Morris agendas (copies attached), dated 9/7/95 and 9/13/95, reference/suggest a "hard" money component to the DNC issue ads: The 9/7 agenda, in addressing how an "additional $33 million" for DNC ads can be raised, states "all soft money (enough mail to cover hard proportion)." The 9/13 agenda, when proposing $10 million in DNC issue ad expenditures from that date through 11/15/95, states "do it through state parties so only need 40% hard money." This second statement appears to refer to the use of Democratic state committees as conduits for ad money from the DNC to the media consultants, although such use would have actually allowed a more favorable hard/soft expenditure ratio than the 60/40 (or 65/35 during 1996) ratio enjoyed by the DNC. As noted below, there is some dispute as to whether the "9/13" meeting actually occurred on 9/14.

These agendas do not reflect the actual participants at these two meetings (nor do virtually any other of the agendas, which were retrieved by Morris at the conclusion of the meetings, reflect such participants). Both are redacted in part as unresponsive (although careful review of all of the agendas do not give rise to hope that unredacted versions of these two would likely reflect whether Vice President Gore was in attendance).

Numerous witnesses before the Task Force and the U.S. Senate have stated, and published accounts of the residence meetings by authors such as Bob Woodward and Dick Morris corroborate, that the Vice President attended residence meetings and participated in discussions concerning the DNC's issue ad campaign. The Vice President himself concedes this involvement. While Mr. Gore did not specifically advise the Task Force of the dates, or frequency, of his attendance, other key witnesses did. The President stated that the Vice President was "in most of the meetings...whenever he was in town." Ron Klain, a residence meeting attendee who became the Vice President's Chief of Staff in November 1995, when Jack Quinn left that job to become White House Counsel, stated that the Vice President "was usually there." Former White House Chief of Staff Leon Panetta similarly advised that the Vice President was usually in attendance. And Morris, who testified before the Senate that the Vice President was markedly less involved in furnishing input regarding proposed

issue ads during the residence meetings than the President, nonetheless testified that Mr. Gore "was at all of the strategy meetings [residence meetings]." During Quinn's interview of 11/27/98, he advised it was the VPOTUS practice to attend residence meetings when he was in town or did not have a scheduled function. Quinn thought these meetings were detailed on the VPOTUS schedule, however, when shown two VPOTUS schedules without the notation, he could provide no explanation. He then suggested that perhaps the residence meetings were not annotated on the VPOTUS schedule. However, it should be noted that some VPOTUS schedule sheets do reflect meetings.

VI. Call Sheets Which bear Relevant Notations

Attached are three of the several call sheets prepared for the Vice President for his use in soliciting contributions to the media fund. One bears a notation that the potential donor had donated "no federal" money that year[3], while the others note that "soft money is permitted," and corporate-soft money is "ok". One could reasonably argue that references to soft money as "permitted", and "ok", (as opposed to soft money exclusively) suggests an alternative, i.e., federal hard money, as a means of contributing to the Media Fund. Further, why would there be any reference to a potential donor's federal money contribution history for the year, unless federal money was permitted?

VII. Relevant Statements by the VPOTUS

In reviewing the VPOTUS Press Briefing dated March 3, 1997 statements are made by him which imply that the Vice President was raising money for the re-election campaign. Listed below are a few excerpts in his own words which describe his role in fundraising for the campaign.

- First of all, to state the obvious, I was a candidate for reelection in the campaign. I worked very hard for the reelection of President Clinton and myself. I'm very proud that I was able to be effective in helping to reelect President Clinton, and I was very proud that I was able to also, as part of that effort, to help raise campaign funds.

- Everything that I did I understood to be lawful. I attended campaign--traditional campaign fundraising events as a principal speaker in many locations all around the country. The vast majority of the campaign funds that I've been given credit for raising came in that forum. I also made telephone calls to ask people to host events and to ask people to make lawful contributions to the campaign.

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[3] The Vice President, when interviewed, said that this particular hand-written notation was not on the call sheet when he used it to make his telephone call soliciting for the Media Fund.

- My counsel advises me that there is no controlling legal authority or case that says that there was any violation of law whatsoever in the manner in which I asked people to contribute to our re-election campaign.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

NOV 17 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section

SUBJECT: "Clear and Convincing Evidence"

You have requested that I provide you with an analysis of section 592(A)(2)(B)(ii) of the Independent Counsel Act, which provides:

> The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

Specifically, you have inquired as to whether the determination of "clear and convincing evidence" is one made by the Attorney General as the finder of fact, or whether an objective standard, similar to the one that might be utilized by a reviewing court, governs the determination. The question was suggested to you, you told us, because you observed that rather than stating the standard in terms of the Attorney General determining that there is clear and convincing evidence, rather the Act states that the standard is whether there is such evidence. This raised the question whether the standard was intended to describe an objective fact or a subjective determination.

It is our view that the standard itself, the language of the Act, the legislative history, and consistent historical practice support a conclusion that the question of whether there exists

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clear and convincing evidence of lack of intent is one that is entrusted to the Attorney General as the finder of fact.

The implications of the issue. While it may initially seem that there would be little difference in result, in fact the results in a given case might be quite different. As will be discussed in more detail below, if the Attorney General is operating as the finder of fact with respect to whether there is clear and convincing evidence of lack of intent, reaching a personal subjective conclusion, the standard is whether the entire body of evidence provides "the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316 (1984)(citations omitted). The trier of fact should be left with "a firm belief or conviction as to the truth of the allegations sought to be established[.]" Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).

On the other hand, if the standard is an objective test of the sort that a reviewing court might apply, the result might be quite different in a given case. Great deference is given to the fact finder by reviewing bodies. A court reviewing a jury's finding of a lack of clear and convincing evidence would reject the jury's conclusion only if it concluded that no "reasonable person" could have concluded that the standard of proof had not been met.[1] See, e.g., Creative Demos v. Walmart Stores, 142 F.3d 367, 371 (7th Cir. 1998) (evaluating the jury's award of punitive damages to determine whether a "reasonable trier of fact could find by clear and convincing evidence that the defendant acted [maliciously]").

Similarly, a court reviewing a judge's factual finding resting on a clear and convincing evidence standard applies a similarly demanding "clear error" standard. See, e.g., Gustafson, Inc. v. Intersystems Indus. Prods., 897 F.2d 508, 510 (Fed. Cir. 1990)(holding that willfulness determination in patent infringement suit must be proven by clear and convincing evidence and that this finding of fact is reviewable under the clearly erroneous standard). If rather than reaching her own assessment of the weight of the evidence, the Attorney General is to determine in a given case whether any reasonable person could disagree with a finding of no intent, or whether a person

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[1] Because of the peculiar reversal of the standard under the Independent Counsel Act -- the necessity of determining that something is not true based on clear and convincing evidence, rather than the more common requirement that a fact be affirmatively demonstrated by clear and convincing evidence -- it is difficult to avoid confusing double and triple negatives in analyzing the issue. We regret the resulting awkwardness in our discussion of the issue.

reaching such a conclusion necessarily is in clear error, the results in any case could clearly shift. This potential difference in result is perhaps most dramatic where assessments of witness credibility are required.

It is our conclusion, however, based on the language of the Act itself, the legislative history, and the Department's consistent historical practice in applying the Act, that the Attorney General is the factfinder in this situation. While the clear and convincing evidence standard is indeed a stringent one, it is in our view a determination that is entrusted under the Act to the Attorney General's judgment.

The Language of the Independent Counsel Act and its Legislative History. Perhaps the clearest indication that the Attorney General is intended to be a finder of fact rather than a reviewer of a determination is the fact that under the structure of the Act, there is no previous "determination." No one else under the structure of the Act plays any role until the Attorney General makes her initial determinations. Furthermore, the Act does not establish any factual presumptions that might substitute for a determination by a factfinder that factual prerequisites for proceeding under the Act have been made. Instead, the Act repeatedly speaks in terms of determinations being made by the Attorney General. These include, for example, determinations as to credibility, 28 U.S.C. § 591(d)(2); determinations as to conflict of interest, 28 U.S.C. § 591(c)(1); and determinations that there are reasonable grounds for further investigation, 28 U.S.C. § 592(b). Like the determination of clear and convincing evidence, all of these are subjective factual determinations, governed by established legal standards, that rest with the Attorney General as factfinder.[2] There is no hint in the language of the Act that unlike these other standards, the clear and convincing evidence finding is meant to be determined not by the established legal standard applicable to the

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[2] The effort to apply objective standards of the sort that a reviewing court might apply has created considerable confusion from time to time in attempting to discuss what these determinations require. For example, in discussing what our recommendation to the Attorney General ought to be with respect to her conclusion as to whether or not to seek appointment of an independent counsel, we have occasionally utilized, as analogy, whether the case would survive a rule 29 motion, or whether a "reasonable prosecutor" would pursue such a case. Both analogies are objective standards of the sort that a reviewing court would use; neither govern the Attorney General's subjective determinations as factfinder. The fact that such standards might help to clarify or organize a position should not be confused with a conclusion that they govern the Attorney General's determinations.

factfinder, but by another, higher standard such as that used by a reviewing court to inquire into a determination that has already been made by a finder of fact, whether judge or jury. For example, the Act does not say that the Attorney General is to determine whether any reasonable finder of fact could find a lack of clear and convincing evidence; rather, it states that she is to make a factual determination, and clear and convincing evidence is the standard she is to apply to that determination.

The legislative history of the standard offers additional support indicating that the standard was one that was meant to govern the Attorney General's own factual determinations, rather than to be a standard of the sort that a reviewing body might apply in the course of reviewing a determination that has already been reached. As in the Act itself, the legislative history contains no hint that the clear and convincing evidence standard was meant to play other than its traditional legal role as a evidentiary standard to be applied by the finder of fact, albeit a relatively stringent one. In a written explanation of the recommendation of the Senate Judiciary Committee that this standard be applied to determinations of intent, Senator Levin, the cosponsor of the 1987 Reauthorization Act, explained that this standard was chosen because it incorporates "a common legal standard which has a body of law interpreting its application." Cong. Rec. S14188 (daily ed. Oct. 13, 1987). That common legal standard, as is explained below, makes it clear that the phrase is used to describe a level or proof intended to govern the determinations of the finder of fact; nowhere to my knowledge has it been applied to a determination made by a reviewing body.

The Clear and Convincing Standard in the Law. The legal authority discussing the standard makes it clear that the standard is a subjective test, intended to be applied by the finder of fact. In case after case, it is described as a standard of proof intended to guide the determinations of the fact finder. See Santosky II v. Kramer, 455 U.S. 745 (1982) (holding clear and convincing standard "adequately conveys to the factfinder the level of subjective certainty about his factual conclusions" in parental rights termination proceeding); Addington v. Texas, 441 U.S. 418 (1979)("[T]he function of such a standard of proof ... is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.") The different standards of proof – such as "proof beyond a reasonable doubt," "preponderance of the evidence" and "clear and convincing evidence" – "communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions." In re Winship, 397 U.S. 358, 370(1970)(Harlan, J., concurring). As once evidence commentator has described it:

> [S]tandards like clear and convincing evidence (or preponderance of the evidence, or even proof beyond a reasonable doubt), are selected to govern a decision by a trier of fact, Judge or jury, who is expected to take credibility into account. The standard represents a confidence level, not an abstract measure of the quantity or quality of evidence presented in any case.

Saltzburg, 1 Federal Rules of Evidence Manual 332 (6th ed. 1994). As these authorities make clear, when there is a directive that a determination be made by clear and convincing evidence, as is the case with section 592((B)(ii), it is intended that this serve as a test by which a body of evidence is to be weighed by the finder of fact, to reach a subjective state of certainty about its conclusions. It is not a test that governs a reviewing body's determinations, and thus would not be used to describe an intent by Congress that the Attorney General apply an objective "abstract measure of the quantity or quality of evidence." Id.

Historical application of the Standard. We have never been faced before with a question as to whether the clear and convincing standard was one that was intended to guide the Attorney General in her subjective determinations as finder of fact, or was an objective test of the sort that might be applied by a reviewing court, and therefore there is no direct discussion of the question in previous recommendations. However, historical practice makes it clear, we believe, that in fact the determinations that were being made were by the Attorney General acting as factfinder, reaching subjective determinations about her own level of certainty. For example, she has found clear and convincing evidence even in the fact of substantial conflicting evidence, a determination that it seems would be impossible if she were applying the sort of test that a reviewing court would apply. See, In re George Tenet; In re Louis Freeh. She has also reached that conclusion in cases in which there was substantial disagreement among those advising her as to whether clear and convincing evidence existed, see, Tenet; if her standard was an objective one of the sort that a reviewing body would apply, the fact that presumably reasonable people had found a failure to meet the standard would seemingly dictate her conclusion.

In sum, we believe that the standard set out in the Independent Counsel Act is and was intended to be an adoption of the traditional legal standard of "clear and convincing evidence" as a direction as to the degree of confidence the Attorney General is to have in her factual conclusions under the Act. There is no basis in the language of the Act itself, the legislative history, the caselaw or historical precedents to suggest that the standard was intended to be an objective test of the sort a reviewing court might apply.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

NOV 17 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section

David Vicinanzo
Supervising Attorney
Campaign Financing Task Force

SUBJECT: Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States

Introduction

On August 26, 1998, the Attorney General initiated a preliminary investigation pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599, (the Act), to determine whether further investigation is warranted into the question of whether Vice President Albert Gore, Jr., a covered person under the Act, may have violated 18 U.S.C. § 1001 when he told attorneys and investigators last Fall that he did not know, at the time he made fundraising telephone calls from his West Wing Office, that the beneficiary of the solicitations, the media campaign run by the Democratic National Committee (DNC), was funded in part with federal money, and that he believed at the time of his telephone calls that federal money contributions to the DNC were limited to $2,000.

Many of the facts relating to this initial allegation were fully developed in the course of the investigation conducted during the initial inquiry. The Attorney General determined that a preliminary investigation was warranted to provide additional time and flexibility to explore all the evidence relating to the Vice President's understanding of these two issues. In addition, early on in our 90-day period, two additional related allegations

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were received that warranted additional inquiry. Specifically, one witness contacted the Federal Bureau of Investigation (FBI) with hearsay information that the Vice President, in a telephone solicitation to Nicholas Allard, may have asked for hard money contributions. Another witness provided information suggesting that during a telephone call received by Charles Uribe in his presence, the Vice President may have requested a federal money contribution. Because these additional allegations, if substantiated, may have created new questions requiring further exploration, we examined the specificity and credibility of these allegations during our preliminary investigation as well.

Upon a full review of all the facts relating to all three allegations and the applicable law, we have determined that there are no reasonable grounds to believe that further investigation of this matter is warranted. It is therefore our recommendation that an independent counsel not be appointed. If the Attorney General agrees, a proposed filing, which informs the court that an independent counsel is not necessary, is attached for her signature. In any event, the Attorney General must reach her decision in this matter no later than November 24, 1998.

As discussed and analyzed in detail in this memorandum, we reach the conclusion that the evidence that the Vice President's statement was false is so insubstantial that no further investigation is warranted. We also conclude that the two allegations relating to Charles Uribe and Nicolas Allard are not sufficiently credible and specific to warrant further investigation.

The Independent Counsel Act

The Independent Counsel Reauthorization Act of 1994 is designed to remove investigative and prosecutive decision making from the hands of the Department of Justice and to place it in the hands of an outside independent counsel at a very early stage in the criminal investigation of certain high-level executive branch officials, including the Vice President. Upon receipt of information concerning a covered person, the Act provides for a 30-day initial inquiry period during which the Attorney General must determine if she possesses sufficiently specific and credible information of the potential violation of a federal criminal law to trigger a preliminary investigation. 28 U.S.C. § 591(d)(2). The purpose of the preliminary investigation, which is limited to 90 days, is to determine whether further investigation is warranted; if so, the Attorney General must apply to the Special Division of the Court of Appeals for appointment of an independent counsel.

If the Attorney General determines that there are no reasonable grounds for further investigation, the Attorney General must file a Notification setting forth a summary of the information received and a summary of the results of the preliminary investigation. 28 U.S.C. § 592 (b)(2). When a

Notification is filed, the Court has no power to appoint an independent counsel with respect to the matters involved. 28 U.S.C. § 592(b)(1).

The Initial Allegation

In the Fall of 1997, the Public Integrity Section conducted a preliminary investigation into the question of whether the Vice President may have violated 18 U.S.C. § 607 when he made fundraising telephone calls from his White House office. On July 27, 1998, long after the conclusion of that investigation, the Vice President's counsel provided the Public Integrity Section with six pages of handwritten notes that on their face raised questions about two statements made by the Vice President during his interview with agents and attorneys investigating the section 607 matter. The suggestions raised by this document can only be understood within the context of the previous investigation.

The section 607 investigation: The section 607 investigation resulted in the Attorney General's conclusion that there were no grounds to seek appointment of an independent counsel for two independent reasons: first, the overwhelming weight of the evidence supported the Vice President's statement that he was soliciting soft money contributions, outside the scope of section 607's ban on political fundraising from the federal workplace, when he made the telephone calls, and two, established Departmental policy precluded prosecutions under section 607 in the absence of aggravating circumstances, such as coercion, that were absent there. Given this, the Attorney General decided that she need not resolve the substantial legal question of whether section 607 even applies to telephone calls from a federal office to a private citizen outside the federal workplace.

Statements made during the previous investigation: During the previous preliminary investigation, the Vice President's explanation was that when he made the fundraising calls, he was seeking large, so-called soft money contributions to the DNC. During the previous preliminary investigation, we therefore explored the question of whether there was any evidence that would tend to cast doubt on the veracity of that explanation. One central event that led up to the fundraising calls was a meeting held at the White House on November 21, 1995.

As part of our preliminary investigation, the Vice President, on November 11, 1997, was questioned about several documents, including memoranda, charts, and analyses, that are described in a Harold Ickes memorandum dated December 18, 1995, as having been "reviewed at the DNC budget and fundraising meeting on 21 November 1995 in the map room." As we set forth in our investigative findings near the end of the preliminary investigation, the documents deal generally with the DNC media fund and specifically with plans to raise several million dollars

for paid television ads through the end of 1995. Within this context, one of the documents, dated November 20, 1995, suggests fundraising phone calls by the "POTUS" and "VPOTUS" as an additional way to raise the media budget shortfall. The remaining pages make up four documents dealing with DNC media budgets and fundraising projections for the remainder of the year. The December 18 Ickes memorandum indicates that the President, Vice President, and David Strauss were among the attendees of the November 21, 1995 meeting where these documents were "reviewed".

The Vice President, when questioned about this set of documents and the November 21, 1995 meeting, stated that he did not recall a discussion at this or any other meeting about the DNC's specific need for both hard and soft money in late 1995 to keep the ads on the air. The Vice President said that he believed that the fundraising phone calls probably were discussed during the meeting. He also recalled that the general topic of the media fund budget being increased was raised and discussed. However, the Vice President recalled that he believed, at the time he made the calls, that the ads were paid for with soft or non-federal money, claiming that he was not aware that there was a hard money component to the media fund.

The Vice President stated that based on this erroneous belief, together with his equally erroneous belief that hard money contributions to the DNC were limited to $2,000, when he made telephone calls requesting large contributions to the DNC media fund, he necessarily subjectively believed that he was soliciting soft money contributions by the very nature of the request.[1] In fact, the ads were financed pursuant to a complex regulatory formula apportioning their cost between hard and soft money, and individual donors are permitted to contribute up to $20,000 to the DNC in hard money per calendar year, so long as their total hard money contributions to all donees do not exceed $25,000 per calendar year. When asked about portions of other Ickes memoranda, unrelated to the November meeting, that showed a hard money component to the media fund, the Vice President said that as a rule he did not read the Ickes memoranda on these topics.

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[1] As set out in our recommendation at the conclusion of the preliminary investigation in that matter, there was also substantial independent evidence confirming the Vice President's statements that he was in fact soliciting soft money. For example, many of the donors who were interviewed stated that it was their explicit understanding that they were being requested to make a soft money donation. In addition, in some conversations, it was specifically suggested by the Vice President that the contributions could come from corporate funds, which can only be soft money.

The recently produced documents: As noted above, the Vice President's counsel, Jim Neal, on July 27, 1998, contacted the Public Integrity Section to inform it that six pages had been recently discovered that appeared to relate to the November DNC budget meeting.[2] Specifically, the documents were copies of documents already in our possession, with the addition of handwritten notations made by David Strauss, the Vice President's former Deputy Chief of Staff. The documents are attached at Tab A.

One of the documents, entitled "DNC 1995 Budget Analysis", upon which Strauss took notes, set forth the current DNC budget, financial status including available loan capacity, and two options for funding an additional $3 million in media above and beyond the $10 million that had been designated for media in the 1995 budget. The document indicates that the DNC had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would need to be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the ads (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion. Consistent with this interpretation of pages one and two of the document -- that the hard portion of the media budget could be borrowed leaving the soft portion to be raised -- the "fundraising projections" set forth on page 3 show that all recent past and future fundraising events planned for the media fund were designed to raise soft, not hard, money.

While the document itself does not break down the media fund into hard and soft components, the placement of the Strauss notes on the document suggests that the hard money component to the media fund may, in fact, have been discussed at the November 21, 1995 meeting attended by the Vice President.[3] Specifically, Strauss's writing -- which notes "65% soft/35% hard" opposite the

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[2] All such documents were requested by us during the course of the preliminary investigation, but these documents were not produced at the time. Neal stated that he did not know why these documents were "missed" during the search for documents conducted last fall. The Campaign Financing Task Force is conducting an inquiry concerning the failure to produce these documents previously, but so far found no evidence to suggest that the failure to produce the documents was anything other than accidental.

[3] Before receiving the documents, we knew from previous Strauss interviews that he took notes during meetings and often used quotation marks to indicate verbatim statements. This background and the fact that several phrases appear in quotation marks immediately suggested to us that Strauss's notes may reflect things that were said during the November 21, 1995 meeting.

term "media fund" -- appears to reflect a phrase that may have been used at the meeting to describe the approximate proportions of hard and soft money used by the DNC to purchase television ads during this period.

The Strauss notes also include what may be a statement of the hard money limit for gifts to the DNC. Specifically, the note just below the "65%/35%" includes what appears to be an attempt to define soft money from the DNC's perspective as "corporate or anything over $20 k from an individual." In addition, while not clearly written, a second notation that appears to say "hard limit $20k" appears on page 2 of the "DNC budget analysis" document opposite the second option in the "Analysis" document.

Possible implications of the new documents: These new documents, then, raised some new questions concerning the Vice President's statements about his understanding of the DNC's efforts to fund the media campaign. The Strauss notes suggest that during the November 1995 meeting, both the fact that the hard money limit on donations to the DNC was $20,000, and that the media campaign was funded by a mix of hard and soft money may have been mentioned. Because the Vice President was present for at least a portion, if not all, of that meeting, these notes thus suggested the possibility that his subsequent statements that he believed at the time that hard money donations to the DNC were limited to $2,000 and that the media campaign was funded only by soft money may have been false.

For example, the "65% soft/35% hard" note, if it reflects something that was said at the meeting about the media fund, may suggest that the Vice President was told in the course of the meeting that this fund, for which he was helping to raise money in part through the fundraising calls, had a hard money component. Moreover, the entries that seem to relate to the individual hard money limit -- "corporate or anything over $20k from an individual" and "hard limit $20k" -- may indicate that the Vice President was told at the same meeting that individuals could give up to $20,000, not $2,000, in hard money per calendar year to the DNC.

Obviously, the Strauss notes offer only a very weak link in a substantial chain of required inferences before reaching a conclusion that the Vice President may have lied in his interview when he said that it was his understanding at the time he made his calls that the media campaign was funded by soft money and that hard money donations to the DNC were limited to $2,000, and standing alone clearly are not sufficient to support a conclusion that the Vice President was making a false statement. The difficulty in establishing that the Vice President was lying in 1997 when he stated what his beliefs were in 1995 about the details of campaign financing requirements is patent.

Nevertheless, we reexamined the circumstances of the November 1995 meeting to explore whether there might be sufficient evidence to support that chain of inferences to warrant further investigation. We specifically sought any information suggesting that the Vice President may in fact have heard and comprehended the facts noted by Strauss; such an inference would be supported, for example, by information that these facts were discussed in sufficient detail and focus at the meeting that many other attendees specifically recall them, or that the Vice President made comments or asked questions in the course of the discussion that would seem to reflect an active understanding of the details, or that the participants recall any affirmative discussion of a need to raise hard money for the media fund. We found no such evidence. Indeed, the range of impressions and vague misunderstandings about these matters among all the meeting attendees is striking, and virtually eliminates any possible inference that mere attendance at the meeting would have served to communicate an accurate understanding of the facts as reflected in the Strauss notes.

Facts

In an effort to determine whether the apparent disparity between what the Vice President told us he believed at the time he made the calls and what the Strauss notes indicate may have been said at a meeting he attended on these topics warrants further investigation, we interviewed the attendees of the meeting.[4] As a threshold matter, the evidence we gathered during these interviews does establish that the Vice President did attend a meeting on November 21, 1995, during which the DNC media fund was at least discussed.

While some of the meeting attendees had a vague recollection of some of the topics of discussion, only two, Leon Panetta and Bradley Marshall, were able to say that the use of hard money was discussed in connection with the media fund. Significantly, none of the attendees who did not have a working knowledge of the media campaign appear to have gained an understanding that the media fund required a mix of hard and soft money by attending the meeting. Moreover, neither Panetta, nor any of the other participants, recalls a mention of $20,000 as the hard money limit for donations to the DNC.

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[4] Thirteen of the 15 people identified as having attended the meeting have been interviewed. A fourteenth, George Stephanopolous, has testified under oath in a Senate deposition that he did not recall this meeting and, if he did attend, he would have left after five minutes. The remaining attendee, the President, has stated through his attorney that he has no recollection of the meeting and has no information on the Vice President's state of knowledge on the relevant topic.

Evidence that hard money was discussed in connection with the media campaign at the November 21, 1995 meeting: Two of the fifteen witnesses who attended the meeting recall a mention of hard money in connection with the media fund. A third, David Strauss, who authored the notes, confirmed that the notes reflect things said in the meeting but could offer no explanation on their meaning and no current recollection of what was said.

Deputy Chief of Staff for the Vice President during this period, David Strauss had no specific recall of the meeting held on Tuesday, November 21, 1995, in the Map Room at the White House.[5] He did confirm that the handwriting on the documents recently turned over is his. He also noted that, based on his habit and practice, he could say that the pages were part of a packet handed out during the meeting and the words noted in his handwriting were things said during the meeting that he recorded as they were said. Strauss said that he took notes during this and other meetings to assist him in his own role as "booking agent" or scheduler for the Vice President. The notes were not taken for the benefit of others and he does not believe that anyone else relied upon the notes that he took during the November DNC budget meeting.

Turning to the notes themselves, Strauss could not recall who might have uttered the words "65% soft/35% hard"; "corporate or anything over $20k from an individual"; or "hard money limit $20k" during the meeting. He was unable to provide an explanation about what each of the phrases might have meant within the context of the meeting. He did not recall the issue of "hard" and "soft" money discussed by those attending but noted that these issues were often discussed at DNC budget meetings. Strauss was also unable to say whether the words were used with regard to the media fund, the DNC's operating budget, or something else. Finally, he could not recall whether the Vice President participated in the discussion regarding these topics, whatever the context might have been.[6]

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[5] While the FBI's 302 at several points attributes information imparted by the witness to his recollection, Strauss repeatedly said during the interview that he had no recollection of the meeting. Thus, many of the statements set forth in the 302 that appear to provide information about this meeting in fact were the witness's inferences based in whole or in part on the documents, his notes on the documents, and his general knowledge of the way things worked both at the White House and DNC.

[6] Strauss concluded, based on his handwritten notes with quotation marks opposite "VP," that the Vice President participated in the portion of the meeting that dealt with fundraising issues. Like everything else about the meeting, though, Strauss could do no more than confirm that, based upon his note taking practices, he believed that the statements written on the page were made.

A second attendee, Leon Panetta, the President's Chief of Staff, recalls being at this and one or two other DNC budget meetings in 1995 also attended by the President and Vice President. Panetta admitted that these were not the types of meetings where he paid a lot of attention to details. However, he was able to confirm that the Ickes memoranda were the kind of material usually passed out and the subjects covered in the memoranda were the kind of topics upon which the discussion would be based.

While much of Panetta's recollection is hard to separate from his interpretation of the documents that Strauss took his notes on, he did say he recalls a discussion of how much would have to be raised both in hard and in soft dollars for the media fund during the meeting.[7] He has no recollection of whether it

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[7] Panetta was interviewed twice by telephone. In the first interview, he began by saying he had no specific recollection of the November meeting. Midway through the first interview, though, he stated that he recalled a discussion of the mixture of hard and soft money needed but believed it was within the context of the overall DNC budget, not the media fund. The FBI's 302 also attributes a recollection of a "discussion, at this meeting, of the hard/soft components of the media fund, and that certain types of events were needed to raise each component." Later, the 302 notes that Panetta recalled "in general terms, discussions of how much had to be raised, and that so much of it was hard and so much soft. He could not recall any specific conversations relating this to the media fund." When questions arose after the interview, a decision was made to ask the witness to clarify in a second interview.

By the second interview, Panetta firmly stated that the discussion of hard and soft money was within the context of what needed to be raised for the media fund. When pressed to separate his recollection from the content of the Ickes memoranda, he admitted that he believed the topic of hard and soft money was made in the context of raising money for the media fund because he recalled those subjects of discussion and the Ickes memoranda clearly indicates that the media fund was the "main driving force" and "main topic" of the meeting. (This statement is memorialized in part in the 302 with the remaining portion set forth in notes taken by Peter Ainsworth, trial attorney with Public Integrity Section who was present during the interview.)

Finally, after our two telephone interviews, Panetta spoke to the Vice President's lawyer, Jim Neal. According to Neal, Panetta said, among other things, that he does not recall a statement at the meeting that there was a need for hard and soft money for the media fund, just that the need for hard and soft money for the overall budget was discussed and that the media fund was part of the overall budget.

was mostly soft or mostly hard that was needed at the time.[8] Panetta said that while he does not recall a specific conversation about the limit on hard money contributions to the DNC, it would not surprise him if it was discussed.[9] Finally, Panetta has no specific recall of any of the statements recorded by Strauss in his notes.

The last attendee who could provide information about the subject of hard money being discussed at this meeting was Bradley Marshall, Chief Financial Officer for the DNC. Marshall recalls the purpose of the meeting was to discuss the media campaign and how it was affecting the overall DNC budget. Several questions were addressed including how the media campaign had gone so far and what the DNC would do, in terms of media, for the rest of the year. While the format of the meeting was a briefing aimed primarily at the President and the Vice President, some of the topics were discussed generally by more than one attendee. Marshall did not recall anything said by the President or Vice President; he did volunteer that he recalls the President asked more questions than the Vice President.

Marshall recalls answering a question about the "spending side" of the media campaign by noting that the expenses were

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[8] Panetta initially said that he recalled a discussion of how much soft and how much hard money was needed and what kind of fundraising events could be done to reach these goals. When asked what he specifically recalled about the phone calls and other events set forth on the back page of the Strauss notes (November 20, 1995 memorandum), Panetta said he recalled that the phone calls were one way to raise soft money. When asked whether he specifically recalls this being said in the meeting, though, the witness said it was only a "general memory" and added that it "seems to make sense". He then backed away from the statement saying he believes that there was not a "specific breakout" in the meetings but, instead, a general discussion about the need for a lot more money to be raised which could only mean a large time commitment from the President and Vice President. It should be noted that in the first interview, he did not recall any discussion concerning hard and soft money relating to the telephone calls. (Again, this statement is partly memorialized in the 302 with the remaining portion set forth in notes taken by [redacted]

[9] Panetta may have contradicted himself on this point. Page 3 of the 302 on the first interview notes that "Panetta did recall a discussion regarding the hard money limits on contributions". On page 4, though, it is noted that he had no specific recollection of the topic. In any event, we know that as of the date of the interview he was unaware of the legal limit.

generally averaging "65% soft/35% hard".[10] The answer, according to Marshall, was one sentence without any elaboration. He does not know who asked the question but volunteered that the probable asker was Harold Ickes since Ickes often called on DNC officials in attendance at meetings to provide this type of specific detail. Marshall does not think the President or Vice President asked the question since they did not often get into "that level of detail". He had no memory of anyone else mentioning hard or federal money during this preliminary discussion of the "spending side" of the media campaign. Marshall recalls the discussion on this "spending side" was much shorter than that devoted to the "fundraising side".

Marshall does not recall a specific use of the term hard, soft, federal or non-federal money during the discussion that centered around the immediate need for media campaign fundraising. By way of explanation, Marshall noted that the DNC had $1.8 million left to borrow on their hard money line of credit but no borrowing capacity on the soft money side. In addition, direct mail contributions to the DNC operating budget -- all in hard money -- were available, if needed, for the media purchases. Marshall recalled both of these facts were cited as reasons why the hard money component of the media fund did not have to be raised in order to keep ads on the air through the end of the year.[11] According to Marshall, after this was established at the meeting, there was no need to differentiate between hard and soft since the money needed to be raised by the President and Vice President was all soft.

In turning to the two options set forth in the "DNC 1995 Budget Analysis", Marshall recalls a general discussion about whether to borrow all or just a portion of the expected media fund shortfall. He also recalls feeling a sense of relief, as Chief Financial Officer of the DNC, that the President did not want to borrow the entire amount. He has no recollection of the discussion about the ways in which this money was to be raised, including the telephone calls, explaining that once the participants turned from his area of expertise, the DNC budget, to address issues of fundraising he paid less attention.

Evidence that the Vice President heard, understood, and retained the meeting comments: Other than his presence at the meeting, we developed no evidence to support a conclusion that the Vice President heard, understood, or retained the comments about the funding of the media campaign that Marshall and Panetta recall were made at the meeting. In fact, as already noted, all

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[10] This phrase mirrors the Strauss note made on page one of the "DNC 1995 Budget Analysis".

[11] He could not say who addressed these topics or how long the discussion lasted but, instead, characterized it as a "general discussion" involving more than one person.

but these two attendees had no recollection of the comments at all. More importantly, several of the attendees who were not well versed in the intricacies of the media campaign also failed to understand the meaning of the comment during the meeting because, like the Vice President, they remained unaware of the media fund's hard money component. In short, what we are left with is the strong inference that the comments were either brief or of little importance to most of the attendees.

The only evidence uncovered that indicates that the Vice President actively participated in the meeting are the portion of the Strauss notes that attribute a couple of phrases about the telephone calls to the "VP" in quotation marks and Panetta's general memory that the President and Vice President were asking questions and making comments. No one interviewed recalls anything said by the Vice President including the phrases that Strauss, in his notes, attributes to him. Nor can anyone recall general topics he may have addressed. And, while Strauss is clear that the statements must have been made since he took them down, he too has no recollection of these things being said. Apart from the quoted phrases, no one can recall a specific instance where the Vice President participated by comment, question, or otherwise; in any way during the meeting. By contrast, Brian Bailey, who had never attended a meeting with the "principals", recalls being impressed with the President's grasp of the issues and budgetary numbers but does not recall the Vice President participating.[12] Bradley Marshall and David Gillette also recall the President, but not the Vice President, taking an active role in the discussion.

We also found no evidence to indicate, one way or another, that the Vice President was called away or was interrupted during the meeting so that he might not have heard any remarks about the funding of the media campaign. No one recalled whether or not he was there for the entire meeting; nor did anyone recall whether someone interrupted the meeting to confer with him or to have him take a telephone call. No one interviewed could recall whether or not the Vice President was interrupted during the meeting for any reason. David Strauss and others suggested that it was not unusual for the more important people in these types of meetings

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[12] Several attendees volunteered comments about the habit or routine of the President and Vice President at these type of meetings. For example, Harold Ickes noted that the two would routinely ask questions and participate in discussions. Similarly, Leon Panetta, in his first interview, described the "roles" of the President and Vice President at these types of meetings as not actively discussing but attentively listening. However, Panetta, when asked whether and how he could tell that the President and Vice President were listening attentively at this meeting, responded that he could recall no specific comments but had a general impression that they were following the discussions.

to be interrupted. Moreover, the President's schedule shows that he stepped out of the meeting to make a short telephone call to Senator Dole, an interruption that may have included the Vice President. However, Harold Ickes, who ran these meetings, noted that it was his practice to suspend the meeting if either "principal" excused himself. In any event, the only indication that the Vice President's attention may have been diverted is Bailey's memory that the two principals sat adjacent to each other and conferred a couple of times during the meeting.

No one interviewed could recall any conversation with the Vice President that might lead to an inference either that he had or had not picked up information about hard money and the media campaign at this or other meetings. Two DNC officials at the time, Scott Pastrick and Donald Fowler, indicated their belief that it was "common knowledge" that DNC expenditures and programs such as the media ads had a hard money component. As we will see in the discussion below, however, several of the meeting participants, including two regular attendees of the DNC Wednesday budget meetings, were unaware at the same time that the Vice President says he was unaware that the fund had such a hard money component. In any event, no one interviewed could specifically identify another meeting or conversation where the Vice President might have been given this information, or where he made any remarks that might indicate his awareness of how the media campaign was actually funded.[13]

Finally, several other attendees said, like the Vice President, that they did not gain an understanding of the media fund composition from this meeting. In fact, at least four other meeting attendees told us at one point or another in their interview that they were not sure that hard money was necessary to fund the campaign. This list includes Brian Bailey, who actually drew up the budgetary analysis that many identified as being at the heart of the media campaign funding discussion during this meeting. It also includes Robert Watson who stated that he was, at times, responsible for writing the checks to pay for the media spots. Importantly, the two attendees closest to and most likely to interact with the Vice President -- his Chief and Deputy Chief of Staff -- did not leave the meeting with this

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[13] Panetta does suggest that there was at least one more DNC budget meeting in the Map Room where both the Vice President was in attendance and the hard/soft breakdown of the media fund was discussed. Panetta suggests this meeting was in the Summer of 1995. Agents have found documentary evidence of one DNC budget meeting, in June of 1995, held in the Map Room. However, this meeting was held fully three months before the $10 million allotted for the Fall media campaign became an item in the DNC budget; thus, if the topic of the meeting was the DNC budget, the media fund was probably not discussed. Moreover, the Vice President, who was giving a speech at Harvard University on this date, did not attend the meeting.

information.

With regard to his own understanding of the DNC's use of funds, David Strauss, who attended the weekly DNC budget meetings as well as the "big" budget meetings such as the one in November that was also attended by the Vice President, confirmed that he was aware that the DNC used a mix of hard and soft money in its overall budget. He said he was not familiar, however, with the DNC media fund. He had no knowledge of the ratio between hard and soft money in the fund, or even if the fund had a hard money component. Strauss learned of the DNC's overall need for a mix of hard and soft money because, as the Vice President's political scheduler, he was often told that the fundraising events that needed to be scheduled were either hard money events like the Saxophone Club meetings, designed to raise lots of smaller donations, or "high roller" fundraising events, designed to raise soft money. He noted that he had no need to learn more than this about DNC budgetary matters.

Ron Klain, Chief of Staff for the Vice President, did not recall any discussions about the DNC media fund at the meeting. In fact, Klain, who was attending one of his first meetings after taking the job of Chief of Staff, claimed that he was not aware of the media fund even after the meeting. He states that he learned after November that the fund was a means by which the DNC could buy commercials. Instead, Klain recalled that the meeting focused on the status of DNC fundraising and the need to raise additional money. Consistent with this memory, Klain recalled that the meeting participants, especially those from the DNC, were seeking to ensure scheduling commitments from the President and Vice President, for events and telephone calls, to help meet fundraising goals. Klain added that his role at the meeting was to accompany the Vice President and learn how the White House worked while Strauss, as Deputy Chief of Staff, was responsible for scheduling fundraising events that were discussed at the meeting with the DNC.[14]

Evidence of lack of motive: In addition to the insubstantial nature of the evidence that the Vice President in fact was aware of the hard money component to the media campaign

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[14] While Klain entered the meeting with a general understanding of the distinctions between hard and soft money and the DNC's need to raise both, he did not recall any discussion of hard and soft money issues during this meeting. Klain volunteered that it was not until the Spring of 1996 that he learned that the media fund had a hard money component, when Harold Ickes tied the need for the Vice President to participate in hard money fundraising such as Saxophone Club events to the DNC media campaign. Klain did not share this knowledge of the media fund composition with the Vice President and is otherwise unaware of whether the Vice President knew that the media fund had a hard money component.

and therefore may have been making a false statement when he denied that awareness, we also find a lack of evidence to reasonably support a conclusion that he may have had a motive to commit such a violation in the context of our section 607 investigation.[15] First, we find no apparent motive for the Vice President to falsely deny he was aware of a hard money component to the media fund at this time when, in fact, the evidence clearly indicates that in spite of a hard money component, the Vice President was being asked to raise soft money in his telephone calls because this is what was needed during the relevant period. Second, we have found evidence that indicates that the Vice President has consistently maintained his erroneous state of belief about the media fund even though he was aware at the time that it might be in his interest to avoid such an admission. Finally, we have uncovered evidence about the history of the DNC's funding of issue ads that indicates that the Vice President's mistaken belief was both predictable and reasonable.

Affirmative evidence of the DNC's need for soft money during this time frame provides little reason for the Vice President to falsely deny he was aware of a hard money component. In fact, two of the meeting attendees, one high-ranking DNC official who did not attend, and the Strauss notes all indicate that at the time, the DNC media fund was in need of soft money to continue airing the ads through the end of 1995. First, Marvin Rosen, who did not recall a discussion of hard money and the media fund at the November meeting, nevertheless volunteered that hard money was not likely to be a major issue during this meeting since he had been informed as a DNC fundraiser that soft money, not hard money, was needed at the time of the meeting in late 1995. More

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[15] Because the issue here is falsity and not intent, the statutory standard is not whether evidence of lack of intent is clear and convincing. Nevertheless, in a recent preliminary investigation where a covered person in fact made a clearly false statement, we note that the Attorney General found clear and convincing evidence of a lack of intent in the context of strikingly similar facts. Specifically, in the Spring of 1997, a determination was made that a covered person lacked the necessary state of mind to violate section 1001 when he testified before Congress to an erroneous set of facts that were contradicted in briefing materials given to him prior to his testimony. This decision was based, in substantial part, on the absence of any other evidence that he was aware of the correct facts; a finding that his statement that he did not read the relevant portion of the briefing material was credible; and a determination that he had no substantial motive to lie. Similarly, here, we find no affirmative evidence that the Vice President was aware of the true facts, that his statement of lack of knowledge is objectively credible, and that there is no plausible motive for him to have lied about these facts, since conceding to knowledge of accurate facts would have benefitted him more than his mistaken belief.

importantly, Bradley Marshall recalls that the point was made during the meeting that because hard money could be raised through borrowing or direct mail, the Vice President's calls and other fundraising events were to focus on raising soft money. Finally, DNC Finance Director Richard Sullivan, who did not attend the meeting, confirmed that there was a shortage of non-federal money during this period, and stated that he believed this shortage would have been discussed at the November meeting.

Corroborating these three witnesses are the documents that Strauss confirms were actually handed out and discussed during the meeting, which make it clear that soft money was what was needed to be raised at the time. As noted above, one of the documents, entitled "DNC 1995 Budget Analysis", upon which Strauss took notes, indicates that the DNC had borrowed up to its limit in soft money by the time of the meeting. The document, under option two (set forth at 5(b)), also shows that, if an additional $3 million were to be spent on advertising, some would be borrowed. Given this state of affairs, the necessary percentage of hard money needed for the ads (variously approximated in other documents as 30% to 40%) would be almost completely covered by a hard money loan. The remainder of the media budget that needed to be "raised" was the soft money portion.

In sum, the documents and several witness statements that indicate that soft money was needed for the media fund at the end of 1995 leaves little motive for the Vice President to provide a false statement about his knowledge of the fund's composition. Stated differently, the Vice President was left with no motive to falsely deny that he knew about the hard money component since there is no onus whatsoever that attaches to this knowledge. Indeed, the documents and statements establish that in spite of the hard money component, the Vice President was being asked to raise soft money in the events and calls being planned for him during the November meeting.

Evidence of the circumstances surrounding the making of the statement also raises a strong inference that the Vice President was aware that it would, in fact, be in his interest to avoid any mention of his mistaken belief. An affidavit provided by his attorney, Jim Neal, states that when the Vice President was being prepared for his interview last fall, during which the remarks in question were made, the Vice President stated his belief that the media campaign was funded exclusively by soft money. According to the affidavit, it was only after this statement of belief that Neal and his co-counsel George Frampton showed the Vice President documents, specifically an October 20, 1995 memorandum addressed to him, that clearly showed that the media fund had a hard money component and, consequently, that his belief was mistaken.[16]

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[16] This memorandum, like the Strauss notes document, indicates that in late October, the hard line of credit was

Aware that documentary evidence, known to investigators, indicated that he had received at least one memorandum that would have corrected his mistaken belief, the Vice President nevertheless informed his lawyers that he would have to admit the mistake in his interview.

Since the meeting with his lawyers last Fall, the Vice President has twice been interviewed and twice provided statements consistent with the statement recounted by Neal. He did so knowing that this statement would raise questions since documentary evidence showed that he had been provided information on at least one occasion that would challenge his stated belief. More importantly, he provided a consistent statement of his mistaken belief in spite of the fact that he had every opportunity, knowing both his error and the existence of evidence that should have corrected his error, to revise or change his statement of belief to conform to the evidence. In short, he could have chosen to either avoid any mention of his mistaken belief during the interview or state that he was aware of the hard money component, but, nevertheless, was asking for soft money from the people he called. Either of these versions would have avoided the inevitable questions about his mistake.[17]

Furthermore, the statement of his mistaken belief about the media fund composition provided him little advantage in defending himself from the section 607 allegation. By the time of the interview, there existed a substantial independent body of evidence, known to the Vice President, that showed that he was asking for soft, not hard, money in his calls. Thus the minor added persuasive effect of his comments about his mistaken belief could not plausibly be regarded as significant enough to warrant violating the law. In addition, the Vice President volunteered three additional reasons for his belief that he was raising soft money when he made the calls; namely, that he had been asked to raise soft money, that it never entered his mind that he would be asking for anything but soft money because the amounts he was requested to ask for clearly indicated that he was seeking soft money, and that soft money was always easier to ask for than hard money. All of these reasons for intending to ask for soft money could be corroborated by evidence, both documentary and

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adequate to "cover the hard part" of the media budget, leaving the "soft" portion to be raised.

[17] As we have repeated on several occasions, the Vice President explained that he did not read the Ickes documents such as the October 20, 1995 memoranda because, among other things, he had little interest in the fine points of DNC funding and felt that others, including DNC lawyers were responsible for these issues. Within the context of the hypothetical decision, then, the Vice President would have known that this explanation could not be easy to corroborate, providing more incentive to avoid mentioning his mistaken belief.

testimonial, as well as common sense. The addition of another reason that not only could not be corroborated but would likely be met with skepticism was both unnecessary and potentially harmful. In sum, the Vice President had little reason to provide attorneys and investigators with his mistaken belief unless it was true.

Finally, we find that the Vice President's explanation for his mistaken belief -- that he viewed the ads run by the DNC as "issue-related", not "candidate-specific", and therefore mistakenly believed that soft money could be used exclusively — is reasonable given the history of the DNC's various media projects from 1994 through 1996.[18] In fact, we have uncovered evidence that the first significant ad campaign run by the DNC during the Clinton administration involved health care spots funded entirely by soft money. The party spent $4.6 million for these ads that were aired throughout 1994. It was not until the end of August, 1995, that the Federal Election Commission (FEC), in an advisory opinion issued in response to a Republican National Committee(RNC)request to fund its own issue ads exclusively with soft money, ruled that the allocation regulations required a "split" of hard and soft money for issue ads run by the national parties since electing candidates to Federal office was inevitably a related goal of the ad campaigns. According to Lyn Utrecht, an election law attorney who advised the DNC during this period, this advisory opinion was relied upon in formulating the media campaign spending formula once the $10 million media budget was put in place in late September of 1995.[19] In sum, the evidence indicates that the "splits" which were apparently mentioned in the November meeting were both new and a departure from past DNC practice of funding issue ads exclusively with soft money. Viewed from this perspective, then, the Vice President's mistaken belief was not only reasonable but predictable.

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[18] It should be noted that Deputy Assistant Attorney General Kevin DiGregory conducted a series of interviews with lawyers and agents who were involved in one or both interviews in an effort to determine whether evidence of the Vice President's demeanor might assist in determining his credibility. After the interviews, DiGregory concluded that "no inferences can be drawn from the Vice President's observable behavior" that would help to determine whether he was being truthful.

[19] Utrecht has told agents that her contact with the White House on these allocation issues was Harold Ickes. As noted above, Ickes has said that he did not share this information with the Vice President. Nor have we found documentary evidence to indicate that the topic of the FEC allocation rules and the ad campaign was raised in a meeting attended by the Vice President between the time of the August FEC ruling and the November meeting.

Legal Analysis

The false statement statute provides, in pertinent part:

> [w]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation shall be [guilty of a felony].

18 U.S.C. § 1001. To obtain a conviction under section 1001, the government must prove (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction. United States v. Herring, 916 F.2d 1543, 1546 (11th Cir.1990), cert. denied, 500 U.S. 946 (1991).

Turning to the facts developed in our preliminary investigation, the "statement"; "materiality"; and "agency jurisdiction" elements for each of the statements at issue in the allegation are easily established. Clearly, the words uttered by the Vice President during the interview qualify as statements for purposes of section 1001. As noted above, the subject matter -- hard money component to the media fund and legal limits for hard money gifts to the DNC -- are relevant, and therefore material, since they describe the state of mind or intent of the Vice President at the time he made the fundraising telephone calls from his West Wing Office. Finally, because the agents and attorneys to whom the Vice President made his statement were investigating potential federal law violations, the "agency jurisdiction" element is met.

The element of falsity should not be confused with the element of the state of mind required to commit the offense in this case. The question we have primarily focused upon during the preliminary investigation is whether there is sufficient information that the Vice President's statements — (1) that he believed the media fund was financed with soft money and (2) that he believed the DNC hard money donation limit was $2000 — were false to warrant further investigation. The state of mind required to commit a violation of section 1001 is "knowingly and willfully". However, whether or not the Vice President believed at the time that the hard money limit was $2000 and that the media fund was financed through soft money goes to the element of falsity, and can thus be explored under the normal standards of information sufficient to warrant further investigation.[20]

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[20] We note that your memorandum recommending this preliminary investigation posits that more flexibility would be achieved by entering a period where the Attorney General could consider state of mind element of the offense, because we see insufficient evidence of falsity. Therefore, it is incongruous to ask whether the statement was made knowingly and willfully.

We note that were explorations of the truth or falsity of statements about beliefs considered to be subject to the state of mind restrictions in the Act, the Act would require that every such statement trigger the Act, whether or not the underlying belief was true, since it is the truth or falsity of the statement of belief that is at issue, not the underlying fact. Furthermore, we could only close the investigation without appointment of an independent counsel if we could develop "clear and convincing evidence" that the subject in fact had such a belief — a standard that would be very difficult to meet in most cases.

Thus, the question here relates to the statutory element of falsity, and the evidence uncovered during the investigation is, in our view, so insubstantial that no further investigation is warranted. Specifically, because no one interviewed could remember, let alone explain, the use of the Strauss note's terms "hard limit $20k" and "corporate or anything over $20k from an individual" in the meeting attended by the Vice President, we are left with no evidence that the Vice President's statement that he believed the legal limit for hard money gifts to the DNC was the same as the limit for individual candidates -- $2,000 per election cycle -- is false.[21] While it is theoretically possible that the Vice President was lying and that evidence of that lie might exist somewhere, that possibility is so remote that we conclude no further investigation is warranted.

On the second statement, the only evidence that the Vice President's statement regarding his belief that hard money was not used to purchase DNC media ads is false rests on Strauss's belief that the words "hard" and "soft" were uttered in a meeting attended by the Vice President, and the memory of Panetta and Marshall that hard money was discussed in connection with the media fund. Strauss, though, has no independent memory of what was said or what his notes mean, and can only surmise that they reflect statements at the meeting because of his pattern of note taking.

Panetta's statement is also far from unambiguous. He changed his statement concerning the meeting three times in the

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However, even if one were to apply the clear and convincing standard to the element of falsity, that is, whether there is such evidence that he did not falsely state what he knew, one of the authors, Lee Radek, believes that this standard is met. Dave Vicinanzo sees the application of this standard to the falsity issue as problematic.

[21] As noted above, Panetta, who claimed at times to have a recollection of the meeting, is unaware that individuals can give up to $20,000 in hard money to the party per calendar year. When interviewed, he admitted he was only knowledgeable about the limit of $1,000 imposed on gifts to individual candidates.

course of two interviews. He began the interview with no specific recollection of the meeting. His first impression was that there would have been references to hard money during the meeting because, he said, the Ickes memoranda had references to hard money. He went on to state that the references would have been to the overall DNC budget. Later, Panetta offered another explanation, claiming that the references to hard money had to be in connection to the additional funds needed for the media fund. When asked about the change in his rendition of the meeting, he admitted that he was relying in part on what the Ickes memoranda told him the meeting was about.

Only Marshall unequivocally recalls his own one sentence reference about the "split" of funds used on the spending side of the media campaign in response to a question asked from someone other than the Vice President and a general discussion about the present availability of hard money for the media fund from a line of credit and direct mail receipts. Marshall notes that there was little need to reference hard money after these points were made since the remainder of the meeting would have been devoted to discussing the raising of soft money.

Weak as the evidence is, we do conclude that the notes, together with the memory of Panetta and Marshall, support a conclusion that some sort of statement was probably made by someone at the meeting to the effect that the media campaign was funded by a mix of hard and soft money and that individuals could give up to $20,000 in hard money to the DNC.

Even assuming the statements were made, however, we have developed no evidence that the Vice President heard the statements, understood the statements, or retained the information imparted. No one recalls him participating when these topics may have been discussed. Moreover, no one recalls him saying or doing anything outside of this meeting that would indicate that indeed he knew, whether because he attended the November meeting or some other way, that the media fund was not all soft money or the hard money limit to the DNC was $20,000.

Conversely, our inquiry has uncovered a wealth of evidence that other meeting participants, most of whom had more involvement in DNC budget topics and fewer other issues to concern themselves with than the Vice President, also failed to hear, understand, or retain the meeting statements. No one but Panetta and Marshall recalled a mention of hard money in connection with the media fund. The list of people who attended the meeting yet failed to learn about this hard money component included Brian Bailey, who spent several months crunching the DNC budgetary numbers, Robert Watson, Chief of Staff at the DNC, Ron Klain and David Strauss, both with extensive political backgrounds.

The reasonable inference that may be drawn from the consistent inability of the meeting participants to recall a

mention of hard money in connection with the media fund is that the discussion may have been so brief or so tangential to the main subject matter of the meeting that all but the speaker and one other participant failed to hear or retain the significance of the point being made. Support for this inference is found in Marshall's statement that his reference to hard money was brief, consisting of one sentence in response to a question. Moreover, Marshall's memory, corroborated by the documents, that soft money, not hard money, was the need in November of 1995 also lends support for this inference since there would have been little necessity to refer, at length, to hard money because this was apparently available to borrow at the time.

In addition to the insubstantial nature of the evidence that the Vice President was aware of the hard money component to the media fund, we also find a lack of evidence to reasonably support a conclusion that he may have had a motive to falsely deny that he knew about the hard money component. As noted, the documents reviewed at the meeting show that the DNC was poised to borrow virtually all the hard money necessary to run the ads into the next calendar year. The clear import of the documents, then, is that soft, not hard, money was needed at the time the phone calls were discussed, which would strongly suggest that raising soft, not hard, money would have been the major focus of discussion at this meeting. In fact, Marshall, in his statement, confirms as much. Because the fundraising telephone calls upon which the Vice President was about to embark were needed to raise soft money, not hard money, his knowledge of the media fund's hard money element was of no consequence. In sum, he had no need to misrepresent the facts about his knowledge of the fund's composition in order to support his statement that the calls were intended to be soft money fundraising calls.

Moreover, the statement provided by the Vice President's lawyer indicates that the Vice President was aware, by the time of his interview, of an additional reason why it would be in his interest to affirmatively state that he knew about the media fund's hard money component. He knew that investigators had uncovered documentary evidence that showed that the Vice President had been told, in a memorandum addressed to him, about this hard money component. He was, no doubt, also aware that his statement denying he had ever seen these documents could not, by definition, be corroborated.

On the other hand, he also knew that his mistaken belief about the media funding -- only one of several reasons that he cited in support for his statement that he intended to raise soft money in the calls — similarly could not be corroborated. In summary, the Vice President was likely aware at the time of his interview that he had little to gain and much to lose in admitting his misconception.

Finally, the Vice President's explanation for his mistaken belief -- that he viewed the ads run by the DNC as "issue-

related", not candidate-specific, and therefore mistakenly believed that soft money could be used exclusively -- is predictable. Both parties took the position that "issue ads" could be paid for exclusively with soft money until late August of 1995 when the FEC ruled otherwise. The RNC publicly advocated such a view as late as August 14, 1995. Viewed within this historical context, the Vice President's mistaken belief was reasonable.[22]

In sum, it is our conclusion that the preliminary investigation did not develop sufficient evidence to warrant further investigation into the question of whether the Vice President's statements regarding his state of knowledge or belief at the time he made the fundraising calls were false. First, we base our conclusion on the insubstantial nature of the evidence that the Vice President in fact was aware of the hard money component to the media campaign and therefore may have been making a false statement when he denied that awareness. Second, we note that we have found no evidence to reasonably support a conclusion that he may have had a motive to commit such a violation in the context of our section 607 investigation last Fall. For these reasons we recommend against the appointment of an independent counsel in this matter.

Nicholas Allard

On September 11, 1998, the Campaign Financing Task Force was contacted by a private citizen who claimed that she had learned through a friend, who was a cousin of Nicholas Allard, that the Vice President had pressured Allard to raise hard money campaign contributions during a fundraising phone call.[23]

Facts

In an effort to investigate this allegation, we interviewed

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[22] In fact, this strong association between the concept of soft money and issue ads appears to be rooted in the history of these type of ads and is evidenced by public references to the television spots as "soft money ads" by a variety of public figures, including Representative Dan Burton.

[23] Allard's name came up last Fall during our section 607 preliminary investigation because he, along with at least 11 others, appeared on call sheets dated June 1, 1995 prepared for the Vice President. Allard's call sheet, like the others from the Spring of 1995, noted that he "has agreed to join the National Finance Board for the Clinton/Gore '96 Reelection campaign." The sheet explained that "[t]his entails a commitment to raise $50,000 for the campaign, $25,000 by June 6th." The last sentence of the call sheet sets forth the need for the call: "[p]lease call to thank him and let him know how important and appreciated his efforts are."

the source of the allegation, Madeline Rhew, Allard's mother, who Rhew alleged was involved by Allard in raising funds, Peter Knight, who had asked Allard to raise money for the Clinton/Gore campaign, and Nicholas Allard himself. With the exception of Rhew's statement, which was based not on personal knowledge but on the hearsay of an unknown third party apparently communicated to her three years ago, we found no evidence that Allard was solicited by the Vice President.

Madeline Rhew: On September 14, 1998, Madeline Rhew told agents that a friend, who she would not identify except as "Cathy," who was a cousin of Nicholas Allard, told her that she had heard through her father that the Vice President called Allard in approximately June of 1995 and said that the elections were coming up and he would like to see Allard give a $25,000 campaign contribution to the Clinton/Gore campaign within two weeks. Rhew said that Cathy said that her father said the call came at a time when Allard was both lobbying Congress and talking to the Vice President about a telecommunications bill that he had written. Rhew told agents that her friend's father was aware of the call because Allard's mother had called him in a panic asking for contributions when Allard experienced difficulty in raising the money. Rhew stated that Cathy told her this in July of 1995.[24]

Rhew told agents that she had been an advocate for campaign finance reform as a member of "United We Stand", a grass roots entity that grew out of the Ross Perot organization. Her interest led her to staff a campaign reform booth at a Dallas conference in 1995 and organize a campaign task force. According to Rhew, her interest also led her to investigate the Allard situation to see if there was a "pattern" of donations to Clinton/Gore by telecommunication lobbyists. Her investigative work included visits to the House of Representatives Clerks Office and the Federal Communications Bar Organization. She also compiled FEC contribution histories and other records on Allard, his family, his law partners, and their families.

Nicholas Allard: When interviewed both last Fall and on October 19, 1998, Nicholas Allard said he received only one telephone call from the Vice President, not in the Spring of 1995, but in October of 1996. He stated that he was out of town when the Vice President called, but that when he returned, he called the Vice President's office and ultimately received a message asking that he call the Vice President at his residence. When he

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[24] Rhew cited a second reason for the Allard family to feel pressured by a Vice Presidential solicitation when she noted that her friend had a cousin, Allard's sister, who was apparently married to a doctor who had received a big favor from the Vice President. Rhew provided no further details about this allegation other than to pass on that it had become a joke in the Allard family not to let the Vice President do any more favors for them because it is too expensive.

did, the Vice President spoke briefly to him, stating that he was unable to talk. The next day, Allard was told by a White House staff person that the information the Vice President was seeking had been found.[25] The "issue" about which the Vice President was calling may have been health care but definitely was not campaign contributions, according to Allard. Allard denied having any direct dealing with the Vice President on the telecommunications bill passed in 1996 but stated he may have spoken to members of his staff. Apart from the brief conversation in the Fall of 1996, Allard states that he has never spoken to the Vice President on the telephone.

Allard explained that he agreed to raise $50,000 for the Vice President's reelection campaign upon the request of Peter Knight or one of "his people". Allard believes he, in turn, solicited family members, neighbors, and business associates during May and June of 1995 and would have asked these people to help him solicit others for contributions.[26] He admits he felt pressure to raise his commitment of $50,000 and believes he fell short of his goal but added that this was an endeavor that he took on without any type of coercion. The Vice President did not ask him to participate in this project and, while he recalls seeing a phone message record from around this time indicating that Peter Knight's secretary had called to say that the Vice President was going to call and thank Allard, he reiterated that he did not remember such a call and feels certain he would remember it if it happened.[27]

Lillian Allard: When interviewed on September 29, 1998, Nicholas Allard's mother, Lillian, told agents that she was not aware of her son ever being solicited for a campaign contribution

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[25] The FBI's 302 for the first interview does not mention the brief telephone conversation with the Vice President at his residence. Allard, when asked about this disparity, stated that he must have been misunderstood during the first interview since he recounted the same scenario in both interviews.

[26] Allard recalls his mother and father both contributed but no more than $100 each. He believes he raised less than $500 from his relatives but was unaware of anyone soliciting his uncle, the father of Rhew's friend, for a contribution.

[27] Several others who were mentioned in call sheets from this period stated, when interviewed during our previous investigation, that they did not, in fact, receive a call from the Vice President during the Spring of 1995. The remaining members of this group recall that the Vice President, consistent with the requests set forth on the call sheets, thanked them for their fundraising efforts. Finally, Peter Knight's secretary, Jewel Hazel, told investigators last Fall that she would place these calls on behalf of the Vice President.

in a telephone call by the Vice President. She noted that she and her husband each gave $100 to the Clinton/Gore campaign in response to a request from Allard, but she does not believe that her son asked her to solicit others for campaign contributions. Lillian Allard never asked anyone to make a political contribution including her brother, William Hagner.[28] Lillian Allard added that her son never told her he was raising $25,000, nor did he say he felt pressured to raise political contributions.

Peter Knight: When interviewed during our preliminary investigation, Peter Knight confirmed that he solicited Nicholas Allard to raise $50,000 for the Clinton/Gore campaign in the Spring of 1995. According to Knight, this commitment, which earned a membership on the campaign's "National Finance Board" entailed raising $25,000 in advance of an event held in early June of 1995 with the balance to be raised over the remainder of the year. He added that he was responsible for the call sheet which requested that the Vice President thank Allard for his commitment. Knight believed that, like some others whose names were included on these "thank you" call sheets, Allard was never called.[29] Knight was also unaware of any other telephone conversation between the Vice President and Nicolas Allard.

Analysis

We have been unable to substantiate Madeline Rhew's allegation that Vice President Gore solicited Nicholas Allard for a contribution to Clinton/Gore '96, much less that any such call may have been placed from the White House.

Contrary to Rhew's allegation, Allard's mother does not recall her son telling her that he had been solicited by Vice President Gore for campaign contributions. As for Allard himself, as he did a year ago, he maintains that he never actually had a telephone conversation with Vice President Gore in which the Vice President solicited him for any kind of contribution. Rather, according to Allard, the Vice President attempted to telephone him, but Allard in a return call was not able to have a substantive conversation. When Allard subsequently telephoned

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[28] Lillian Allard told investigators that Hagner has a daughter named Cathy, the first name given by Rhew to identify her friend.

[29] Knight explained that he kept a list of people that he had asked the Vice President to thank and used it to keep track of which calls had been made. We were given such a list during the previous investigation with several names, but not Allard's, crossed off. Comparing Knight's list with our previous interview results corroborates Allard's claim that he was not called since most of the people whose names are crossed off confirmed that they were called and thanked while the others, with a single exception, said they were not.

Vice President Gore's office, he was told that the "issue", which was not related to political contributions, had been resolved.

In theory, it is possible that Allard and his mother have lied to us. However, we have no evidence whatsoever to believe that this is the case. Given the consistent version of events that Allard has now recounted twice in the last year, it seems much more likely that Rhew, who apparently received her information in a conversation with a friend three years ago, provided us with an unfounded allegation.

Because we have discovered no evidence corroborating Ms. Rhew's multiple hearsay allegation, we believe that no further investigation of the Allard matter is warranted.

Charles Uribe

In mid-September 1998, we received information from prosecutors in the U.S. Attorney's Office, Southern District of New York, that Kenneth Smith, a cooperating witness in a commercial bribery/conduit contribution investigation, had alleged that his former boss, Charles Uribe, had received a telephone solicitation from Vice President Gore to raise $50,000 specifically for the Clinton/Gore '96 campaign.

Charles Uribe is the Chairman and Chief Executive Officer of AJ Contracting Company Inc. ("AJ"), a New York City construction management company. In June 1998, Uribe and AJ pleaded guilty to bribery in state court in New York, in connection with bid-rigging in the office construction market in New York City. Uribe received no jail time, apparently because of his poor health. AJ was fined $3.3 million. See Bagli, After Guilty Plea in Bribe Case, Company Calls the Payments Legal, New York Times, June 18, 1998, at B10.

Uribe was one of the names on call sheets involved in our section 607 investigation. In the course of that investigation, we learned that a four and one half minute telephone call was placed from the White House to AJ's main office telephone number on February 5, 1996. During our preliminary investigation last year, Uribe, whom we were informed was in very poor health and hospitalized because he was rejecting a transplanted kidney, declined to talk to us about this telephone call, but permitted his attorney to provide us with information. According to the proffer, the Vice President called Uribe at AJ's offices and asked Uribe to contribute $25,000 to the DNC. His lawyer said that Uribe did not remember whether or not the Vice President referred to the DNC Media Fund during their telephone conversation. When asked whether Uribe's memory of the time frame of this call was consistent with telephone records indicating that a call was placed from the White House to AJ's offices on February 5, 1996, Uribe's attorney said that, according to Uribe, the February 1996 time period "sounded about right." Finally, according to the proffer, Uribe gave $25,000 to the DNC in response to the Vice

President's request.

Because we were aware of only one phone call from the Vice President, and because that call was placed from the White House, Kenneth Smith's allegation to prosecutors in the Southern District of New York that the Vice President had solicited Uribe for contributions to the Clinton/Gore '96 campaign suggested that the Vice President may have violated 18 U.S.C. § 607, by soliciting hard money contributions in federal office space, and 18 U.S.C. § 1001, by telling investigators during an interview on November 11, 1997, that he did not recall ever soliciting individuals to make contributions to Clinton/Gore '96. Accordingly, we decided to explore Smith's allegation as part of the 90-day investigation that we had already begun concerning whether the Vice President lied to investigators during his November 1997 interview.

Facts

Kenneth Smith's Initial Interview: On September 17, 1998, Task Force agents interviewed Kenneth Smith, formerly the President of AJ, for the first time. Smith essentially provided the same information he had shared with the New York prosecutors, i.e., that some time in 1995 or 1996, but prior to the 1996 presidential election, an AJ secretary named Mary Dolan interrupted a meeting of approximately eight to twelve AJ executives in a conference room to say that the Vice President was on the telephone and wished to speak with Uribe. According to Smith, Uribe responded: "Vice President of what?" Dolan replied that it was the Vice President of the United States. According to Smith, Uribe instructed Dolan to transfer the call to the conference room where he took the call in front of the AJ executives.

Smith was only able to hear Uribe's side of the conversation, which consisted primarily of "yes sirs" and "no sirs." Smith did not hear Uribe refer to the DNC, the DNC Media Fund, or Clinton/Gore '96 during the telephone conversation. Smith estimates that the conversation lasted approximately two and one half minutes.

According to Smith, after Uribe hung up the telephone, Uribe told the other attendees of the meeting that the Vice President had just requested that Uribe "raise money for the campaign." According to Smith, Uribe then told the AJ executives that "we" needed to raise $50,000, and indicated that they and other AJ executives and employees would be expected to make contributions aggregating $50,000 to Clinton/Gore '96. According to Smith, Uribe also explained that the requested contributions needed to be raised within a specific period of time for reasons relating to federal "matching funds" for the Clinton/Gore campaign.

According to Smith, the following AJ executives and employees probably attended the meeting during which Vice President Gore

called Uribe: James Capolino, Betty Ahearn, and Pradeep Desai. Smith said that it was likely that Carl Schwartz, Ken Browne, Michael Gannon, and Greg Gannon also attended. In addition, it was possible that Robert Vitolo, Vinny Maiello, Frank Bilotto, and Mike Garone were present.[30]

According to Smith, after Uribe said that "we" needed to raise $50,000 for the Clinton/Gore campaign, Uribe went around the room and instructed specific attendees of the meeting to make a contribution based on Uribe's knowledge of how much they had already contributed toward their legal contribution limits. According to Smith, Uribe instructed each AJ employee present and able to legally contribute to make a specific dollar contribution to the Clinton/Gore campaign, ensuring that each employee contributed up to $5,000.

During his first interview, Smith told us that he was not sure whether he made a contribution subsequent to and as a result of Vice President Gore's telephone call to Uribe. In an effort to reconstruct his contribution history, Smith had located two check carbons and monthly statements from his Charles Schwab checking account. One of the carbons was for check number 389 and contained a notation in Smith's handwriting of "Democrats." The relevant account statement reflected that check number 389 was in the amount of $5,000 and was paid on September 5, 1996. The other carbon was for check number 347 and contained a handwritten notation of "Clinto." The relevant account statement reflected that check number 347 was paid on November 3, 1995. At the time of Smith's interview, Smith had not yet received copies of the actual checks, and he could not recall for certain without seeing the checks whether he had made checks 347 and 389 out to Clinton/Gore '96 and/or the DNC. Smith said that it was possible that he had written either one of these checks (or a third check that he had not been able to locate) as a result of Vice President Gore's request to Uribe. According to Smith, if he did make a contribution as a result of Vice President Gore's telephone solicitation, it would have occurred one or two days following the telephone call.

Finally, Smith told us that he was not aware of any other telephone calls from Vice President Gore to Uribe other than the one which came during the AJ executives meeting. According to Smith, Uribe would have boasted to Smith about any such additional calls.

Other Interviews: Two additional people we interviewed who used to be affiliated with AJ provided us with information concerning Uribe's telephone conversation with Vice President Gore.

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[30] Ahearn, Desai, Vitolo, Garone, and both Gannons declined to submit to interviews with Task Force agents.

1. James Capolino

James Capolino, formerly an Executive Vice President of AJ, recalls being in a lunch meeting in AJ's fifth floor conference room when a call came in for Uribe from the Vice President.[31] Capolino is unclear on the date of the call, but surmises that it probably took place in the Fall of 1996. According to Capolino, Uribe, himself, and Smith were present when the phone call came in. Although there may have been another person there as well, Capolino does not recall that being the case. Capolino believes that the call was placed to AJ's main number, 889-9100, and ultimately transferred to the conference room where the meeting was in progress. According to Capolino, he and Smith stayed in the room while Uribe spoke with the Vice President, which lasted approximately between three and four minutes. After the conversation was finished, Uribe immediately told Capolino that the Vice President had stated something like, "This is a tough campaign. We need all the help we can get. We need $25,000.00 as soon as possible. Can you do that?" According to Capolino, Uribe's answer was something like, "Consider it done." Capolino does not recall specifically, but believes it is possible that Uribe said that the Vice President told him that Knight or the Clinton/Gore campaign would contact Uribe about his pledge.

Capolino did not hear any mention during the conversation of hard versus soft money, to whom any contribution checks should be made out, or where the money would go. It was not clear to Capolino on whose behalf the Vice President was calling. However, he believes it was on behalf of the DNC, because by the time of the call "people were tapped out" and Uribe would have been unable to raise $25,000 in hard money contributions.

Capolino recalls that, immediately after the call, Capolino's attitude about the solicitation was "enough is enough." According to Capolino, Uribe seemed to sense this and responded to Capolino by stating something like, "Don't worry I'll handle this. I am going to call some people." Capolino does not recall being asked to contribute in response to the Vice President's call. According to Capolino, two or three weeks after the call, Capolino asked Uribe if he had been successful in raising the $25,000. Capolino says that Uribe told him that he had raised the $25,000.

Capolino is aware of only one telephone call to Uribe from the Vice President, and like Smith, believes that if there had

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[31] According to Capolino, at some point during the 1996 presidential campaign, Uribe asked Capolino how to become a "major player" in the DNC. Capolino told us that he may have contacted the DNC for purposes of developing Uribe as such a player. According to Capolino, from that time onward, Peter Knight worked with Uribe with respect to the Clinton/Gore campaign. According to Capolino, Knight would ask Uribe for contributions or to raise money, primarily for Clinton/Gore '96.

been more than one, Uribe would have bragged about it around the office.

2. James Cella

James Cella was a consultant for AJ and for a period of time dated Allison Uribe, one of Charles Uribe's daughters. According to Cella, he and Charles Uribe at one time were close personal friends, but since have had a falling out.

Cella recalls Uribe telling him that Uribe had missed a call from Vice President Gore. Cella believes that this missed call occurred in the Summer of 1996 because the weather was warm, but it would have been no later than August of 1996.

Uribe also told Cella about a second telephone call from Vice President Gore, which Uribe did receive. Cella was not present when this call came in, but he believes that it was more than two days after the first missed call and that the weather was still warm.

Cella recalls that Uribe told him that Vice President Gore requested $50,000 from Uribe, but that Uribe told the Vice President that "he could only do $25,000." Cella was not asked to contribute as a result of the Vice President's request, nor was he asked to solicit funds in connection with the Vice President's call.

According to Cella, he subsequently learned from Allison Uribe that Charles Uribe had collected $25,000 in response to the Vice President's request. According to Cella, "it was a while" and "a period of time" between the Uribe's conversation with the Vice President and the contributions being made. According to Cella, "it could have been months or even a year later after the request."

Cella recalls Allison Uribe telling him that the contributions in response to the Vice President's call were made to the DNC and were made up of $5,000 from Ken Smith, $5,000 from Charles Uribe, $5,000 from Pradeep Desai, $5,000 from either AJ or Integral Construction ("Integral"),[32] and $5,000 from Allison Uribe.[33] According to Cella, the $25,000 collected by Uribe for the DNC constituted soft money. Cella believes these funds were transmitted to the DNC either during or after August of 1996. According to Cella, Allison Uribe told him that she personally delivered these checks to Clinton/Gore '96 headquarters. Allison

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[32] Integral is another company controlled by Uribe.

[33] Allison Uribe did make a $5,000 contribution to the DNC in January 1997, but did not make any contributions to the DNC in August 1996.

Uribe told Cella that Charles Uribe requested her to bundle the contributions and deliver the bundle to Washington in order to "get credit." According to Cella, Charles Uribe thought that this might help Allison Uribe get a job in the Clinton/Gore Administration.

3. AJ Employees Who Were Not Present for the Telephone Conversation Between Vice President Gore and Uribe

We interviewed several additional AJ executives and employees concerning their knowledge of a telephone conversation between Vice President Gore and Uribe. Two of these individuals -- Kenneth Browne and Carl Schwartz -- had been identified by Kenneth Smith as people who likely attended the AJ executives meeting when Vice President Gore's telephone call was received. Two others whom we interviewed -- Robert Vitolo and Frank Bilotto -- were identified by Smith as possible attendees of the meeting. Browne, Schwartz, Vitolo, and Bilotto all told us they were not present at a meeting during which Uribe took a telephone call from Vice President Gore.

Smith's Second Interview: On October 2, 1998, we interviewed Kenneth Smith a second time. During this second interview, we showed Smith copies of the two checks from his Schwab account discussed above. Check 347 is a $2,000 check, dated October 20, 1995, made out to Clinton/Gore '96. Check number 389 is a $5,000 check, dated August 19, 1996, made out to the DNC.

Seeing these checks made Smith less certain about their relationship to Vice President Gore's solicitation of Uribe. Smith could not recall whether either contribution was made as a direct result of the Vice President's conversation with Uribe. While Smith opined that it was possible that the Clinton/Gore '96 contribution was related to the Vice President's telephone call, later in the interview he stated that he now questioned his recollection that Uribe had asked the attendees of the meeting to contribute to the Clinton/Gore campaign as opposed to the DNC. Smith recalls the amount that Uribe asked for as being $5,000, not $1,000 or $2,000.[34]

Smith reiterated that the meeting in question was attended by six or more AJ executives. Smith recalls that the Vice President's call may have come in during the afternoon, possibly after 3:30 p.m. During such a meeting, even in the afternoon, the

[34] However, rather than definitively concluding that his August 19, 1996, check to the DNC was related to the Vice President's solicitation of Uribe, Smith stated that it was possible that he wrote this $5,000 check to the DNC in connection with James Cella's fundraising efforts. As noted below, Uribe's August 19, 1996, letter to Peter Knight seems to make clear that Smith's August 19, 1996, $5,000 check to the DNC was part of the $25,000 Uribe provided to the DNC in response to the Vice President's request.

AJ officers and employees present routinely would be eating.

Evidence Relating to Late 1995 Contributions to Clinton/Gore 96: On October 23, 1995, Uribe sent a letter to James Harmon, then the head of a Wall Street investment firm, enclosing eight checks totaling $10,000, each made out to Clinton/Gore '96. One of these checks was check number 347 drawn on Kenneth Smith's Charles Schwab checking account, in the amount of $2,000, which is referred to above.

We recently interviewed James Harmon, now the head of the U.S. Export-Import Bank, about the Clinton/Gore '96 contributions that Uribe sent to him in October 1995. A Democratic party activist, Harmon raised funds for Clinton/Gore '96 in late 1995 and early 1996, particularly in connection with a New York City Clinton/Gore fundraising event that occurred in early February 1996.[35]

Harmon told us that he knows Uribe somewhat through business. Although Harmon could not recall specifically, when shown Uribe's October 23, 1995, letter, Harmon stated that he likely solicited Uribe for contributions for the New York City Clinton/Gore event. Harmon has no knowledge of Vice President Gore being involved in soliciting the contributions that Uribe sent to Harmon in October 1995.

Letter to Peter Knight: On August 19, 1996, Uribe drafted a letter to Peter Knight, which stated in relevant part:

> Dear Peter:
>
> Vice President Gore personally called me in late spring -and I was very flattered - to ask if I could raise an additional $25,000 for the DNC above the amount we raised for Clinton/Gore '96.
>
> I am pleased to enclose the following checks:

Integral Construction	$10,000
Charles Uribe	5,000
Kenneth D. Smith	5,000
Pradeep Desai	5,000
Total	$25,000

The corporate check was deposited to the DNC's non-federal account. The three individual checks were deposited into the DNC's federal account.

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[35] The fundraising event apparently was originally scheduled for early November 1995, but was postponed due to the assassination of Israeli Prime Minister Yitzhak Rabin.

Analysis

Unlike Nicholas Allard, in the case of Charles Uribe, we do know with reasonable certainty that the Vice President in fact solicited Uribe for a political donation during a telephone conversation. However, the evidence we have amassed in our investigation indicates that the Vice President asked Uribe to contribute $25,000 to the DNC, not to Clinton/Gore '96, as Kenneth Smith originally alleged. Further, in our view, there is no evidence from which it may reasonably be inferred that Vice President Gore asked Uribe to make a hard money contribution, as opposed to a soft money contribution, to the DNC.

It first should be noted that Smith himself retreated substantially during his second interview from his initial position that Uribe told the other attendees of the AJ executives meeting that the Vice President had asked Uribe to raise money for the Clinton/Gore campaign. In both his interviews, Smith was quite certain that Uribe had sought $5,000 contributions from AJ officers in response to the Vice President's solicitation. Thus, when Smith was shown during his second interview that he had written a $5,000 check to the DNC in August 1996 and a $2,000 check to Clinton/Gore '96 in October 1995,[36] he was not sure whether Uribe had told him and the other attendees to write checks out to the DNC or to Clinton/Gore '96 in response to the Vice President's solicitation.[37] Smith's confusion appeared to heighten when he was told that the legal limitation on contributions to Clinton/Gore '96 was $1,000 per person.[38] He stated that Uribe

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[36] Although Smith's recollection during his first interview that Uribe referred to federal matching funds in the context of describing the Vice President's telephone call is suggestive of a solicitation for a contribution to Clinton/Gore '96, the documentary evidence discovered in the course of the investigation renders this unlikely. Perhaps Uribe referred to federal matching funds in Smith's presence in late 1995, in the course of raising funds for Clinton/Gore '96, apparently at the behest of James Harmon.

[37] Had Uribe submitted a series of $5,000 checks to Clinton/Gore '96, the committee presumably would have returned those checks to him, because they each would have been $4,000 in excess of the statutory limit. See 2 U.S.C. § 441a(a)(1)(A).

[38] Smith also seems to be confused about who was present during the telephone call. While Smith believes that eight to twelve AJ officers and employees were present when Uribe took the Vice President's call, Capolino recalls only himself, Uribe, and Smith being present. Our interviews have tended to corroborate Capolino's memory on this point. Several individuals whom Smith thought had probably or possibly attended the meeting have told us that they were not there. As noted below, however, we have not been able to interview every person whom Smith indicated

tracked the contributions given by AJ employees and would not have asked any AJ employees to write checks for greater than the applicable limitation.

Even if Smith had continued to maintain that he was certain Uribe had told him and the others present during the telephone call that the Vice President had asked Uribe to raise money for Clinton/Gore '96, Uribe's August 19, 1996, letter to Peter Knight provides conclusive evidence that the Vice President solicited Uribe for a contribution or contributions to the DNC. This is consistent with the proffer we received from Uribe's attorney during our preliminary investigation last year to the effect that the Vice President asked Uribe to contribute $25,000 to the DNC. In addition, James Cella recalls that Allison Uribe told him that contributions to the DNC were made in response to Vice President Gore's telephone solicitation of her father.

No one with whom we have spoken[39] has told us that he or she remembers hearing about more than one telephone conversation between Uribe and the Vice President. Both Kenneth Smith and James Capolino independently told us that Uribe would have boasted of another such call, and neither one recalls that happening. Nor have we discovered any telephone records which would lead us to believe that there was a telephone call to Uribe at AJ's offices from Vice President Gore other than the call that occurred on February 5, 1996.

Uribe's reference to the call in his letter to Knight as being in "late spring" of 1996 seems most plausibly explained as either an inadvertent or an intentional misdating by Uribe. If Uribe promised Vice President Gore on February 5, 1996, that he would contribute $25,000 to the DNC, but did not get around to doing so until more than six months later, one can understand why he might have wanted to refer to the call as having occurred in

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might have been present at that time.

[39] We have not been able to interview every AJ officer or employee who may have some information regarding a telephone call or calls to Uribe from Vice President Gore. In particular, Uribe has not been willing to submit to an interview. According to Uribe's attorney, Uribe still has health problems and his memory has been affected by medication he has been taking. However, as noted earlier, in the course of last year's investigation we did receive a proffer from Uribe's attorney concerning Vice President Gore's fundraising telephone call to Uribe.

In addition, AJ Executive Vice President Pradeep Desai (who made a $5,000 contribution in furtherance of Uribe's $25,000 pledge to the Vice President), Betty Ahearn (Uribe's personal secretary), and Mary Dolan (the receptionist who apparently fielded the call from the Vice President) have declined to speak with us.

late Spring. Moreover, Uribe's attorney proffered in late 1997 that Uribe then believed that a date of February 5, 1996, for his telephone conversation with the Vice President sounded about right.

Of course, it is theoretically possible that the Vice President solicited Uribe for a contribution to the DNC during the one telephone conversation that we know about and asked him to raise funds for Clinton/Gore '96 in another conversation that we have been unable to document.[40] Although the August 19 letter from Uribe to Knight refers to an "amount that we raised for Clinton/Gore '96," it provides no basis from which we can conclude that Vice President Gore was involved in any way in soliciting Uribe for those contributions. To the contrary, our investigation has established that James Harmon most likely solicited Uribe to raise the money for Clinton/Gore '96 to which Uribe presumably referred in his August 19 letter. Harmon has no knowledge of Vice President Gore being involved in soliciting funds from Uribe for Clinton/Gore '96.

With respect to the Vice President's solicitation of Uribe on behalf of the DNC, Uribe met his $25,000 pledge in the form of four checks -- one corporate check for $10,000 and three personal checks for $5,000 each. Although the corporate check by definition would have been a soft money contribution, the three personal checks, which ultimately were deposited into the DNC's federal account, conceivably could have been intended by Uribe to be hard money contributions.[41] However, we have no evidence that the Vice President explicitly asked Uribe to provide $25,000 or some portion thereof in hard money to the DNC.

It seems very unlikely that the Vice President asked Uribe to break up his $25,000 contribution into more than one check, let alone the unique grouping of one corporate and three personal checks that Uribe ultimately provided. The call sheet for Uribe merely suggested that the Vice President ask Uribe to contribute $25,000 to the DNC Media Fund. Moreover, in the course of our investigation last year, we came across no instance in which the Vice President asked a potential donor to break up a pledge into

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[40] Because we conclude that the Vice President asked Uribe to contribute to the DNC, we do not reach the question of whether a request to raise contributions from others would constitute a solicitation that might violate section 607.

[41] These three checks each were made out simply to the DNC. There was no indication on the checks whether they were intended by the contributor to go to the DNC's federal or non-federal account. As we learned during our preliminary investigation last year, during the 1996 election cycle the DNC often deposited checks on which there was no federal vs. non-federal designation into a federal account without the donor's knowledge or consent.

more than one check, let alone some combination of hard and soft dollars. It seems much more plausible that Uribe unilaterally decided to meet his $25,000 pledge by way of the four checks. To the extent he could get Kenneth Smith and Pradeep Desai to give $5,000 of their own money to the DNC, as opposed to funding the $25,000 entirely himself or through a corporation he controlled, it obviously would have been in Uribe's financial interest to do so.[42] In addition, as Capolino told us, Uribe previously had not been a major player in the DNC, and thus presumably was used to making contributions in the smaller increments applicable to congressional and some state and local campaigns. Thus, perhaps out of force of habit, Uribe decided to break up his $25,000 into four smaller amounts. Finally, to the extent Uribe wanted himself and/or Allison Uribe to be perceived as having worked hard for the Democratic party, bringing in four checks (two of which on their face were not linked to Uribe) probably would be more effective than Uribe simply writing one $25,000 check on a personal or corporate account.

Whatever Uribe's reason for not writing a $25,000 check from a personal or corporate account, there is no basis to conclude from the way Uribe met his pledge that the Vice President asked Uribe to give hard money to the DNC.

In sum, we have concluded that Vice President Gore made one telephone solicitation of Charles Uribe for a contribution to the DNC. Our evidence indicates that this call occurred on February 5, 1996. We have discovered nothing to make us believe that this call was different in any material way from the many telephone solicitations the Vice President made in late 1995 and 1996 in which he asked potential donors to make substantial soft money contributions to the DNC Media Fund. There is insufficient evidence to support any inference that Vice President Gore's telephone solicitation of Uribe included a request to contribute to Clinton/Gore '96 or to make a hard money contribution to the DNC. Accordingly, we recommend that the Attorney General conclude that no further investigation of the Uribe allegation is warranted.

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[42] The bank records that Smith provided to us from his Schwab checking account do not reflect any reimbursement to Smith around the time of this contribution. We do not know whether Uribe or AJ or any other person or entity reimbursed Desai for his $5,000 contribution to the DNC on August 19, 1996.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

NOV 17 1998

EXHIBIT 49

MEMORANDUM

TO: Lee J. Radek
Chief
Public Integrity Section

FROM: [redacted]
Deputy Chief
Public Integrity Section

[redacted]
Trial Attorney
Public Integrity Section

SUBJECT: Recommendation to Close the Preliminary Investigation of Harold M. Ickes without Seeking Appointment of an Independent Counsel

The Public Integrity Section and the Campaign Financing Task Force have conducted a preliminary investigation under the Independent Counsel Act of an allegation that Harold M. Ickes committed perjury during testimony before the Senate Committee on Governmental Affairs on September 22, 1997. The alleged perjury involves Ickes's statements that he was not sure and did not know what, if anything, the Administration had done with regard to the Teamsters strike of Diamond Walnut Growers, Inc. We believe that the potential perjury is unprosecutable as a matter of law at this point, based on a fair consideration of the totality of the evidence obtained during the preliminary investigation. Nor do we see any reasonable basis for believing that further investigation could lead to additional evidence that would be sufficient to overcome the fatal proof deficiency that presently exists. Accordingly, we recommend that the Criminal Division ask the Attorney General not to seek an independent counsel in this matter.

The factual background and circumstances relevant to Ickes's testimony have been set forth in detail in the Section/Task Force

memorandum recommending appointment of an independent counsel. We take no issue with the memorandum's factual summary. We write separately to: (1) clarify the statutory standard for the appointment of an independent counsel; (2) set forth our view that the proof of perjury in this case is fatally deficient; (3) explain why requesting appointment of an independent counsel in this case is inconsistent with the Attorney General's Independent Counsel Act precedent in cases involving perjury and false statement allegations; and (4) express our concern that appointment of an independent counsel based on the quality of evidence in this case will publicly establish a dangerous precedent that will invite partisan manipulation and make appointment of an independent counsel likely anytime a covered person fails to recall a matter of any significance during a congressional inquiry, criminal investigation, background investigation or in the course of any other statement to the federal government.

I. THE STANDARD UNDER THE INDEPENDENT COUNSEL ACT: BROADER THAN LEGAL SUFFICIENCY OF THE EVIDENCE

Section 592(c) of the Independent Counsel Act requires that the Attorney General apply to the Special Division for the appointment of an independent counsel if she determines, upon completion of the preliminary investigation, that "there are reasonable grounds to believe that further investigation is warranted." The threshold is low, but the Attorney General is clearly provided a certain range of discretion to determine what constitutes "reasonable grounds" to warrant further investigation. The statute limits the basis for that determination in only two ways: (1) it must comply with "the written or other policies of the Department of Justice with respect to criminal investigations;" and (2) it may not be based on a belief that the subject of the investigation "lacked the state of mind required for the violation of criminal law involved" unless the lack of intent has been shown by "clear and convincing evidence."[1]

The Act's triggering standard implicitly recognizes that a preliminary investigation is unlikely to exhaust all possible avenues of investigation. In giving the Attorney General the authority to close out a matter after a 90-day investigation, the Act anticipates that there will be allegations that are so

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[1] The Attorney General's determination of when an independent counsel is required is unreviewable in any court. 28 U.S.C. § 592(f).

unlikely to be prosecutable, that it simply is not "reasonable" to continue investigating them.

It has been said there is no "bad case" exception to the Independent Counsel Act. Indeed, the policies that motivated the Act are implicated as much in marginal cases as they are in strong cases. But in our view there is a distinction between a weak case that probably would not be brought in the exercise of sound prosecutorial discretion, and a case that is so deficient that it falls outside the zone of reasonable prosecutorial judgment, either because we know it is unprovable as a matter of law or because there is no reasonable prospect to believe further investigation would lead to evidence of a prosecutable crime. The latter category of cases does not require the exercise of independent prosecutorial judgment, and thus does not require the appointment of an independent counsel.

The Attorney General is instructed by the Act to be "reasonable" in making determinations about what further investigation is warranted. The standard is broader and more flexible than the traditional Fed. R. Crim P. 29(a) sufficiency of the evidence standard, which requires the judge to consider the evidence in the light most favorable to the government, see Glasser v. United States, 315 U.S. 60, 80 (1942), and ask if a "rational trier of fact" could find "the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307,319 (1979). At the end of a preliminary investigation, the record is not bounded as it is at the conclusion of a trial. Moreover, a preliminary investigation is not an adversarial proceeding. It is a quasi-judicial fact-gathering enterprise for the purpose of deciding whether further investigation is warranted. The Rule 29 standard is designed for a different and much more limited issue.

In our view, the "reasonable grounds" language of section 592 (b) grants the Attorney General more discretion to make judgments about witness credibility and the strength of circumstantial evidence than a court has in deciding whether to allow an indicted case to go to a trial jury. A Rule 29 analysis is certainly part of what may appropriately be considered in determining whether further investigation is warranted, but the appellate-style objective legal analysis can and should appropriately be subsumed into a broader "reasonable grounds" standard, i.e., are there reasonable grounds to believe that this allegation warrants further investigation or prosecution. Similarly, the often asked question of whether

"any reasonable prosecutor"[2] would pursue the matter does not accurately state the test for the Attorney General; that too is an objective test of a reviewing body, similar to the "any reasonable juror" test. While again posing that question may help to clarify the issue, we think it appropriate to emphasize the fact that posing the issue either as a Rule 29 issue or as a "reasonable prosecutor" issue can be misleading, because both are objective tests applied to determine whether a finding made by a finder of fact can be sustained. Here, there has been no such finding of fact; the Attorney General is the decision maker and her determination is to be informed by her sound exercise of discretion, and whether she subjectively believes that further investigation of this case is reasonably likely to lead to evidence that could ever be sufficient to make a conviction for perjury "probable."

II. THERE IS NO EVIDENCE OF FALSITY

To prosecute a failure to recall as perjury, there must be evidence sufficient to prove beyond a reasonable doubt that the professed lack of recollection is literally false. See Bronston v. United States, 409 U.S. 352 (1973)(literal truth bars perjury conviction). Ickes's allegedly perjurious statements are akin to failures to recall. Read literally, they are statements about his present state of mind, i.e, his lack of certainty and knowledge during the deposition about what the Administration did regarding the Diamond Walnut strike. Under Bronston, that is what ultimately must be proven false beyond a reasonable doubt.

Because the issue is falsity, the standard under the Independent Counsel Act is not whether there is clear and convincing evidence that Ickes forgot, but rather whether the evidence of falsity indicates a potential perjury violation warranting further investigation.[3]

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[2] Prosecutors are not automatically "reasonable" simply because they are prosecutors. The test should not be whether there is a federal prosecutor somewhere who says he would bring the case, but rather whether a reasonable prosecutor would believe that further investigation is warranted (which is something less than presently prosecutable) under a reasonable interpretation of the Department's established policies and practices.

[3] In the context of a "failure to recall" perjury, the evidence of falsity will be largely indistinguishable from the

There is no dispute that Ickes was aware of the Kantor call in April 1995. Ickes readily admits to it, and two witnesses, Jennifer O'Connor and Kantor, confirm it directly. But the fact that Ickes once knew about the call is the beginning, not the end of the analysis.

The real question is whether it is reasonable, after considering all the evidence, to infer that at the time of the deposition Ickes in fact was "sure" and did "know" that "something" had been done by the Administration regarding the Diamond Walnut strike. In making that determination in the context of the Independent Counsel Act, it is appropriate - especially when, as here, nearly all reasonable investigative steps have been taken -- to consider whether the available evidence obtained to date would be sufficient to sustain a conviction as a matter of law. In reaching her conclusions, as a fact finder, the Attorney General should view the entire body of evidence fairly and impartially, not skewed in the light most conducive to a finding of guilt. Moreover, it is only "reasonable" that the Attorney General consider the total body of evidence and indulge only in inferences that logically flow from credible evidence.

It is our conclusion that a fair and impartial review of the evidence makes clear that there is no likelihood of ever obtaining a conviction in this case because there is no prospect of ever being able to prove the falsity of Ickes's lack of certainty and knowledge during the deposition.

Factors for Assessing a Failure to Recall. There are a variety of factors that case law and common sense suggest might provide a basis for drawing inferences about the truthfulness of a professed failure to recall. They include:

- the amount of time between the underlying event and the testimony;
- the specificity and clarity of the questioning;
- the nature and significance of the underlying event to the witness;

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evidence of intent.

- the existence of a motive to conceal;
- whether the witness had advance notice that the underlying event was likely to be a topic of questioning;
- the ability of other similarly situated witnesses to recall the underlying event;
- the ability of the witness to recall related or similar events during his testimony.

In this case, each of these seven factors, in our view, suggests that it was reasonable for Ickes not to recollect the Kantor call during his deposition. Viewed collectively and impartially, they leave no room for a rational trier of fact to conclude the contrary beyond a reasonable doubt. We will summarize below our view of the evidence on the four most significant factors:[4]

Two and a Half Years. The two and a half years between the testimony and the Kantor call is obviously a significant period that makes clear recollection unlikely. Many of us have trouble remembering significant matters that happened much more recently than two years ago.

The Questioning Was Vague and Ambiguous. Another significant factor, in our view, is the question itself. The more precise and focused the question, the more likely a witness is to recall a specific event. If Ickes had been asked a specific question – such as, "To your knowledge, did anybody from the Administration contact Diamond Walnut to urge the company to resume negotiations?" – it would be more reasonable to believe that the Kantor call would have come to mind.

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[4] The other three factors provide less direct and less powerful bases for drawing inferences about the truth or falsity of Ickes's failure of recollection. Nonetheless, what they do suggest is consistent with our view that Ickes's lack of certainty and knowledge was genuine since: there was no advance notice about the Diamond Walnut matter being a topic of questioning; most of the other witnesses had limited or no recollection prior to having their recollections refreshed; and our review of the deposition showed a number of other credible failures to recall with no indication of selective memory.

But the question here - "What, if anything, was done [by the Administration] regarding the Diamond Walnut strike?" - did nothing to focus Ickes's recollection on the specific "thing" at issue, regardless of how the question is interpreted.

If, for instance, the question is interpreted literally - as the interrogator now tells us she understood it - it would encompass any action of any kind, at any time, by anyone in the Administration. It would include, for example, Administration officials talking internally about the issue, reading reports or letters with information about the issue, or meeting with Teamsters officials to hear their views. Understood literally, the question is so sweeping and unfocused to do little or nothing to focus attention on any particular "something." It is akin to asking a Justice Department official today, what, if anything, the Department did on a particular constituent matter during 1996. Overlooking a particular matter in response to a question of that nature would certainly be reasonable.[5]

On the other hand, it is plausible that Ickes may have interpreted the question more narrowly to encompass only official Administration action or alternatively only action that actually "did" something; for example, the invocation of federal powers to intervene in labor disputes under certain circumstance.[6] The more narrow reading of the question might well have directed Ickes's attention away from "things" he regarded as inconsequential, such as a telephone call that led to nothing. In short, it is our view that the questioning was either too broad or too confusing to have reasonably focused Ickes's recollection on the Kantor call, which will seriously impair any effort to prove that Ickes must have remembered.

The Kantor call was a Routine and Unimportant Matter to Ickes. The significance of the Kantor call to Ickes is another

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[5] It is obviously much easier to overlook a particular event in response to a vague sweeping question (i.e., What, if anything, has the Justice Department done to combat corruption?) than it is to forget about the same particular event in response to a specific and clear question (i.e., In 1996, did the U.S. Attorney's Office in San Diego establish an inter-agency Border Corruption Task Force?).

[6] Ickes clearly did not interpret the question literally since he did not respond by describing discussions and meetings with the Teamsters and his staff about Diamond Walnut, which he volunteered information about in the surrounding testimony.

important consideration in assessing how forgettable it was. There is no doubt that Ickes was involved in the issue: he went to at least two meetings at which Diamond Walnut was discussed; sent Kantor two brief memos about the issue; met with Kantor personally about it; asked O'Connor, his assistant, to follow-up to make sure that Kantor made the call; and received an oral report from O'Connor that the call had been made. It has been suggested that we should infer from the nature and extent of Ickes's involvement that the Kantor call was an important enough matter to Ickes that he must have remembered it two and a half years later.

In our view, the best evidence about the relative significance to Ickes of the Kantor call comes from the other people who worked with Ickes at the time, in particular those involved in the Diamond Walnut matter. During the preliminary investigation, we interviewed O'Connor; Janice Enright, Ickes's chief of staff; John Sutton, Ickes's administrative assistant; and Tom Shea, another Ickes's senior aide. Enright, Sutton, and Shea had no recollection of Diamond Walnut ever being an issue that Ickes worked on. O'Connor, who was Ickes's aide on labor issues, had only a vague recollection of the matter. She viewed it as one of literally hundreds of routine labor constituent matters that were handled by Ickes's office. As for the Kantor call itself, it was a non-event that she did not even bother to memorialize in writing, relying instead on a brief oral report to Ickes, who at the time showed no interest in the matter and made no attempt to have anyone else contact the company.

From the USTR perspective, the call was also treated as a minor and unimportant matter. Peter Scher, Kantor's chief of staff, has no present recollection of the issue, even after being shown a contemporaneous e-mail he sent to another Kantor aide asking him to remind Kantor to make the call. That Kantor waited several weeks to follow-up on Ickes's request further indicates that it was not a high priority. As for the call itself, Kantor regarded it as inconsequential; it led nowhere. Kantor did not prepare a memorandum or any other written report of the call for Ickes. Instead, the result of the call was reported back orally through staff -- and perhaps mentioned in passing by Kantor to Ickes sometime later.

The enormous range and volume of matters that Ickes handled in the White House further demonstrates the relative insignificance to him of a matter like the Kantor call. During his three years in the White House, Ickes was known for his long hours (14 hour days/6 days a week) and his ability to

efficiently manage a vast amounts of work and complete large and complex projects. On a given day, according to his staff, he could address hundreds of different issues. Ickes estimated that in the 1994-1995 time frame, various labor matters accounted for 10 to 15 percent of his time of which only a small percentage of that related to the Teamsters. In the context of a portfolio that included Whitewater, the Democratic National Committee, health care, welfare reform, and other major political and policy issues in addition to labor, it is understandable the Kantor call in connection with the Diamond Walnut strike may not have been that memorable.

That Ickes attended a couple of meetings, sent a couple of short memos, and had a couple of conversations with staff about the Kantor call does not provide a reliable basis for discounting the strong direct evidence from the people in the best position to know whether the Kantor call was memorable. We doubt that the number of meetings, conversations and memorandums about a particular matter is any more reliable an indication of its significance in the White House than it is within the Department of Justice.[7] Indeed, it is almost impossible to reconstruct circumstantially from a paper record an accurate picture of the relative significance of the Kantor call to someone like Ickes whose responsibilities include such a unique mix of high priority matters. In our view, a fair and impartial balancing of the direct and circumstantial evidence about the significance of the Kantor call clearly indicates that it was not a matter of sufficient importance that he would necessarily -- or even likely -- have remembered it two and a half years later.

No Motive to Conceal. The presence of a strong reason to conceal the underlying event is a basis for inferring that a failure to recall might be feigned. It might also provide a basis for inferring that the underlying event was memorable (unless the witness routinely engages in criminal or improper conduct). In this case, however, there is nothing criminal, improper, or even unusual about a high-level government

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[7] If for instance, we were trying to determine how important and memorable a particular two year-old matter was to the Deputy Attorney General, it would be much more useful to know what the DAG, his chief of staff, his top aides, and his administrative assistant say about the importance of the matter than it would be to count the number of memorandums, e-mails, meetings, and conversations involving the DAG during which the matter may have been mentioned.

official contacting Diamond Walnut to encourage the company to try to settle its strike with the Teamsters. Indeed, the preliminary investigation revealed that high-level attempts to encourage a settlement of the strike were attempted on multiple occasions by high-level Administration and congressional officials.

For instance, in March 1994, one year before the Kantor call, Labor Secretary Reich invited the company to participate in federally sponsored mediation. Reich's intervention caused the parties to restart negotiations in May 1994 with federal mediator John Calhoun Wells -- which was what the Teamsters had been requesting. Reich's effort to facilitate a settlement was backed by the Republican congressman from Diamond Walnut's district and received favorable coverage in the California media.

In 1995 and 1996, another high-level Administration official, Deputy Secretary of Agriculture Richard Romminger -- after being briefed about the strike by Ron Carey -- reached out multiple times to various people associated with Diamond Walnut. Because of his efforts, informal negotiations were restarted in late 1996 and early 1997.[8] Romminger readily disclosed the details of his role in the negotiations during our investigation and during the recent investigation by the Hoekstra Subcommittee.

The existence of other high-level attempts to promote a settlement, some of which were public, suggest that there was no political motive for Ickes to conceal intervention in the Diamond Walnut dispute. As Reich demonstrated in 1994, trying to settle the Diamond Walnut strike was something to brag about, not something to hide.

As for the theory that Ickes had a political motive to conceal the extent of the Administration's willingness to do special favors for the Teamsters, it is simply unsupported by the evidence. It was hardly a secret to the Thompson Committee that the Teamsters were an important constituency to the Administration and the Democratic party, and that the Administration was trying to do whatever it could to court Teamster support. Ickes readily admitted as much during his

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[8] William Cuff, the CEO of Diamond Walnut, reported that he also received offers to help settle the strike from Senators Kennedy, Feinstein, and Kassebaum, as well as Congressman Richard Pombo (R-CA).

testimony and even volunteered information about conversations with Ron Carey and Bill Hamilton relating to Diamond Walnut.[9] Moreover, throughout his deposition and later in his public hearing testimony, Ickes was frequently confronted with allegations that politically important constituents and large donors were receiving special treatment from the Administration. Ickes's typical response to those allegations was not to deny the special treatment, but rather to aggressively and sarcastically defend it as part of the political process; for example, "and if you give enough money to Republican Senators, you will get access too." [10]

We agree that Ickes had a general desire not to help his questioners, who he no doubt perceived as partisans intent on casting him in an unfavorable light. But that type of general motive -- a reluctance to advance a hostile inquiry -- is too broad to prove much. It is a motive that exists whenever an Administration official is questioned by a congressional committee controlled by political opponents. Failures of recollection occur all the time during congressional investigations, and it is not reasonable to infer that they are perjurious merely because the witness is a current or former high-level Administration official.[11]

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[9] The information Ickes volunteered – i.e., I'm sure I talked to Hamilton about Diamond Walnut -- clearly invited follow-up questioning. That the interrogator never bothered to follow-up does not change the fact that Ickes gratuitously gave the Committee investigative leads relating to Diamond Walnut, which is inconsistent with having an intent to steer investigators away from the Teamsters' connection to the Diamond Walnut matter.

[10] Ickes had a motive to minimize his role in the alleged Teamsters contribution swap scheme, which he knew at the time of the deposition was being investigated by the U.S. Attorney's Office for the Southern District of New York. There is no connection, however, between the Diamond Walnut strike and the contribution swap. In our view, it would be highly speculative and illogical to infer that Ickes wilfully lied about the Kantor call because of a concern derived from the contribution swap scheme investigation.

[11] Moreover, at the time of his testimony, Ickes was no longer in the Administration, having been unceremoniously ushered out of the Deputy Chief of Staff job in January 1997.

III. DEPARTMENTAL PRECEDENT COUNSELS AGAINST TRIGGERING

In two recent preliminary investigations, the Attorney General has made determinations not to seek appointment of an independent counsel for alleged false testimony and statements where the inculpatory evidence was arguably more compelling than the evidence in this case.

Babbitt. The preliminary investigation of Interior Secretary Bruce Babbitt involved two allegedly false statements. The first, which went to an independent counsel, was Babbitt's categorical denial under oath that he had told lobbyist Paul Eckstein during a private meeting two years earlier that Ickes had called and directed him to make a decision on an Indian casino application that day. Babbitt had made conflicting statements about the conversation in the past and knew prior to his testimony that the reference to Ickes would be a focal point of the interrogation. Because Eckstein's sworn testimony was specific and highly credible, and contradicted Babbitt's emphatic denials, we concluded that there was sufficient evidence of falsity to "warrant further investigation" by an independent counsel.

But the Babbitt matter also involved a second alleged false statement during the same conversation with Eckstein. Eckstein claimed that Babbitt had made a comment about how Indian tribes had contributed more than $500,000 to Democratic interests. Babbitt testified that he had no recollection of making a statement about Indian contributions. We recommended and the Attorney General determined without difficulty that there was no evidence that Babbitt's failure to recall was false – even though Babbitt clearly had a strong motive not to admit the incriminating statement, had ample opportunity to refresh his recollection in advance of his testimony, was asked precise and specific questions about the remark, claimed to have a clear recollection of other statements made during the same conversation, and may have lied about another aspect of the same conversation.

The decision not to refer Babbitt's failure to recall was the correct decision under the Act. No reasonable prosecutor could have believed that further investigation would lead to proof beyond a reasonable doubt that Babbitt actually did recall a single remark in a conversation more than two years old. It did not matter that it might have been possible to construct an inculpatory theory based on speculative inferences about motive and the nature of Babbitt's memory.

Freeh. On March 5, 1997, FBI Director Louis Freeh testified falsely before a congressional committee that the FBI's suspension of Frederic Whitehurst was "solely" based on the recommendations and findings of the Department of Justice's Office of the Inspector General. In fact, Whitehurst was suspended both for the reason Freeh gave and because he had refused to cooperate with an investigation into unauthorized disclosure of confidential information, a matter not dealt with in the OIG report.

The preliminary investigation revealed that the full reasons for Whitehurst's suspension had been set forth in briefing materials provided to Freeh only days before his testimony. Moreover, the issue was a politically sensitive one, which arguably could have provided ammunition to political enemies of the FBI. Finally, there was evidence that shortly after his testimony Freeh acknowledged to Inspector General Bromwich that he knew that there had been two reasons for Whitehurst being placed on administrative leave. Despite this evidence and the fact that Freeh's testimony was confident and categorical, the Attorney General concluded that under the totality of the circumstances she could determine by clear and convincing evidence that Freeh had made an innocent mistake when he said that the OIG report was the "sole" basis for the suspension.

Again, we do not take issue with the determination not to refer the Freeh perjury allegation to an independent counsel. The Freeh matter is significant because it highlights the discretion that the Attorney General has under the statute to make judgments about the credibility of witnesses and the strength of inferences from circumstantial evidence. The Attorney General could not have found clear and convincing evidence of a lack of intent on Freeh's part if she had "considered the evidence in the light most favorable to the government." Rather she properly viewed the evidence objectively, without a predisposition for or against the subject, and concluded that there was enough other evidence -- i.e., a lack of clarity and completeness in the briefing process, evidence from which it could be inferred that Freeh may not have read the briefing materials, Freeh's lack of personal involvement in the matter, and his prompt correction of his mistake -- to warrant the conclusion that no further investigation was warranted.

In our view, appointment of an independent counsel for Ickes would be inconsistent with the Attorney General's decisions in Freeh and Babbitt, where the evidence of falsity

and criminal intent was stronger than it is here.

IV. DANGEROUS PRECEDENT FOR THE FUTURE

We are concerned about the possible appointment of an independent counsel in this matter not just because of the unfairness to Ickes, but also because it will publicly establish a precedent of seeking appointment of an independent counsel because of a witness's diminished or failed recollection. Failures to recollect are common in congressional testimony, especially among covered persons, who are typically senior officials with broad responsibilities. It would be a serious misstep to construe the Independent Counsel Act in a manner that would effectively require appointment of an independent counsel every time a covered person professes to lack a clear memory of a matter, and there is a memorandum or another witness that provides evidence that in fact the covered person did have clear knowledge of the matter at some prior point. The potential for partisan manipulation of the Act would be greatly increased. Testimony before Congress would become an even more perilous event for any covered person, especially covered persons with faulty memories.

Under the Independent Counsel Act, it is for the Attorney General to determine what constitutes a "reasonable basis" to believe that further investigation is warranted. In our view, it is only reasonable to further investigate an alleged feigned failure of recollection if there is direct or strong circumstantial evidence, which when viewed objectively, establishes a reasonable probability that the case could be proven beyond a reasonable doubt. We are far from that threshold here.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

NOV 17 1998

MEMORANDUM

To: James K. Robinson
Assistant Attorney General

From: Lee J. Radek
Chief
Public Integrity Section

David A. Vicinanzo
Supervising Attorney
Campaign Financing Task Force

Re: Recommendation to Seek Appointment of an Independent Counsel to Investigate Perjury and False Statement Allegations against Harold M. Ickes, former White House Deputy Chief of Staff

INTRODUCTION

On September 1, 1998, the Attorney General notified the Special Division of the Court of Appeals that the Department of Justice had initiated a preliminary investigation pursuant to the Independent Counsel Act involving an allegation of perjury against Harold Ickes, former Deputy Chief of Staff to the President. Although Ickes is not a covered person under the Act, the Attorney General determined that it was appropriate to consider the allegation against Ickes pursuant to the discretionary clause of the Act. 28 U.S.C. § 592(c)(1).[1]

The allegation against Ickes arises out of answers he gave during a September 22, 1997, deposition conducted by the staff of the Senate Committee on Governmental Affairs. The testimony at issue concerned Ickes's professed lack of knowledge regarding "what, if anything, the Administration did" in 1995 in connection with the long-running Teamsters strike at Diamond Walnut Growers, Inc. Specifically, Ickes is alleged to have

[1] John C. Keeney, Deputy Assistant Attorney General, Criminal Division, is recused from this matter.



falsely purported not to know at the time of his deposition that in March and April 1995 he was personally involved in causing U.S. Trade Representative Mickey Kantor to call Diamond Walnut to assess the status of the strike and urge the company to try to resolve it.

Because the potentially false testimony consists of statements by Ickes about the nature of his recollection and the extent of his knowledge at the time of the 1997 deposition, we sought during the preliminary investigation to gather any and all evidence, direct or circumstantial, that would tend to show the falsity or truthfulness of Ickes's professed lack of certainty and knowledge about certain aspects of the Diamond Walnut matter. The investigation has uncovered a wide range of circumstantial evidence bearing on the issue of whether Ickes in fact recalled during the deposition what the Clinton Administration did regarding the Diamond Walnut strike.[2]

Although the evidence that Ickes must have remembered is weak, we do not believe, as a matter of law, that prosecution would be precluded. In our view, the question of whether Ickes was aware of the Kantor call during the deposition is a jury question. Accordingly, it is our recommendation that an independent counsel be appointed to investigate whether Ickes falsely testified about the extent of his recollection during the Senate Committee deposition.

We are preparing a proposed filing with the Special Division, reflecting our recommendation and conclusions, which will be forwarded to the Attorney General for her signature if she agrees. If she does not agree, we will prepare appropriate filings to close down the preliminary investigation without requesting appointment of an independent counsel.

BACKGROUND

I. ORIGINS AND SCOPE OF THE PRELIMINARY INVESTIGATION

The Senate Report. On March 10, 1998, the Senate Committee on Governmental Affairs issued a 9500 page Final Report on its Investigation of Illegal or Improper Activities in connection with 1996 Federal Election Campaigns. The Report contained numerous requests for criminal investigation by the

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[2] The case agent from the Federal Bureau of Investigation has reviewed this memorandum and concurs with the factual summary.

Department of Justice, including a request that we investigate whether Ickes and other Administration officials violated any federal election, fundraising, or other criminal statutes. The Report further claimed that Ickes had provided "misleading and inaccurate" testimony when he claimed not to know of anything that the Administration did in connection with the Diamond Walnut strike.[3]

Initial Investigation by the Task Force. In response to the Report, in July 1998, the Campaign Financing Task Force began using grand jury document subpoenas and FBI interviews to investigate the possibility that Ickes and others in the Administration had taken official action in connection with the Diamond Walnut strike in exchange for campaign contributions by the Teamsters. The investigation revealed that although the Teamsters mounted an aggressive campaign to enlist Administration assistance in settling the strike, the Administration, in fact did little or nothing of any substance to pressure Diamond Walnut to settle the strike on terms favorable to the Teamsters. The Teamsters were -- and continue to be -- disappointed with the lack of real action by the Administration. Although the Teamsters contributed large amounts to a wide range of Democratic candidates and interests during the 1996 election cycle, no evidence was found that any contribution was made in exchange for any official action or promise to take official action in connection with Diamond Walnut.

Decision to Initiate Preliminary Investigation. On July 30, 1998, David Vicinanzo concluded in a memorandum providing a preliminary factual summary of the Diamond Walnut matter that "it appears likely that Ickes made false statements under oath in his Senate Deposition." On September 1, 1998, based on the evidence summarized in the Vicinanzo memorandum, the Attorney General formally commenced a 90-day preliminary investigation of the matter pursuant to the discretionary clause of the Independent Counsel Act.

Although Ickes is not a covered person under the Independent Counsel Act, the Attorney General determined that

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[3] The Committee's Report did not characterize Ickes's testimony as perjury or as false. The Report alleged rather that the Ickes's testimony was "less than candid," "misleading," and "inaccurate," and asked that the Attorney General review the testimony to determine if it constituted perjury or obstruction of Congress.

an investigation or prosecution of Ickes in connection with the Diamond Walnut perjury allegation might present her with a personal or political conflict of interest.[4] Accordingly, on September 1, 1998, the Attorney General filed a notice with the Special Division formally initiating a preliminary investigation of Ickes pursuant to the discretionary clause of the Act.[5]

Scope of the Preliminary Investigation. During the course of the preliminary investigation and the substantial investigation that preceded it, 37 witnesses were interviewed about the Diamond Walnut strike, the Teamsters lobbying campaign, and the response of the Administration. The interviews included personnel from the Teamsters[6], Podesta Associates (the Teamsters's lobbying firm), Diamond Walnut, the Labor Department, the Agriculture Department, U.S. Trade Representative's Office, the White House, and Senator Kennedy's office.

We received documents from the White House, the Teamsters, Podesta Associates, Diamond Walnut, and the Department of Agriculture and were given access to interview reports and documents gathered in other investigations, including the pending Teamsters contribution swap case in New York and the

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[4] We are not aware of any changed circumstances that would warrant the Attorney General reopening the issue of whether this investigation of Ickes warrants the use of the discretionary clause.

[5] The Act requires that a preliminary investigation opened under the discretionary clause be conducted in accordance with the same standards and procedures that govern preliminary investigations of covered persons. The Attorney General does not at this stage have any additional discretion to seek or not seek appointment of an independent counsel as a result of proceeding under the discretionary clause.

[6] Former Teamster President Ron Carey provided us a proffer through his attorney. Former Teamster government relations director William Hamilton is currently under indictment for perjury and other charges in the Southern District of New York. Hamilton declined to provide us an interview or make an attorney proffer. His attorney stated that he might reconsider if we represented to him that Hamilton's unavailability was going to be the deciding factor in the appointment of an independent counsel.

Independent Counsel investigations involving Mike Espy and Bruce Babbitt. We also obtained testimony and documents from the Senate Governmental Affairs Committee, the House Committee on Government Reform and Oversight, and the Oversight Subcommittee of the House Education and the Workforce.

Finally, on November 11, 1998, we received a 54-page written submission from Ickes's attorneys, along with a lengthy compilation of exhibits. The attorney submission is attached hereto(without the exhibits) as Attachment B.

II. FACTUAL BACKGROUND

The preliminary investigation revealed that the Diamond Walnut strike has been a very public and contentious labor dispute for over seven years and that throughout the pendency of the strike there have been a wide variety of attempts by the Teamsters to get assistance from Congress and the executive branch in facilitating a resolution of the dispute. In order to understand the nature and significance of the issue to the Administration and to shed light on a possible motive to conceal the Kantor call, we summarize below in some detail the background of the strike and the extensive history of unsuccessful Teamster-initiated efforts to use federal government leverage to promote a settlement.

Diamond Walnut Strike. Diamond Walnut Growers, Inc., is an agricultural cooperative based in Stockton, California, with approximately 2,200 grower/members, who collectively produce, process and package more than 50% of all United States walnuts. Diamond Walnut is one of five cooperatives comprising Sun Diamond Growers of California -- a "super-cooperative" specializing in coordinating agricultural marketing and sales.[7]

Diamond Walnut employs approximately 300 regular year-round workers and 450 seasonal workers during the September/October harvest season. For over forty years, most of these workers were members of the International Brotherhood of Teamsters. In 1985, Diamond Walnut was experiencing

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[7] On September 24, 1996, Sun Diamond was convicted of giving illegal gratuities to then Secretary of Agriculture Mike Espy. Espy is currently on trial in the District Court for the District of Columbia for receiving gratuities from Sun Diamond and other entities that had business interests that could be affected by the Department of Agriculture.

financial difficulties and appealed to the union, which agreed to wage cuts of 30 to 40% -- typically from $10 to $7 an hour.

By 1991, the company's economic condition had improved, and the union asked during renegotiations of the collective bargaining agreement to have wages restored to their 1985 levels. The company refused, and the Teamsters went on strike in September 1991, which was just at the start of the critical harvest season. The company quickly hired replacement workers and managed to get through the harvest. Over time, most of the replacement workers have become permanent regular or seasonal employees.[8]

The strike was bitter from the beginning, with the company's refusal to fire the replacement workers (who saved it from economic disaster during the 1991 harvest season) being a key sticking point. Early efforts by the Teamsters to have the parties submit the dispute to mediation or arbitration were rejected by the company, and no substantial negotiations occurred during the first two and a half years of the strike.

Teamsters Efforts to Pressure Diamond Walnut to Settle. Over the past seven years, the Teamsters have mounted an aggressive multi-faceted public campaign to bring Diamond Walnut to the bargaining table and get their members back to work. The campaign has included a 40-day hunger fast by strikers, a cross county bus tour to generate support for the union, efforts to organize walnut boycotts in the United States and in Europe, and various other activities designed to generate publicity about the strike.

Washington Lobbying Campaign. In addition to the publicity and economic campaign, the Teamsters also launched a broad-based Washington lobbying campaign involving Congress and various departments and agencies of the executive branch. The objective was not only to "raise the consciousness" of congressional and executive branch officials concerning the plight of the minority female strikers, but also to look for ways to cut off various federal benefits enjoyed by Diamond Walnut by arguing that it was wrong to provide federal subsidies to a company that engaged in illegal and unfair labor

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[8] The composition of the replacement workers differs substantially from the striking workers. A large percentage of the striking workers were older Hispanic women, whereas the replacements were predominantly male and on average substantially younger.

practices. In 1993, the Teamsters retained the Washington firm of Podesta Associates to work with Teamster officials to develop and implement a comprehensive lobbying strategy.

Striker Replacement Legislation. The Teamsters/Podesta Associates lobbying campaign's congressional component focused largely on promoting legislation that would have banned the hiring of permanent replacements for striking workers. The union was able to make Diamond Walnut a high profile issue during congressional hearings and debate on the striker replacement legislation. Striking Diamond Walnut workers testified in 1993 before committees in both the House and the Senate and met privately with members of Congress to urge passage of the proposed Workplace Fairness Act.

The striker replacement legislation passed the House in 1993, but was blocked by a filibuster in the Senate in July, 1994. The issue resurfaced again in Congress in March 1995, when the Administration responded to the 1994 filibuster by issuing an Executive Order that prohibited the federal government from doing business with companies that hire permanent replacements for lawfully striking workers. Congress reacted by considering a number of bills to overturn the Executive Order, which again prompted extensive floor debate about the propriety of companies permanently replacing striking workers.[9] During the two year period of active congressional consideration of the striker replacement issue, the Teamsters and Podesta Associates used the Diamond Walnut strike as a "poster child" in support of striker replacement legislation. As a result, the plight of the striking Diamond Walnut workers was repeatedly mentioned -- and in some instances, extensively detailed -- in congressional floor debates and in statements in the Congressional Record, particularly by Senators Kennedy, Metzenbaum, and Boxer.

Congressional Attempts to Facilitate Settlement. During the period of legislative activity on the striker replacement issue, the Teamsters asked certain congressional figures to reach out to Diamond Walnut to try to stimulate a settlement. For instance, Senator Kennedy -- Anthony Podesta's former boss -- personally called William Cuff, the President of Diamond

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[9] The Executive Order prohibiting federal contracting with companies that hire permanent replacement workers was ultimately found by the D.C. Circuit to violate the National Labor Relations Act. Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

Walnut, and offered his assistance in trying to bring together the parties. Cuff recalls receiving similar calls about the strike from local Congressman Richard Pombo and former California Congressman Tony Coehlo. Cuff also had meetings to discuss the strike with Senator Diane Feinstein and Senator Nancy Kassebaum.

Although these congressional efforts generated media attention and brought some political pressure to bear on Diamond Walnut, the Teamsters were unsuccessful in getting any striker replacement legislation enacted; nor did the intervention of various members of Congress result in any substantial progress towards a settlement.

Executive Branch Efforts. The second prong of the Teamsters's lobbying campaign involved trying to persuade federal agencies to cut off subsidies or programs that benefitted Diamond Walnut as a way of pressuring the company to reach a fair settlement of the strike. The key agencies targeted by Podesta Associates were the Department of Agriculture (which runs the Market Promotion Program and the School Lunch Program); the Department of Labor (which has general jurisdiction over labor issues); and the U.S. Trade Representative's Office (which has responsibility for negotiating international trade agreements governing U.S. access to foreign markets for walnuts).[10]

Early Efforts at Agriculture Department. In 1993, the Teamsters repeatedly approached then Secretary of Agriculture Mike Espy and others in the Agriculture Department, seeking their help in encouraging Diamond Walnut to return to the bargaining table. Among other things, the Teamsters wanted the Department of Agriculture -- because of Diamond Walnut's alleged unfair labor practices and refusal to negotiate -- to cut off Diamond Walnut's participation in the Market Promotion Program (MPP), a federal program which provides subsidies for generic promotion of American goods in overseas markets. As the largest domestic producer of walnuts, Diamond Walnut benefitted substantially from the millions of dollars of free foreign marketing providing by the MPP. Although the Teamsters were able to meet with Agriculture officials (but not Espy personally) and present their case, the Agriculture Department

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[10] The Teamsters also approached the Environmental Protection Agency, which regulates pesticides used in growing walnuts.

concluded that it did not have the authority under the authorizing legislation to decide eligibility for the MPP. Because of Espy's close ties with the Sun Diamond, the Teamsters decided not to pursue the matter further.

Early Efforts at Labor Department. Teamster officials met with Labor Secretary Robert Reich shortly after he was appointed and discussed several substantive issues including the Diamond Walnut Strike. After Reich met with the Teamsters, the Labor Department's Women's Bureau investigated and prepared a report for Reich on the strike. The report, which was made public in the fall of 1993, highlighted the effect of the strike on older Hispanic women workers and was generally favorable to the Teamsters' position. The Report concluded by recommending that the Labor Department take "all possible and reasonable steps to bring Diamond Walnut and the Teamsters back to the table to hammer out an agreement and return the strikers to work."

The Teamsters were quick to circulate the Labor Department report to Congress and other parts of the federal government. Diamond Walnut was not pleased with the report, which the company believed to be factually flawed and biased. Cuff sent the Labor Department and members of Congress a rebuttal disputing some of the report's factual premises and complaining that the Labor Department appeared to have adopted the Teamsters view of the strike.[11] After releasing the report, the Labor Department tried unsuccessfully in the fall of 1993 to bring the parties together for mediation.

In January 1994, Congressman Richard Pombo, a Republican whose district includes Diamond Walnut, wrote Secretary Reich and asked the Department of Labor to mediate the strike. Pombo's letter was reported in the California press.[12]

Secretary Reich Facilitates Federal Mediation. In February 1994, Secretary Reich wrote to Bill Cuff and explained that the purpose of the Women's Bureau report was not to set

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[11] In recent congressional testimony, Cuff said that he viewed the Women's Bureau report and some of the Labor Department's actions in 1993 as putting pressure on the company to settle the strike.

[12] According to press accounts, Congressman Pombo had previously sided with the company and opposed the union's request for federal intervention.

blame, but "to encourage all parties toward a settlement." Noting that the new Director of the Federal Mediation and Conciliation Service, John Calhoun Wells, had offered to get personally involved in the dispute, Reich encouraged Diamond Walnut to take advantage of Wells's offer and begin talks in Washington.

In March 1994, Diamond Walnut publicly accepted the offer to have Wells mediate. The Labor Secretary's role was reported in the press as "thrusting an olive branch" between the Teamsters and the company. A Diamond Walnut spokesman was quoted giving Reich credit for bringing the parties together "despite ourselves."

In May, 1994, Ron Carey and Bill Cuff met with John Calhoun Wells in Washington to try to find a way to reach a settlement. The parties, however, were unable to find a compromise on the core issue of whether the replacement workers would be fired as part of the settlement. Cuff was adamant that his commitment to the replacement workers was irrevocable. The Teamsters believed Cuff was just stonewalling. Negotiations broke off without any substantial progress.

National Labor Relations Board Action. On January 20, 1995, the National Labor Relations Board issued a decision finding that Diamond Walnut had violated the National Labor Relations Act by discriminating against three strikers who were reinstated prior to a decertification election. The NLRB ordered that a third decertification election be held.[13] The Teamsters used the NLRB decision to help make their case that Diamond Walnut was a labor law violator.

1995 Lobbying. After the Labor Department sponsored mediation failed in 1994, the Teamsters and Podesta Associates geared up their lobbying campaign again in early 1995. They continued to reach out to key federal agencies and also took their concerns directly to the White House where they met with Ickes and other White House advisors.

United States Trade Representative's Office. In early 1995, Teamster officials and representatives from Podesta Associates had multiple conversations and meetings with staff at USTR. The Teamsters wanted USTR not to pursue trade

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[13] A prior decertification election had previously been ruled invalid by the NLRB's Regional Director because of procedural defects.

negotiations to reduce tariffs on walnuts -- arguing again that it was wrong for the U.S. government to be working to provide economic benefits to a company that engaged in unfair labor practices. Anthony Podesta remembers talking several times with Peter Scher, chief of staff to Kantor, to present the Teamsters' case. Podesta asked Scher to have Kantor call the CEO of Diamond Walnut and persuade him to settle the strike.

Other than the Kantor call -- which is discussed below -- USTR took no action directed at Diamond Walnut in response to the lobbying from the Teamsters and Podesta. To the contrary, during the pendency of the strike, the U.S. Trade Representative's Office continued to seek negotiated concessions on walnut tariffs as part of multilateral trade talks, and succeeded bilaterally in opening the Korean and Israeli markets for the importation of walnuts. The opening of international walnut markets substantially benefitted Diamond Walnut, which generates 25 to 30 percent of its revenues from exports.[14]

White House Meetings. In early 1995, representatives from the Teamsters had several meetings at the White House with staff to discuss a variety of substantive labor issues, one of which was the Diamond Walnut strike. Some of the meetings included other members of the Transportation Trade Department of the AFL-CIO; some were just Teamsters. White House staff and representatives from various departments and agencies of the executive branch would typically attend. Ickes, as the chief of staff's point man on labor issues, often participated.

Political Importance of Labor Unions and the Teamsters. From a political perspective, labor unions were very important constituents to the Administration. Documents produced by the White House to the Thompson Committee included approximately 20 pages of typed "Notes," with a separate page discussing each of the major labor unions, including specific recommendations on

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[14] During the pendency of the strike, Diamond Walnut had a lobbying campaign of its own. In particular, through the Walnut Commission it lobbied the White House, USTR, and the Department of Agriculture on issues of importance to the company, including the opening of foreign markets through trade negotiations and the preservation of the subsidies provided by the Market Promotion Program. Overall, the company's lobbying was much more successful than the union's, especially at USTR which negotiated trade concessions in a number of markets that benefitted the walnut industry.

how the Administration should court the support of each union. The Notes were apparently prepared sometime in early 1995, probably by Steve Rosenthal, then an Associate Deputy Secretary of Labor. The Notes were apparently read by Ickes since they are annotated throughout by his handwritten notes and highlighting.

One of the pages of the Notes related specifically to the Teamsters and emphasized that the union had played an "enormous role" in the success of Clinton/Gore '92 and the success of the Democratic party generally in the 1992 campaign. The Notes described how the "old" corrupt Teamsters had traditionally supported Republican presidential candidates until Ron Carey, who was a "new" anti-corruption Teamster, had switched the union to the Democrats in 1992. By 1995, however, the Teamsters' enthusiasm for the Administration appeared to be fading.

Accordingly, the Notes stressed that it was important that the Administration cultivate Carey and work on some of his "parochial issues." As the Notes warned:

> If [Carey] doesn't succeed in his efforts, the union is likely to fall back into the hands of the "old Teamsters." This would be a huge setback for the entire labor movement. Carey is not a schmoozer -- he wants results on issues he cares about. The Diamond Walnut strike and the organizing effort at Pony Express are two of Carey's biggest problems. We should assist in any way possible.[15]

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[15] Ickes was questioned at length about the "Teamster Notes" document at his September 22, 1997, Senate deposition. He was also questioned during the deposition about Notes specific to six other labor unions (the United Mine Workers Association, the United Brotherhood of Carpenters, the American Federation of State, County and Municipal Employees, the Communication Workers of America, the American Federation of Teachers, and the United Food and Commercial Workers). The questioning focused on Ickes's knowledge of Administration actions taken to promote and maintain the support of the particular union. With respect to a number of the union courting recommendations contained in the Notes, Ickes acknowledged that certain specific actions (such as allowing a labor leader to ride on Air Force One or have a meeting with the President) in fact did occur. Ickes also volunteered during his testimony about the various pages of Notes that as a general rule the Administration tried to maintain good relations with labor organizations that had been supportive of the DNC, the

Ickes's Responsibilities as Deputy Chief of Staff. Ickes served as Deputy Chief of Staff to the President from January, 1994, until January, 1997. During his three years in the White House, Ickes handled a variety of thorny political and policy issues. He was known by his staff for his long hours (14 hour days/6 days a week) and his ability to efficiently manage a vast amounts of work and complete large and complex projects. On a given day, he could address hundreds of different issues.

Ickes's major projects included overseeing the President's health care initiative, serving as the point person in the Chief of Staff's Office on Whitewater; overseeing White House relations with the Democratic National Committee; overseeing the President's welfare reform initiative, and overseeing the 1994 mid-term elections. Because of his background as a labor lawyer, Ickes also served as the point person in the Chief of Staff's Office on labor issues. Ickes estimated that in the 1994-1995 time frame, various labor matters accounted for 10 to 15 percent of his time, although he cautioned that it is often difficult to quantify what constitutes a "labor issue." Issues specific to the Teamsters accounted for only a small portion of the overall time he spent on labor matters.

Beginning in 1995, Ickes's chief aide on labor issues was Jennifer O'Connor. O'Connor told us she communicated in at least a minor way with over 100 labor unions. There were approximately 20 to 25 important unions that she interacted with on a regular basis, meaning once or twice a month. The Teamsters were one of the more important unions. Her job with respect to all the unions was to foster and facilitate a positive relationship between the unions and the President.

O'Connor stated that she and Ickes regularly had meetings at the White House with constituent groups, including labor officials, on a broad range of issues. O'Connor was unable to estimate how many of the meetings were specific to labor, but stated that it would not be unusual for Ickes to have several meetings with labor people on the same day.

White House Response to Teamsters Lobbying. During at least two of the White House meetings in early 1995 attended by Ickes, the Diamond Walnut strike was mentioned. The Teamsters requested that Ickes ask USTR Kantor to call the head of

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Administration, or other Democratic interests.

Diamond Walnut and put pressure on the company to start negotiating again.

After a meeting with Teamsters officials on March 1, 1995, Ickes sent a memorandum, dated March 6, 1995, to Kantor, stating that he had met with the Teamsters about the Diamond Walnut strike and that he wanted to meet with Kantor at his "very earliest possible convenience" to discuss the strike. Ickes attached several documents that provided background on the strike, including the Labor Department's 1993 Women's Bureau report.

Ickes Meets with Kantor. Ickes and Kantor did not meet until March 24, 1995. The meeting, which appears on Kantor's calendar, apparently took place at Kantor's office.

At the meeting, Ickes explained that the Teamsters believed that Diamond Walnut was "stonewalling" them, refusing to come to the bargaining table. The strike was a "thorn in the side" of the union. Ickes asked Kantor to make a call to the head of Diamond Walnut to see if the company was willing to try to negotiate a settlement.

Ickes told us during his interview that he believed Kantor was the right person to make the call -- as opposed to Ickes himself, for instance -- because Kantor was from California, had run several statewide campaigns there, and knew something about the strike.[16] Ickes said that at the time he knew very little about the strike. Kantor recalled that he and Ickes also discussed the fact that Kantor had represented farm workers and understood labor issues. Ickes told us he did not give Kantor any instructions as to what to say when making the call, and he was confident that he did not tell Kantor to put pressure on the company, which is consistent with Kantor's recollection. However, according to a Teamsters memo, shortly after his meeting with Kantor, Ickes reported that Kantor had agreed "to use his discretionary authority to try to convince the CEO of [Diamond Walnut] that they should settle the dispute."

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[16] It appears from the documentary evidence that the Teamsters or Podesta Associates came up with the idea of having Kantor make the call. Ickes told us he did not remember who suggested Kantor but that it would not have been unusual for the Teamsters to suggest someone since they were fairly sophisticated.

Kantor told us that he was reluctant to make the call but agreed to do it.[17] He also said he did not regard the call as a priority matter, which he said may explain why he apparently took several weeks to make the call.

March 27, 1995, Labor Meeting. On March 27, 1995, three days after meeting with Kantor, Ickes and several other White House and Administration officials, including Jennifer O'Connor, met at the White House with Ron Carey and Bill Hamilton of the Teamsters, Ed Wytkind, the Director of the AFL-CIO Transportation Trades Department, and Robert Molofsky of the Amalgamated Transport Union to discuss a variety of substantive labor issues. The Diamond Walnut issue was raised again by the Teamsters, with Carey making a brief statement about the status of the strike and how important it was to the Teamsters. Carey expressed concern that Diamond Walnut was using federal subsidies to offset losses from the strike. In Carey's view, the government was thereby helping to fund the company's resistance to a fair settlement.

Carey estimates that the substantive discussion of Diamond Walnut lasted only 10 to 15 minutes.[18] Carey's current recollection is that Ickes and his staff said very little at the meeting and promised nothing of substance. It appeared to Carey at the time that "the entire meeting was pointless and that nothing would be accomplished."

Carey does not specifically remember Ickes saying anything about Kantor, although one of the other labor officials present, Robert Molofsky, remembers – after reviewing documents about the meeting – that Ickes told Carey that he "would talk" to Kantor and ask Kantor "to call someone at the Diamond Walnut to see if anything could be done to help settle the strike."[19] Molofsky did not get the impression that Kantor would be pressuring the company.

We interviewed five Administration and White House officials or aides (other than Ickes) who attended the March

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[17] Ickes did not recall any reluctance on Kantor's part.

[18] Carey's attorney gave us a written proffer of what Carey recalls about the meeting.

[19] The quoted language is from the FBI's 302, not directly from Molofsky.

27th meeting.[20] None of them had a clear recollection of the meeting, much less a specific recollection of what was said about Diamond Walnut -- even after reviewing the Teamster memorandum summary of the meeting.[21]

During our October 27, 1998, interview, Ickes said that after having reviewed the March 27, 1995, Teamsters memo about the meeting, he now recalls attending the meeting and remembers discussion of a number of specific labor issues, including Diamond Walnut. He does not remember if the Diamond Walnut strike was an issue discussed in front of everyone or whether it was a side-bar discussion with the Teamsters. He does not recall saying anything about Kantor agreeing to use his "discretionary authority," and commented that he is not sure what "discretionary authority" would refer to in connection with the USTR.

Follow-up with Kantor. The same day as the March 27, 1995, meeting, Ickes sent Kantor a short memorandum to remind him to make the call to Diamond Walnut. The memo, which referred to Kantor as "Mr. Ambassador," thanked him for meeting with Ickes "the other day" about "Sun Diamond in California -- Teamsters strike,"[22] and expressed confidence that Kantor would follow-up on the matter. Ickes also attached for Kantor's information a March 13, 1995, memorandum from Tony Podesta highlighting the connection between Sun Diamond, Diamond Walnut's parent cooperative, and Republican governor of

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[20] The administration witnesses interviewed were: Mort Downey, Deputy Secretary of Transportation, Tom Glynn, Undersecretary of Labor; Steve Silberman, Office of Cabinet Affairs at the White House; Steve Rosenthal, Assistant Secretary of Labor for Policy; and Jennifer O'Connor.

[21] When asked during her deposition to the Thompson Committee if she remembered the March 27th meeting, Jennifer O'Connor, the Ickes aide who handled the Diamond Walnut issue, testified: "Yeah, I have a very, very hazy recollection maybe of being in a meeting with Ron Carey and a big group of people, but I can't remember who else was there, and I really don't remember the content."

[22] Ickes was unsure during the Senate deposition whether Sun Diamond and Diamond Walnut were the same entity and if not what the relationship between the two is. Kantor was also confused. He called the parent company Sun Diamond at first instead of Diamond Walnut.

California Pete Wilson.

In addition to the thank-you memo to Kantor, Ickes asked O'Connor, his aide on labor issues, to "bird dog" Kantor's office to make sure that Kantor made the call to the CEO of Diamond Walnut. O'Connor remembers Ickes asking her to check to see if Kantor had made the call, but does not remember learning anything from Ickes about the substance of the underlying issue, other than that it was something important to the Teamsters.

O'Connor's and Scher's Recollections. Although her initial recollection was fairly vague, O'Connor now remembers -- after her memory was refreshed -- that she called Kantor's office at least twice during April 1995 to see if Kantor had made the call. She believes she spoke to Pete Scher, Kantor's chief of staff. When she first talked to Scher, he said that they had checked with counsel's office to make sure that Kantor could make the call and had learned that he could make the call but could not say much. Scher told her that Kantor was going to make the call, but hadn't made it yet.

O'Connor remembers calling Scher again sometime later and learning that Kantor had made the call but that, according to Scher, Kantor had not said very much and that nothing much came of the call.

Scher vaguely remembers a request from Ickes's office that Kantor make a call about the Diamond Walnut issue. Among the documents produced to us by the White House is an e-mail dated April 4, 1995, from Scher to USTR aide Jeff Nuechterlein, in which Scher told Nuechterlein that Kantor had told Ickes that he "would call the Diamond Walnut folks and put some pressure on them vis-a-vis the strike."[23] Scher noted that he had mentioned the call to Kantor and that Kantor knows he needs to do it. He asked that Nuechterlein add the call to Kantor's call list so that the call would be made that week.

During our interviews,[24] Scher did not dispute the contents of the April 4th e-mail, but insisted that he presently has no

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[23] As discussed below, during the Senate's investigation documents relating to Diamond Walnut were not requested by the Committee, and accordingly, the White House did not produce any.

[24] We interviewed Scher twice, initially, on September 3, 1998, and then again on October 14, 1998.

specific recollection of discussing the call with Kantor, Nuechterlein, USTR's counsel, or anyone else at USTR. Nor does he recall the specifics of any conversations with Jennifer O'Connor about the issue, although he stated that logically she would have been the person he would have talked to on an issue of this sort.

Although it is unclear exactly when Kantor placed the call, we found an e-mail dated April 19, 1995, from O'Connor to Janice Enright, Ickes's chief of staff, in which O'Connor reports that according to Kantor's staff he had still not made the Diamond Walnut call. O'Connor asked Enright to ask Ickes to ask Kantor if he has made the Diamond Walnut call.[25]

O'Connor recalls talking again to Scher shortly after sending the April 19th e-mail. Since we know that Scher did not return from a two-week honeymoon until April 24, 1995, we believe that O'Connor most likely learned from Scher about the results of the Kantor call during the last week in April, 1995.

The Kantor Call. Sometime in April 1995 – most likely during the latter half of the month -- Kantor called William Cuff, the CEO of Diamond Walnut.[26] Kantor remembers -- after having his memory refreshed[27] -- that the purpose of the call was twofold: (1) to determine the status of the strike; and (2) to find out if there was any prospect for settlement. That was his understanding of what Ickes had asked him to do.

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[25] Even after reviewing the O'Connor e-mail and other documents about Diamond Walnut, Enright has no recollection of Diamond Walnut ever being an issue that Ickes handled. Indeed, she does not recall any conversation with Ickes or anyone else about Diamond Walnut during her tenure in the White House (January 1994 through January 1997).

[26] The April 25, 1995, Board Minutes of Diamond Walnut contain a reference to the Kantor call, thus establishing that the call occurred sometime prior to that date.

[27] In his October 6, 1998, testimony before the Oversight and Investigations Subcommittee of the House Committee on Education and the Workforce ("the Hoekstra Subcommittee"), Kantor testified that if he had not refreshed his recollection by reviewing his contemporaneous notes, he "wouldn't have remembered anything except that I was just inquiring as to what was going on with the strike."

Kantor's call to Cuff lasted approximately five minutes.[28] According to Kantor's contemporaneous notes of the conversation, Cuff told him that the strike had been going on for three and a half years, that the parties had tried to work with John Calhoun Wells of the Federal Mediation and Conciliation Service, and that there had been a meeting with Ron Carey a year earlier. Kantor also noted that the company would like to settle, was willing to meet, but that the union had a strong stand. The notes further reference the union's position that the strikers need to be taken back and the company's view that it had "no choice" but to keep the replacement workers.

Kantor does not believe his call accomplished anything other than to confirm that the company and the union were not close to a settlement and that the company was not inclined to compromise on the key issue.

Cuff's Recollection of the Call. Cuff's recollection of the call is somewhat different from Kantor's. He recalls Kantor "saying that he was calling about the strike to see if there was anything that he could do to help resolve it." Kantor also said he "wanted to try to understand what were the unresolved or major issues," which is basically consistent with Kantor's recollection.[29] Cuff, however, also remembers Kantor claiming to want the strike settled because of its impact on foreign trade negotiations. Cuff felt that Kantor was implying that the Diamond Walnut strike was, or had the potential of, interfering with unspecified international trade talks.[30] Cuff said he was concerned and surprised by the call because it came

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[28] Not knowing the difference between Diamond Walnut and Sun Diamond, Kantor initially called Larry Busboom, the head of Sun Diamond. Busboom referred him to Cuff.

[29] During his testimony before the Hoekstra Subcommittee on October 6, 1998, Cuff was shown Kantor's handwritten notes and testified that they were not inconsistent with his recollection of the call.

[30] The Diamond Walnut Board Minutes from April 25, 1995, reflect Cuff's reporting that Kantor had said the strike was interfering with international trade negotiations. Kantor does not recall talking about international trade negotiations during the call, but acknowledged that he might have.

from such a senior government official.[31]

In his recent appearance before Hoekstra's Subcommittee, Cuff testified that "there was absolutely no explicit threat" or any promises made by Kantor. He described Kantor's handling of the call as "very professional" and the tone of the call as "very informal." Cuff remembers that Kantor concluded the call with words to the effect, "if there is anything I can do, give me a call."[32]

O'Connor Reports Back to Ickes. O'Connor now remembers orally reporting back to Ickes what she learned from Scher, which was that Kantor had made the call, that not much was said, that the company was "unmoved" by the conversation, and that the outcome of the call was "nil." O'Connor also conveyed to Ickes that she had learned that USTR did not plan to take any additional action regarding Diamond Walnut. Ickes did not express any particular thought or emotion when O'Connor briefed him about the results of the Kantor call. It was O'Connor's impression that he "did not appear to care one way or another." He did not ask her to do anything further on the matter as far as she recalls.[33]

O'Connor does not think that she prepared a memorandum or other written record for Ickes because "there wasn't an awful lot of substance to report." She has no knowledge of who, if

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[31] During the Hoekstra hearings, Cuff testified during questioning by minority counsel that although Kantor was the only cabinet level official who had called him personally about the strike, he did "receive calls from a lot of other Washington bigwigs with respect to the strike," and that the strike "received attention from a fairly large number of relatively senior political people."

[32] Cuff also stated that he is not aware of Diamond Walnut being adversely affected by the USTR's office, or by any other government agency or employee as a result of Kantor's call.

[33] When O'Connor testified in her Senate deposition on October 6, 1997, she could not recall the substance of what she reported back to Ickes. She told us during our most recent interview that her recollection has improved over the course of being questioned multiple times and as a result of having reviewed documents and press accounts of the Diamond Walnut matter.

anyone, Ickes talked to about the results of the Kantor call.[34]

Other than the Kantor call, O'Connor is unaware of any other federal government employee contacting Diamond Walnut about the strike or doing anything to try to settle the strike, although she assumes that someone at the Department of Agriculture may have been doing something because of the company's obvious agricultural ties.

1995 Executive Order and Debarment Proceedings. As noted earlier, striker replacement legislation supported by the Administration and organized labor was defeated in Congress in 1994. Because of the Diamond Walnut strike, the Teamsters had been a particularly vocal and active proponent of the legislation. After the legislative defeat, the Administration issued an Executive Order on March 8, 1995, which prohibited the federal government from doing business with companies that permanently replace lawfully striking workers. The Secretary of Labor was charged with implementing and enforcing the Order.

On April 21, 1995, the Teamsters filed a complaint with the Labor Department asking that Diamond Walnut be debarred from eligibility for any federal government contracts because they were continuing to employ permanent replacements for lawfully striking workers. On May 25, 1995, the Secretary of Labor issued final implementing regulations. On June 26, 1995, the Labor Department notified Diamond Walnut that it was initiating an investigation to determine if the company has hired permanent replacement workers and if so whether it should be debarred. Then, on July 28, 1995, Deputy Assistant Secretary of Labor, Charles L. Smith, notified Diamond Walnut's attorney that based on the investigative record, he was proposing debarment. The company was told it had until August 15, 1995 to respond.

Ultimately, Diamond Walnut was not debarred because of the strike. Aggressive litigation by the U.S. Chamber of Commerce

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[34] Kantor has a vague recollection of reporting the results of the call at some point to Ickes or someone in Ickes's office. He has no recollection of what he said but believes it would be consistent with what is reflected in his contemporaneous notes.

Ickes told us that he also has a vague recollection of Kantor mentioning in passing sometime later the fact that he accomplished nothing with respect to Diamond Walnut.

and a number of other business associations resulted in the Executive Order and implementing regulations being held unlawful, thus precluding any debarment action against Diamond Walnut or any other company that was employing permanent replacement workers. See Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) (February 2, 1996, decision holding that the Executive Order violates the National Labor Relations Act).

It is unclear what effect, if any, the threat of debarment had on the company's willingness to negotiate. The Teamsters were deeply disappointed that the debarment never came about.[35]

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[35] After parent company Sun Diamond was convicted in September 1996 of giving illegal gratuities to Agriculture Secretary Mike Espy, the Department of Agriculture initially proposed debarring not only Sun Diamond, but also its subsidiaries, including Diamond Walnut, from doing business with the federal government (i.e., the military and the school lunch program). In March 1997, the Agriculture Department decided not to proceed with the debarment of Sun Diamond subsidiaries like Diamond Walnut provided they established various internal and external controls to promote business ethics.

The Agriculture Department's decision not to debar Diamond Walnut was protested "in the strongest terms" by Ron Carey in a March 12, 1997, letter to Agriculture Secretary Dan Glickman. Carey said he was shocked by the decision to debar only the parent company, calling it "a sham," since Sun Diamond is effectively just a holding company for Diamond Walnut and other agricultural cooperatives.

Teamsters official Bill Hamilton was even more strident in a March 7, 1997, memorandum to Bill Samuel, Associate Deputy Secretary of Labor. He demanded to know: (1) "Why the hell is an Administration, already under siege for perceived ethical and legal lapses on several fronts, giving a break to the very set of companies that created the first serious Clinton Administration ethical challenge by bribing the Secretary of Agriculture;" and (2) "Why would the Department [of Labor] go out of its way to bring Diamond Walnut, with its sordid history of mistreating Hispanic women workers, back into the family of honorable companies eligible for government contracts."

The 1997 correspondence from Carey and Hamilton are evidence of the Teamsters's deep frustration and disappointment with the Administration's lack of substantive action in trying to pressure Diamond Walnut to settle the strike. At the Hoekstra

There is no evidence that Ickes or anyone in his office had any knowledge about the proposed debarments and the ultimate outcome.

1995/1996 Lobbying at the Agriculture Department. On April 5, 1995, a week after the March 27th TTD meeting at the White House, Hamilton wrote Ickes to remind him to follow-up with Kantor about making the call to Diamond Walnut. Hamilton also mentioned that the Teamsters had learned that the Department of Agriculture was purchasing walnuts from Diamond Walnut for the school lunch program.[36] He attached a letter he had just faxed to Ellen Haas, Undersecretary for Food, Nutrition, and Consumer Services, Department of Agriculture, asking for a meeting to discuss the possibility of terminating Diamond Walnut's participation in the school lunch program in light of the recent Executive Order providing for debarment of companies that hire permanent replacement workers. Hamilton also asked Ickes if he would set up a meeting for Carey and Hamilton with the newly confirmed Secretary of Agriculture, Dan Glickman.

Teamsters Meeting with Secretary Glickman. Carey and Hamilton, along with Teamster official Ron Carver, eventually met with Glickman and Deputy Agriculture Secretary Richard Rominger on June 6, 1995. An internal Teamster document encouraging Carey to attend mentioned that the Glickman meeting "was set up for us by the White House." Neither Ickes, O'Connor, nor anyone else in Ickes's office who we interviewed, had any recollection of arranging a meeting for the Teamsters with Glickman. Glickman and Rominger also had no memory of how the meeting was set up.

Subcommittee hearings on October 6, 1998, testimony from Teamster official Ron Carver made clear that that disappointment continues today:

> [I]n general, we were displeased with the reception we got from the Clinton Administration and found that it in no way matched the concern and involvement, say, that the labor movement found from Labor Secretary Dole under the Bush Administration, which was more responsive and more effective.

[36] According to Hamilton, Cuff and a lobbyist for Diamond Walnut had been at the Agriculture Department that week promoting the virtues of walnuts.

During the June 6, 1995, meeting, the Teamster officials gave Glickman background information about the Diamond Walnut strike and emphasized that the Teamsters were making reasonable proposals and genuinely wanted to settle the strike. The company, however, was stonewalling.

The Teamsters complained to Glickman that Diamond Walnut was getting federal benefits through the school lunch program and the Market Promotion Program and argued that these benefits should be cut off because of Executive Order 12954.

Glickman and Rominger were both sympathetic to the Teamsters' concerns and indicated that they would get back to them. Both believed that USDA did not have any authority to exclude Diamond Walnut from either program. As a result, the Department took no action to try to do what the Teamsters asked.[37]

Rominger Sounds out Diamond Walnut. Several weeks later, on July 17, 1995, Rominger, on his own initiative, called Cuff, the CEO of Diamond Walnut, because he wanted to hear Diamond Walnut's side of the story directly.[38] He asked Cuff if there was any reason the strike could not be resolved. Cuff said the union wanted the replacement workers fired and the company was unwilling to do that. Cuff said that Diamond Walnut had not hired any replacement workers since the Executive Order was issued.[39]

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[37] Podesta Associates realized that Agriculture was not able to prevent Diamond Walnut from benefitting from the generic international marketing provided by the Market Promotion Program. Accordingly, Charles Hansen of Podesta Associates worked on putting together a legislative strategy to defund the entire MPP. Hansen attempted to assemble a broad coalition to support elimination of the "corporate welfare" provided by the MPP. Hansen's legislative campaign failed when Congress voted in July, 1995, to continue the program.

[38] Rominger was the former Director of the California Department of Agriculture and had a strong personal interest in California agricultural issues.

[39] Rominger had a practice of taking detailed contemporaneous notes of all his substantive activities, including meetings and phone calls. His recollections of Diamond Walnut related meetings and calls are based largely on his review of his notes.

Rominger did not immediately call any of the Teamsters officials after his conversation with Cuff because he did not feel he had anything to tell them, since in his mind he had not made any progress.

On July 27, 1995, Rominger called Jerry Barton, a former member of the Diamond Walnut board of director, whom Rominger knew from his California days. Rominger asked Barton for the names of the current Board members to see if there was anyone he could reach out to. Rominger called Carver on July 27, 1995, and told him that he had talked to Barton. The matter went no further at that time.

Rominger Facilitates Negotiations in 1996/1997. A year later, in the fall of 1996, when the Agriculture Department was considering debarment of Diamond Walnut as a result of the Sun Diamond criminal convictions, Rominger again reached out to Diamond Walnut. This time he called William Allewelt, a former schoolmate who was an advisor to the Diamond Walnut Board. Rominger asked Allewelt if he was willing to meet with Ron Carver, who was interested in talking to someone at Diamond Walnut about a possible resolution to the strike. Allewelt agreed to meet Carver and facilitate confidential meetings with company officials.

Between December 1996 and the early Spring of 1997, Carver and other Teamster officials met with Allewelt, Cuff and other Diamond Walnut officials. According to Allewelt, Carver seemed committed to resolving the issue and the talks made progress at first. Ultimately, the negotiations failed – as with previous talks, over the issue of whether the company would have to terminate replacement workers.

Rominger believes that he probably received reports about the negotiations from both Allewelt and Carver, but never reported anything about the Diamond Walnut issue to Ickes or anyone else at the White House.

Neither Ickes, O'Connor, nor anyone else we interviewed from Ickes's Office had any recollection of hearing about the 1996/1997 negotiations or Rominger's role in promoting and facilitating them.

III. ICKES'S TESTIMONY

Because context is often critical in assessing whether a failure to recall is genuine, we have carefully examined evidence of what Ickes and his attorneys knew or might have

reasonably assumed about the scope and focus of the September deposition. We have also reviewed in detail Ickes's actual testimony about Diamond Walnut and attempted to describe the particular context in which the disputed colloquies occurred. Finally, as part of our effort to assess whether Ickes's memory failure was selective and whether he had a motive to conceal union-courting activity, particularly in connection with the Teamsters, we have reviewed the nature and extent of Ickes's deposition and hearing testimony on other specific labor matters, including matters from the same time period as the Kantor call.

Scope of September Deposition. On September 22, 1997, Ickes was recalled for a third day of deposition testimony before the Senate Committee on Governmental Affairs. Ickes had testified previously on June 26 and 27, 1997, about a variety of campaign and fund-raising issues, but the Committee had additional questions based on new documents and information they had received. Correspondence between counsel reveals that Ickes's attorneys knew before the deposition that one of the areas of interest would be the Teamsters, in particular the contribution swap allegations that were under investigation by the U.S. Attorney's Office for the Southern District of New York.[40] There was no indication, however, in any of the correspondence we reviewed that the Administration's involvement in the Diamond Walnut matter would be an issue.

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[40] The contribution swap scheme involved an alleged conspiracy among Teamsters officials and political consultants to illegally use Teamster funds to fund Teamsters President Ron Carey's reelection campaign by making contributions to political or other labor organizations, including the Democratic National Committee and the AFL-CIO, in exchange for the other organizations encouraging non-union donors to contribute large amounts to the Carey's campaign.

Ickes was interviewed by AUSAs from the Southern District of New York several weeks before his September deposition. During the interview, Ickes was told by the prosecutors that he was a "subject" of their investigation, although Ickes's attorney has told us that she and Ickes's other lawyers learned that many people with no apparent potential liability were being told that they were "subjects" by the Southern District. Ickes told the Southern District -- and later the Senate Committee -- that he had no involvement in the contribution swap scheme and knew nothing about it at the time.

During the course of the preliminary investigation, we have talked to Maggie Hickey, the counsel for the Majority Staff who conducted the Ickes deposition, Cassandra Lenchtner, lead minority counsel for the Ickes deposition, and Amy Sabrin, Ickes's counsel during the deposition. All confirm that there were no discussions among counsel in advance of the deposition about Diamond Walnut being a topic of questioning.

Documents Requests/Productions In Advance of Deposition. In an effort to determine whether Ickes would likely have focused on Diamond Walnut in the course of preparing for the deposition, we have reviewed the Senate Committee's document requests to the White House and to Ickes's personally. None of the specific requests reference Diamond Walnut or seek any categories of documents that would appear to encompass any materials relating to any discussions or Administration action relating to the strike. The only labor documents sought by the Committee from Ickes were "[a]ll documents (including handwritten notes) referring or relating to campaigning or fundraising involving unions.[41]

Although Ickes produced thousands of pages of documents, including over a thousand pages relating to campaigning or fundraising involving unions, none of the documents produced contained any reference to Diamond Walnut. The White House also produced a large volume of documents to the Committee on a variety of subjects. The only reference to the Diamond Walnut strike in any of the documents produced by the White House prior to the Ickes deposition is the single mention of the issue in the fifth paragraph of the "Teamsters Notes" document.[42]

We also have reviewed the Committee's document subpoena to the Teamsters, which was dated July 30, 1997. The document request was divided into 33 categories or subcategories of documents, most relating to campaign and contribution activity

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[41] The request for documents relating to campaigning or fundraising involving unions was one of 26 categories of documents sought by the Committee in a subpoena dated June 3, 1997. No additional documents were subpoenaed from Ickes prior to the September deposition.

[42] The White House also produced a cryptic two-line memorandum dated October 25, 1996, from Bill Hamilton of the Teamsters to Jennifer O'Connor, which referred to an unidentified document relating to "Sun Diamond Growers."

by the Teamsters. Subsequent correspondence between the Teamsters's counsel and Committee staff added additional requests for documents relating to the contribution swap issue and also narrowed the scope of the initial subpoena. None of the categories of documents sought related to Diamond Walnut or any other substantive labor issue. Nor did any of the documents ultimately produced by the Teamsters on September 15, 1997, relate in any way to Diamond Walnut.

The Deposition. Ickes testified on September 22, 1997, for a full day (9:30 a.m. to 5:15 p.m.).[43] The morning questioning focused on a variety of issues including DNC fundraising, the DNC media fund, and the Wisconsin dog track/Indian casino issue.[44]

After the lunch break, Margaret Hickey, the Majority staff's lead deposition counsel, turned the questioning to labor issues. She began by asking Ickes about a memorandum dated February 3, 1996, from Jennifer O'Connor to Ickes, which outlined O'Connor's recommendations of what the Administration should be "doing for the labor community from now until November." O'Connor's recommendations included: constituent services, such as working with unions on their issue-related problems and concerns; meetings with the President and senior officials; scheduling high-level officials for union events; making available White House "goodies" (i.e., coffees); and various meetings and communication with the DNC to coordinate resources and get out the vote activities.

Testimony about Courting Labor. Hickey questioned Ickes about a number of O'Connor's specific recommendations.[45] Ickes

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[43] The transcript of the September 22, 1997, deposition is Attachment A hereto. The testimony about the Teamsters and Diamond Walnut begins on page 121; the specific testimony at issue begins on page 132, and continues through page 141.

[44] At more than a dozen points during the morning session -- and on a range of topics -- Ickes indicated in response to a question that he lacked a recollection or lacked a clear recollection of a particular meeting, conversation, or matter. Ickes used a variety of phrasings during his deposition (and also in the course of his other congressional testimony) to express a diminished or non-existent present recollection.

[45] During the general questioning about the handling of labor issues at the White House, White House lawyer Lanny Breuer,

volunteered information on some points (including detail about the kind of labor issues he handled and several paragraphs on what a "coordinated campaign" is), and on others professed lack of certainty or an absence of knowledge or recollection.[46]

Testimony about the Teamster Notes. Hickey moved directly from the February 3, 1996, O'Connor memo to the "Teamsters Notes," which as we noted earlier are undated, but appear to be from early 1995.[47] In response to an open ended question about his relationship with Ron Carey, Ickes volunteered that he had several White House meetings with Carey on substantive labor issues. He then went on, unprompted, to list some of the issues: AMTRAK, Section 13(c), the reorganization of the Interstate Commerce Commission, and striker replacement.

Discussions with Teamsters about Diamond Walnut. Hickey did not ask any follow-up questions on any of these issues; instead, she returned to the Notes document, read Ickes a sentence that referred to Diamond Walnut, and asked if any of Ickes's meetings with Carey included discussions of Diamond Walnut. Ickes said they may have, and then volunteered that he knew that he discussed Diamond Walnut with Bill Hamilton, the Teamsters's Political Director. He then clarified that he did not know whether he discussed it with Carey or not. Hickey did not ask anything about the substance of any of these discussions.

Ickes also testified that he "probably" was involved in setting up a meeting or meetings between Carey and the President, but that he had "no idea" when the meetings would

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who was representing the White House's interests during the deposition, objected on the grounds that the questioning was unrelated to the campaign finance issues that the Committee was charged to investigate. Breuer made the same objection during questioning about the Diamond Walnut matter.

[46] For instance, with respect to labor "message sessions" recommended by O'Connor, Ickes was asked "Do you know if these message sessions did take place?" He answered, "I think -- the answer is, as a fact, I don't know they took place. I was -- don't recall being part of them, and my hunch is that they did not take place."

[47] Ickes commented during the questioning that because the notes were undated, he did not know when they were written, when he received them, or when he annotated them.

have occurred.

Knowledge of What the Administration Did About Diamond Walnut. After Ickes explained what some more of his handwritten annotations on the Notes document meant, Hickey asked the question that is the focus of the potential perjury violation:

> Q: To your knowledge, what if anything was done on the Diamond Walnut strike?
>
> A: By --
>
> Q: By the administration.
>
> A: I'm not sure anything was done on the Diamond Walnut strike.

Hickey did not ask any follow-up questions that might have sharpened the question or clarified the answer.[48]

Additional Questioning on Diamond Walnut. After the exchange quoted above, Hickey moved immediately to a cover memorandum dated October 25, 1996, from Hamilton to O'Connor, which reflected Hamilton sending O'Connor something about "Sun Diamond Growers." Hickey asked if Ickes discussed Sun Diamond with O'Connor. Ickes responded:

> I -- is -- well, I don't know -- is Sun Diamond the same as Diamond Walnut? That's the question I have in my mind. I know that I discussed Diamond Walnut with Jennifer. Sun Diamond -- if Sun Diamond is the same as Diamond Walnut, then the answer is clear, yes, given what I've just said; if it's different, I don't know. And the answer is I don't know whether they are one and the same or whether they aren't.

The Deposition Gets Contentious. The next question from Hickey -- did Ickes recall instructing O'Connor to talk to Hamilton -- prompted objections from both Sabrin and Breuerabout the lack of nexus between the question and anything

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[48] Hickey told us that when she asked the question she was "fishing to see what was there." She interpreted her question broadly. In her view, "anything" included any additional meetings, communications, or discussions by anyone in the Administration relating to Diamond Walnut that Ickes knew of.

having to do with campaign finance and about the Committee's apparent attempt to probe specific labor policy matters without reference to the campaign. A somewhat heated colloquy among counsel ensued, taking up approximately six pages of the transcript. Sabrin and Breuer ultimately allowed the questioning to proceed.[49]

According to Hickey, the mood of the deposition, which had been cordial,[50] changed dramatically as a result of the arguments among counsel. She resumed questioning about Ickes's discussions with O'Connor and Hamilton concerning Diamond Walnut. Ickes said that O'Connor and Hamilton "probably" talked about Diamond Walnut and acknowledged that he "may have been" present, although he did not recall a specific discussion.

The Question Gets Re-asked. Hickey then re-asked her earlier question, "What did the Administration do regarding the Diamond Walnut strike?"[51] Ickes replied, "Asked and answered. You've already asked me that, and I've answered it." When Hickey asked Ickes if he would restate his answer, Ickes got annoyed and suggested that the reporter could read it back. Hickey agreed, but the court reporter had difficulty finding the earlier question and answer. While they were waiting, Ickes got into a testy exchange with majority counsel about their inability to remember their own questions. The parties took a several minute break to allow the court reporter more time to find the question and answer.[52]

Even after the break, the reporter still was unable to find the question and answer. Hickey remembers Ickes making a snide comment about Rosemary Woods, which appeared to upset the

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[49] After the lawyers' colloquy, Sabrin asked for "a minute" to confer with her client. According to Hickey, the break was in fact a short one.

[50] According to Hickey, Ickes was more contentious and sarcastic during the June deposition days than he was overall during the September deposition.

[51] Hickey told us during our interview that she re-asked the question because she "just forgot" that she had asked it earlier.

[52] According to Hickey, the second break was longer than the first. She remembered it as being long enough to use the bathroom.

reporter. Eventually, Sabrin asked Hickey to repeat her question one more time. Hickey asked, "What did the Administration do regarding the Diamond Walnut strike?" Ickes answered, "Nothing that I know of."

At this point, Hickey moved on to questions about the Teamsters contribution swap scheme, followed by questioning about the Administration's efforts to curry favor with a half dozen other labor unions.[53] In the subsequent questioning, Ickes confirmed that certain specific labor-courting activity proposed in the Notes in fact occurred. With other specifics, he was vague or had no recollection.

The Committee Learns about the Kantor Call. On September 30, 1997, the Committee staff received from an undisclosed source in New York a copy of the March 27, 1995, internal Teamsters memo, which reported that Ickes had talked to Kantor about calling Diamond Walnut. On October 1, 1997, the Washington Times carried a front page story about the memorandum, suggesting that it showed "a striking interdependence" between the Administration and the Teamsters.[54] The Diamond Walnut issue was mentioned as one of several on which the Teamsters got special help from the Administration. On October 6, 1997, the Committee staff used the memorandum to question Jennifer O'Connor about the Kantor call during her confidential deposition and confronted O'Connor with Ickes's testimony that he did not know of anything that the Administration had done regarding Diamond Walnut.[55]

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[53] Hickey told us that she did not ask any follow-up questions on Diamond Walnut because she had run out of material. At the time of the deposition, she did not know about the Kantor call or about any of the other activity by the Administration over the years that was directly or indirectly related to the strike. She is not even sure she knew at the time that the strike was still on going.

[54] The March 27, 1995, Teamster memorandum was subsequently reported in a few other newspapers around the country, generally with the spin that it revealed how close the Administration was to the Teamsters.

[55] O'Connor is apparently the only deposition or hearing witness other than Ickes who was asked questions by the Committee about Diamond Walnut or the Kantor call.

Ickes's Public Hearing Testimony. On October 7 and 8, 1997, Ickes testified publicly before the full Committee. Senator Nickles questioned Ickes aggressively about the White House's relationship with the Teamsters. He showed Ickes the March 27, 1995, Teamsters memorandum and questioned him about whether he had ever "intervened" at the Labor Department on behalf of the Teamsters in connection with the Pony Express issue.[56]

Ickes testified that he did not recall having any discussions with the Labor Department about the Pony Express issue, but also said, "I may well have, to find out the status. I don't think I did." Nickles did not ask any questions about the Kantor call. He touched on Diamond Walnut only once in the course of asking Ickes whether he ever had any dealings with Maria Eschaveste, head of the Wage and Hour Division at the Labor Department, regarding the Teamsters and Pony Express or Diamond Walnut. Ickes said he may have but did not recall any. Neither Nickles nor any other Senator in the two days of public hearings asked any other questions about Diamond Walnut. The Kantor call was never mentioned.

IV. SUBSEQUENT STATEMENTS BY ICKES

Time Magazine Interview. Our investigation uncovered one reported statement by Ickes about the Kantor call during the fall of 1997. In the October 27, 1997, issue of Time magazine, Ickes is quoted as telling Time, "I remember calling Mickey and saying, 'This is something bothering the Teamsters.'" Time also interviewed Kantor who acknowledged making the call. According to Time, Kantor said he "discussed the company's views of the strike with a top official and asked 'what were the prospects' of settlement, but did not offer a solution."

Neither Ickes nor Kantor recall talking to Time about the story, but neither dispute the substance of what is attributed to them. Ickes said he is familiar with the reporter Michael Weisskopf and thinks well of him.

Statement to O'Connor. As the end of her second interview, we asked O'Connor if she had anything more to add

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[56] The Pony Express issue was another contentious labor issue that was important to the Teamsters and was talked about during the same White House meeting in early 1995, at which Carey made his brief presentation to Ickes about Diamond Walnut.

that might be relevant to our preliminary investigation of Ickes. O'Connor told us that she believes that Ickes just forgot about the Kantor call during his deposition. She said that she remembered having lunch with him at the Old Ebbitt Grill sometime in October or November of 1997 after they had both testified, and she believes, after the Time article had appeared. During the course of trading stories about their experiences testifying before Congress, O'Connor's testimony about the Kantor call came up. O'Connor recalls Ickes saying words to the effect, " My God, I forgot about it." She does not remember any discussion about why Ickes forgot or any complaint by Ickes about the nature of the questioning.[57]

Ickes's Interview Statements. On October 27, 1998, we interviewed Ickes for 3 hours at his lawyers' office. Ickes provided us extensive information about the scope of his White House duties and emphasized the relative insignificance of the Kantor call in the context of his other projects. Ickes also volunteered a fairly confident current recollection of talking to Kantor about making the call and about learning from O'Connor that the call had determined that prospects for a settlement were nil. He also told us that he recalled Kantor mentioned the call to him in passing some time later -- something which we were unaware of before his interview.

Ickes's recollection was still very vague about the number and content of the TTD and Teamster meetings, although he was able to recall some of the other substantive labor issues that were discussed when shown the March 27th memorandum. Ickes had no recollection during our interview of any of the other aspects of the Teamsters lobbying campaign at USTR, Agriculture, or Labor. Specifically, he did not remember anything about Secretary Reich's 1994 intervention; nor did he know anything about Rominger's facilitation of negotiations in 1996 and 1997.

Ickes was emphatic during the interview that he did not believe there was anything at all illegal or improper about Kantor making the call; nor did he believe that revealing the call would be politically embarrassing, since in his mind it was a routine status call.

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[57] When we asked Ickes if he recalled making any statements to O'Connor about the Kantor call during a lunch at the Old Ebbitt some time after his testimony, he said he may have, but has no specific recollection of the conversation.

Ickes's Interpretation of the Testimony. With respect to his deposition testimony, Ickes said he interpreted the question, "What if anything was done by the Administration on the Diamond Walnut strike?" to be asking whether the Administration had taken any active role in settling the strike. His answer, "I'm not sure anything was done on the Diamond Walnut strike," reflected his lack of certainty about his recollection of an issue that was more than two years old. He also said that when he re-answered the question with, "Nothing, that I know of," he was not trying to convey any greater level of certainty than his first answer; to him, it was just another way of expressing that his recollection was unsure. Finally, Ickes told us that he does not now recall recalling the Kantor call during the 1997 deposition, but even if he had recalled it he believes he would have answered the question the same way because he does not think the Kantor call is responsive to the question.[58]

LEGAL DISCUSSION

I. POTENTIAL PERJURY OR FALSE STATEMENT VIOLATION

Elements of Perjury. The essential elements of perjury under 18 U.S.C. § 1621 are: (1) the defendant testified under oath in a proceeding for which a law of the United States authorizes administration of an oath; (2) the oath was administered by a qualified person; (3) the defendant knowingly made the false and material statement detailed in the indictment; and (4) the defendant acted willfully and contrary to the oath that had been given.[59] United States v. Debrow, 346

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[58] Ickes also could not recall when after the deposition he remembered the Kantor call – although he was presumably reminded of it once it was reported on October 1, 1997, in the Washington Times, and certainly, by the time he was shown the March 27, 1995, memo during his public testimony on October 8, 1997.

[59] 18 U.S.C. §1621 provides in relevant part:

> Whoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath, states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury

U.S. 374, 376 (1953); see also United States v. Dean, 55 F.3d 640, 659 (D.C. Cir. 1995), cert. denied, 116 S.Ct. 1288 (1996) (perjury requires willfully false testimony on a material matter). To be material, the false statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." United States v. Gaudin, 515 U.S. 506, 509 (1995) (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)).[60] A violation of the relevant portion of 18 U.S.C. § 1001 similarly requires the willful making of a false material statement.[61] For purposes of our review under the Independent Counsel Act, the operative issues are the same for each statute:[62] Is there sufficient evidence to warrant further investigation of whether Ickes's testimony was false in any material respect? And if so, is there clear and convincing

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[60] Gaudin reversed a long line of precedent and held that ordinarily materiality is a factual issue that must be decided by the jury, not the court.

[61] Section 1001 provides in relevant part:

> [Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be [guilty of a 5-year felony].

With respect to the legislative branch, the section applies only to administrative matters or "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate," which would clearly encompass Ickes's testimony in this case.

[62] One minor difference, which is not material given the standards of the Independent Counsel Act, is that section 1621, unlike section 1001, retains the common law "two witness" rule for proving falsity. The "two witness" requirement, however, can be met by the testimony of one witness and independent corroborating evidence. See United States v. Haldeman, 559 F.2d 31, 97 n.185 (D.C. Cir. 1976). Moreover, even if the two-witness rule could be viewed as a bar to a perjury prosecution, it certainly would not preclude a parallel charge under § 1001.

evidence that Ickes did not make the false statements willfully?[63]

General Principles of Perjury Law. When a witness testifies in response to questions, proof that a defendant willfully answered falsely often turns on the defendant's understanding of the question he answered. Generally, the "jury is best equipped to determine the meaning that a defendant assigns to a specific question." United States v. Lighte, 782 F.2d 367, 372 (2d Cir. 1986); see United States v. Sampol, 636 F.2d 621, 655 (D.C. Cir. 1980) (per curiam). The test is an objective one: "The jury should determine whether the question -- as the declarant must have understood it, giving it a reasonable reading -- was falsely answered." Lighte, 782 F.2d at 372. The questions and answers at issue should be considered in context, taking into account the entire line of questioning and the defendant's knowledge of the purpose of the proceeding, as well as any extrinsic evidence of how he interpreted the questioning. See United States v. Chapin, 515 F.2d 1274, 1279-1280 (D.C. Cir. 1975) (when viewed in context, statements "subject to a reasonable and definite interpretation by the jury"); United States v. Bonacorsa, 528 F.2d 1218, 1221 (2d Cir. 1976) (looking to "the natural meaning in the context in which words were used"). "Mere vagueness or ambiguity" in questioning is not an absolute defense to perjury, but is a factor the jury should take into account in assessing the government's proof of falsity and willfulness. United States v. Chapin, 515 F.2d at 1279; see United States v. Milton, 8 F.3d 39, 45-46 (D.C. Cir. 1993) (same applies in context of a false statement charge under § 1001). As a general rule, "[i]f the response given was false as the defendant understood the question, his conviction is not invalidated by the fact that his answer to the question might generate a number of different interpretations." United States v. Williams, 552 F.2d 226, 229 (8th Cir. 1977); see Chapin, 515 F.2d at 1280.

Fundamental Ambiguity Defense. In rare cases, a line of questioning may be so "fundamentally ambiguous," that a perjury or false statement prosecution is precluded as a matter of law. See Chapin, 515 F.2d at 1280; Lighte, 782 F.2d at 375. A question is "fundamentally ambiguous," when it "is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." Lighte, 782 F.2d at 375 (quoting United States v. Lattimore,

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[63] For ease of presentation, we will analyze these factual issues in the context of a potential perjury violation.

127 F. Supp. 405, 410 (D.D.C.), aff'd per curiam by an equally divided court, 232 F.2d 334 (D.C. Cir. 1955).

Literal Truth Doctrine. Courts have also recognized that in a question-answer context a literally true but unresponsive answer even if intentionally misleading by implication cannot legally form the basis of a perjury conviction. Bronston v. United States, 409 U.S. 352, 356-57 (1973). Thus, when a witness makes an unresponsive, but literally true statement, "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." Bronston, 409 U.S. at 360. Bronston, however, does not mean that "the possibility that a question or an answer may have a number of interpretations" invalidates a perjury indictment or conviction. Chapin, 515 F.2d at 1280.

Proving a Perjurious Failure to Recall. Convictions for professed failures to recall are rare. Indeed, we could find no reported cases in which a defendant had been convicted of a perjurious failure to recall that did not also involve underlying criminal conduct or multiple instances of perjury. The D.C. Circuit has noted, however, that proving the falsity of an "I don't recall" is "not impossible." United States v. Chapin, 515 F.2d at 1284. In cases that have sustained perjury or false statement convictions for professed failures to recall, courts have relied on inferences based on, inter alia: the significance of the underlying event to the defendant; the length of time between the event and the statement; the presence of a motive to conceal; the repeated or extensive nature of the defendant's involvement in the underlying event; the presence of other perjurious or obstructive conduct; and the ability of other witnesses to remember the same event.[64]

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[64] See, e.g., Chapin, 515 F.2d at 1284 (falsity of defendant's lack of recollection about giving "dirty tricks" instructions to Nixon campaign operative Donald Segretti one year prior to testimony sufficiently proven by inferences from the large number of instructions over six month period and defendant's "obvious desire" to distance himself from Segretti's activities); United States v. Barnhart, 889 F.2d. 1374 (5th Cir. 1989) (evidence sufficient to prove falsity of defendant's failure to recall telling federal agents investigating saving and loan fraud that he had been advised by a FSLIC regulator to "get dumb" when he talked to the FBI and the grand jury, where defendant had told two different agents about the "get dumb" advice on three different occasions all within 15 days of his grand jury testimony); see also United States v. Sweig, 441 F.2d 114, 117-118 (2d Cir. 1971) (evidence sufficient to prove that defendant, an administrative assistant to the Speaker of the U.S.

II. THE INDEPENDENT COUNSEL ACT STANDARD

Is "Further Investigation Warranted?". - Pursuant to the Independent Counsel Act, we attempted during the preliminary investigation to determine whether "there are reasonable grounds to believe that further investigation is warranted" of Ickes's potentially perjurious testimony. In applying the "further investigation" standard, we necessarily take into account the legal doctrine that defines the potential crime at issue. Further investigation of a perjury allegation would clearly not be warranted under the Act if there was no reasonable investigative prospect of obtaining additional evidence sufficient, as a matter of law, to prove each of the essential elements of perjury -- i.e., evidence sufficient to get the case to a jury.[65] The one exception is the intent

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House of Representatives, falsely failed to recall the name of a client of his co-conspirator for whom he made phone calls that constituted a criminal conflict of interest, where evidence showed defendant had at least nine separate conversations about the client with five army officials over a four-month period of time; handled at least eleven documents concerning the client, which indicated his "considerable familiarity with the situation;" and where the underlying activity was illegal and the defendant knew in advance of his testimony what was being investigated); United States v. Devitt, 499 F.2d 135, 140 (7th Cir. 1974) (evidence sufficient to prove falsity of police officer defendant's failure to recall having accepted money from tavern owners, where four tavern owners testified in detail that defendant had extorted money from them, and defendant testified that he would have remembered it if he had ever "shaken down" any taverns). But see United States v. Clizer, 464 F.2d 121, 125 (9th Cir. 1972)(evidence insufficient to sustain perjury conviction based on defendant's allegedly false failure to remember telling his co-defendant four months before his grand jury appearance "to get rid of the evidence," where only evidence of statement was testimony of a government informant, and where there was no other evidence -- other than motive -- that the defendant "must have remembered the incident").

[65] The traditional test for sufficiency of the evidence requires the court to consider the evidence in the light most favorable to the government, see Glasser v. United States, 315 U.S. 60, 80 (1942), and ask if a "rational trier of fact" could find "the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307,319 (1979). The fact

element, which under the Act is governed by a higher standard than the actus reus elements.[66]

On the other hand, where we determine that there is sufficient evidence as a matter of law to prove each of the elements of the crime, or it is reasonable to believe further investigation could produce such evidence -- and there is not clear and convincing evidence of a lack of intent -- then the Independent Counsel Act requires that the Attorney General seek appointment of an independent counsel, even though, in our view, the case may lack prosecutorial merit. See In re: Bruce E. Babbitt, Application to the Court Pursuant to 28 U.S.C. § 592(c)(1) for the Appointment of An Independent Counsel, D.C. Circuit, Independent Counsel Division (February 11, 1998).

As described above, we have conducted an extensive investigation of the facts and circumstances surrounding Ickes's statements that he was not sure and did not know at the time of the September 1997 deposition if the Administration "did anything" regarding the Diamond Walnut strike. In our view, we have taken all reasonable investigative steps likely to lead to evidence material to a potential perjury charge.[67]

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finder's prerogative to draw inferences, however, is not unlimited. A guilty verdict may not be based on "mere speculation;" there must be evidence that supports the inference. United States v. Long, 905 F.2d 1572, 1576 (D.C. Cir. 1990). Moreover, in reviewing the legal sufficiency of the evidence, the court "must look at the entire record," United States v. Byfield, 928 F.2d 1163, 1166 (D.C. Cir. 1991).

[66] The Act allows the Attorney General to find that no further investigation is warranted because of a lack of criminal intent only if the lack of intent is demonstrated by clear and convincing evidence.

[67] The only witness we were unable to interview or receive a proffer from was William Hamilton, the Teamsters Political Director, who is currently under indictment in New York for perjury and other charges in connection with the Teamsters contribution swap scheme. Not surprisingly, given his current status, Hamilton declined to cooperate with the preliminary investigation.

It seems unlikely, however, even if Hamilton were inclined to provide a statement, that he would be able to provide any credible evidence that would add to what we already know about

The only non-intent element genuinely at issue is falsity.[68] Given that there is no reasonable basis for believing that further investigation would uncover additional material evidence, the issue becomes whether the evidence set forth above is sufficient as a matter of law to prove the literal falsity of Ickes's professed lack of certainty and knowledge regarding the Diamond Walnut matter. If so, the allegation can only be resolved through the exercise of traditional prosecutorial discretion, which is a discretion the Department does not have in Independent Counsel Act matters.

Evidence is Sufficient to Prove Falsity. The Bronston literal truth doctrine requires that there be evidence not merely that Ickes knew in 1995 about the Kantor call or that his answer may have created a misimpression that he had no involvement in the Kantor call, but rather that his answers, "I'm not sure anything was done," and "Nothing that I know of," are literally false. In other words, to make a perjury case against Ickes based on these statements, there would have to be proof that at the time of the deposition he was "sure" that something was done, and that there was "something that he knew of," as he understood the question.

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the potential falsity of Ickes's professed inability to recall. The Southern District of New York has allowed us to review the contents of Hamilton's personal computer, which was searched during their investigation. We have also received by subpoena from the Teamsters and Podesta Associates all documents in their files relating to Diamond Walnut, including any documents evidencing contact with the White House or Ickes on the issue. The information in these contemporaneous documents makes clear what other Teamster officials and the Teamsters lobbyists have corroborated, i.e., that Diamond Walnut was an important issue to the Teamsters and one that they discussed on several occasions with Ickes and his staff. There is no reason to believe that Hamilton -- who presumably would be a bit gun-shy about possibly being charged with additional lies -- would say anything inconsistent with his own contemporaneous documentation or with the consensus recollection of his colleagues.

[68] Ickes's failure to recall the Kantor call -- although peripheral to the Committee's campaign finance inquiry -- easily meets the extremely low legal threshold for materiality, i.e., it was "capable of influencing" the Committee's investigation since it potentially could have caused the Committee to investigate a suspected quid pro quo involving Teamster political support in exchange for official action on Diamond Walnut.

Kantor Call Was Important to Ickes. In our view, there is sufficient evidence to infer that Ickes in fact recalled the Kantor call. The most compelling evidence suggesting that Ickes must have remembered the call is the nature and extent of Ickes's involvement in the Diamond Walnut issue during early 1995. The evidence indicates that over a two-month period Ickes attended two and possibly three meetings with labor officials at which the Diamond Walnut strike was discussed. On at least two occasions, the Teamsters' desire to have Kantor call Diamond Walnut was specifically raised. It was clear that the Teamsters cared about the strike and that they wanted Kantor to do more than just make a status inquiry.

On March 6, 1995, Ickes sent Kantor a formal memorandum attaching background information about the strike. He then met personally with Kantor on March 24th and persuaded him to make a call relating to a contentious labor issue, even though Kantor, as USTR, did not routinely inject himself into labor disputes. Kantor's call was important enough to Ickes that he sent Kantor a memorandum after the March 24th meeting reminding him to follow-up. The Teamsters were meanwhile following-up with Ickes -- a letter dated April 5, 1995, thanked Ickes for getting Kantor to agree to make the call, but noted that Kantor had not as yet not made the call. It was also during this period that Ickes asked O'Connor to "bird dog" Kantor's office to make sure the call was made.

A few weeks later, O'Connor reported back to Ickes that Kantor had finally made the call, but that the company was "unmoved." Ickes also had a conversation with Kantor at some subsequent point about his having made the call, but not having accomplished much.

In light of Ickes's background as a labor lawyer, his familiarity with the Teamsters, and his awareness of the political importance to the Administration of keeping the Teamsters happy, it is plausible that he would remember a matter like the Kantor call, which he was personally involved in arranging over a period of several weeks. In our view, a reasonable jury could so find beyond a reasonable doubt, based on the available evidence.

Motive Evidence. Although we have been unable to find any evidence of illegality in connection with the Kantor call itself, Ickes must have known that in the aftermath of the Teamsters contribution swap scandal, any example of the Administration doing special favors for the Teamsters would be politically embarrassing. He had no reason to think that the

Senate Committee was previously looking into Diamond Walnut. Accordingly, he had a strong political motive not to alert them to a specific instance of the Teamsters influencing official action, something he logically may have believed would raise the specter of a possible quid pro quo.

Other Circumstantial Evidence of Falsity. In addition to the significance of the issue at the time and Ickes's political motive to conceal, there is also evidence that Ickes knew very well that the Teamsters would be a hot topic at the deposition. He therefore had a reason to familiarize himself with all aspects of his official dealings with the Teamsters. Ickes's ability to recall the Kantor call during the Time magazine interview, which occurred about a month after his testimony, could also be reasonably viewed as evidence that he was readily able to remember the call when he wanted to during the same general time frame as the deposition. Finally, Ickes frequently hid behind purported failures of recollection throughout his deposition and hearing testimony before the Senate Committee. A jury could reasonably infer that he had a deliberate strategy of "getting dumb" to avoid answering questioning he did not want to answer.[69]

Taking the evidence in the light most favorable to the government, we conclude that the circumstantial evidence gathered to date is sufficient for a rational trier of fact to find beyond a reasonable doubt that Ickes testified falsely when he professed lack of certainty and knowledge about what the Administration did regarding Diamond Walnut.[70] For the

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[69] A jury could also consider that Ickes currently has a clear and fairly detailed recollection of talking to Kantor about the call, which might suggest to a rational trier of fact that Ickes could have remembered the Kantor call a year earlier even without being specifically refreshed. Moreover, a jury could draw inculpatory inferences from Ickes's ability to remember during the deposition details about other, arguably more innocuous, labor-courting activity -- such as a union leader getting to travel on Air Force One -- which might suggest a selective memory.

[70] Prior to the Attorney General's decision to initiate the the preliminary investigation, Patty Merkamp Stemler, Chief of the Appellate Section, Criminal Division, concluded in a August 28, 1998, memorandum to Assistant Attorney General, James K. Robinson, that questioning at issue in this matter was not so fundamentally ambiguous as to bar a perjury prosecution. Our

same, reason we do not believe that there is clear and convincing evidence that Ickes did not knowingly and willfully lie during the deposition.

CONCLUSION

For the foregoing reasons, we conclude there are reasonable grounds to believe that "further investigation is warranted" to determine whether Ickes committed perjury in the course of his September 22, 1997, congressional deposition. Accordingly, we recommend that pursuant to the Independent Counsel Act, the Attorney General seek the appointment of an independent counsel to investigate possible criminal violations related to the perjury allegation.

Should the Attorney General agree, we further recommend that we explore with Independent Counsel Carol Elder Bruce an expansion of her jurisdiction to handle the Ickes perjury allegation. Because we have been informed that the Attorney General wishes to decide this matter before she leaves the country on November 24th, there will be sufficient time after that point to discuss the matter with Bruce and draft appropriate papers for the Attorney General's signature on November 30th when she returns.

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research during the preliminary investigation has not uncovered any authority to warrant revisiting Stemler's conclusion. Although we believe the question, "What did the Administration do regarding the Diamond Walnut strike?" could be reasonably be interpreted in various ways, it is our view that the case law makes clear that determining what interpretation the defendant gave the question is a matter for the trial jury.

November 20, 1998

MEMORANDUM

To: James K. Robinson
Assistant Attorney General
Criminal Division

From: Larry R. Parkinson
General Counsel
FBI

Re: Recommendation to Seek Appointment of an Independent Counsel to Investigate Allegations Against Vice President Gore and Harold Ickes

This memorandum briefly summarizes our position on the two Independent Counsel Act matters currently before the Attorney General. Because we have engaged in lengthy discussions on these matters, this memorandum is not intended to set forth yet another detailed factual and legal analysis. Instead, it will focus on several key points that are critical to the Attorney General's ultimate decisions.

Our final recommendation is that the Attorney General seek the appointment of an independent counsel to investigate allegations against both Vice President Gore and Harold Ickes.

I. The Appropriate Independent Counsel Act Standards

Upon reaching the end of the 90-day preliminary investigations, the Attorney General must apply for the appointment of an independent counsel if she "determines that there are reasonable grounds to believe that further investigation is warranted." In order to make that determination, the Attorney General should ask three questions:

(1) Is there sufficient evidence as a matter of law to prove each element of the alleged offenses?

(2) Or, is it reasonable to believe that further investigation could produce such evidence?

(3) Is there clear and convincing evidence of a lack of intent?

This standard, which is set forth in the Radek/Vicinanzo memorandum regarding Harold Ickes (at pages 38-39), is the

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appropriate one. With respect to the second question, it is particularly important to keep in mind that a 90-day preliminary investigation was statutorily designed to be a limited inquiry. With the exception of allegations which turn out to be frivolous or almost wholly lacking in evidentiary support, Congress did not expect the Department to reach final conclusions about a matter after a 90-day investigation. In fact, Congress intended to force DOJ into a limited role by withholding some of its most basic investigative tools. As the Senate Committee on Governmental Affairs stated during the 1987 amendment process,

> During the preliminary investigation, the Attorney General is prohibited from convening a grand jury, issuing subpoenas or using certain other investigative tools. These restrictions are designed to ensure that the Attorney General's role in the case is a limited one, confined to determining the need for an independent counsel to look into the matter.

Senate Report No. 100-123, at 3, reprinted in 1987 U.S.C.C.A.N. 2152.

These limitations on the Department are consistent with the fundamental purpose of the Independent Counsel Act: when there is evidence that a covered person may have violated the law, the ultimate decision should rest in the hands of an independent person who does not have a conflict of interest or a potential conflict of interest. Whether that ultimate decision is a prosecution or a declination should not matter. In fact, because the Act is designed to promote the public's confidence in impartial law enforcement, in some ways it is more important for a declination to be made by an independent decisionmaker.[1]

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[1] Instead of undertaking a quick review to determine whether a covered person may have committed a crime, the Department recently has engaged in exhaustive investigations designed to cover every possible lead within the 90-day period. Not only is this approach often inconsistent with the intended statutory scheme, it may seriously hinder the search for truth by abandoning an orderly and strategic investigative process. Without the use of subpoenas and a grand jury, it is extremely difficult to conduct a full and effective investigation. (Attorney proffers and voluntary document production are very poor substitutes for compelled evidence.) Moreover, when a matter does end up with an independent counsel, the "independent" investigation is often hamstrung by the prior DOJ investigation.

The 90-day period under the statute is not designed to allow the Department to investigate as much as it possibly can during that period. Rather, it is intended to be another limitation on the Department's investigation. During past

Now that we have reached the end of the 90-day preliminary investigations of the Gore and Ickes allegations, in our group discussions we have been asking customary questions: Would a typical U.S. Attorney's Office indict such a case? Do we personally think the subject lied? While these questions are understandable, the answers are largely irrelevant to the task at hand. The Attorney General is not permitted to use prosecutorial discretion to resolve such matters at this stage in the process. See In Re: Babbitt, Application for the Appointment of an Independent Counsel, at 7 ("The question of whether the potentially false statements at issue are material enough to warrant criminal prosecution is a prosecutive judgment that I am not permitted to make under the Independent Counsel Act.")

So what does an Attorney General do when faced with a matter that has satisfied the low thresholds under the Act but has no prosecutive merit? She must first and foremost follow the law and seek the appointment of an independent counsel. However, she is also free to tell the Court, the new independent counsel, and the public what she thinks about the merits of the case. Not only is she free to do that, she is encouraged to do so. This issue was specifically addressed during the 1994 reauthorization:

> In 1993, Attorney General Reno asked the Committee to make it clear that an Attorney General, when requesting appointment of an independent counsel, may include in the filing "the "Department's views of the potential prosecutorial merit of the case." She asked that they be able to include views that the case involves: "factual patterns that would not ordinarily be prosecuted by the Department, either because of the relatively minor nature of the alleged offense or because it is clear that the chances of developing a strong enough case to take to court are nonexistent."
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> She said such commentary might help overcome an apparent reluctance by independent counsels to close a matter based upon the results of the preliminary investigation if those

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reauthorizations of the Act, DOJ was severely criticized for improperly extending the strict statutory time frames through lengthy "threshold inquiries" and other actions. "Congress has always intended that the Department of Justice play a limited role in the independent counsel process, consisting primarily of an expeditious review of each case to determine whether an independent counsel is needed to look into the matter. Congress therefore placed an overall limit on the time that the Department could spend examining a case and deciding whether to decline or request the appointment of an independent counsel." 1987 U.S.C.C.A.N. at 2158.

> results warrant such action. The ABA's White Colar Crime Committee addressed a similar concern in recommending that Attorneys General be allowed "to decline cases involving technical, yet benign, violations of the law, subject to the review of an independent counsel."
>
> The Committee believes it is not only permissible under current law, but appropriate for the Attorney General to include such views in filing[s] requesting appointment of an independent counsel, since they will assist independent counsels in complying with Justice Department law enforcement policies and operating in a manner similar to other federal prosecutions.

Senate Report No. 103-101, at 21-22, reprinted in 1994 U.S.C.C.A.N. 766.

II. Vice President Gore

A. Sufficiency of the Evidence

Is there sufficient evidence as a matter of law to prove that Vice President Gore made a false statement when he told the investigators on November 11, 1997, that he believed the Media Fund was composed solely of soft money? We believe the answer to this question is clearly "Yes."

The Radek/Vicinanzo memorandum concludes that the "falsity" element of the offense has not been established.[2] This conclusion rests principally on an opinion that there is insufficient evidence that the Vice President was ever aware of a hard money component to the media fund. However, the memorandum falls short in two respects. First, it fails to give sufficient weight to the inculpatory evidence surrounding the November 21, 1995 meeting. Second, it focuses almost exclusively on that single meeting, without taking into account the wide range of other relevant evidence.

1. November 21, 1995 Meeting

The investigation has established firmly that the Vice President attended the DNC budget meeting held in the White House Map Room on November 21, 1995, and that there was at least some discussion of the hard money/soft money components of the media fund. The facts surrounding the meeting are set forth in detail

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[2] There appears to be a consensus that the other elements of the offense, including materiality, are satisfied.

in the Radek/Vicinanzo memo, the Feigin memo, and the investigative agents' factual summary (which is included as an attachment to this memo); they will not be repeated here. To summarize, four witnesses -- David Strauss, Leon Panetta, Bradley Marshall, and Brian Bailey -- provided evidence that there was a discussion of the media fund and the hard money/soft money components.

There were ten or eleven other participants in the November 21, 1995 meeting who did not recall any discussion of hard money in the context of the media fund. While some (including the Vice President's attorneys[3]) have attempted to make much of this lack of recollection, it is hardly surprising that the attendees would not recall the specifics of a single meeting that took place nearly three years ago. What is more surprising is that several of the participants actually did remember some of the specifics.

While conceding that there was at least some discussion of hard money in the media fund context, the Radek/Vicinanzo memo relies heavily on the fact that the investigation turned up no concrete evidence that the Vice President "heard, understood, or retained" the comments. While certainly worth noting, this "lack of evidence" is less than compelling. Other than his own statements to the investigators, there likewise is no significant evidence that he did not hear, understand, or retain the comments. At least with respect to "hearing" and "understanding," it seems reasonable to infer that a smart person being briefed on a reasonably simple issue[4] probably "heard" and "understood" the comments at the time they were made. Whether the person "retained" the information is another matter.

Under the circumstances, there certainly appears to be legally sufficient evidence (based on reasonable inferences) to conclude that the fact of a media fund hard money component was in the Vice President's head at some point in time. The more difficult question is whether there is sufficient evidence to infer that the fact was still in his head when he made his statement to the investigators in November of 1997.

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[3] When the Vice President's attorney made his presentation to the Deputy Attorney General on November 16, 1998, he began by saying that 10 of the 14 meeting attendees "did not hear" any such statement. When pressed, he conceded that those ten simply had "no recollection" of what was said at the meeting.

[4] While some have suggested that the hard money/soft money split within the media fund is a complicated, "in-the-weeds" matter, we disagree. The issue here is simply whether the Vice President knew there was a hard money component to the media fund. The Vice President conceded that he was well aware that the DNC had hard and soft money components generally.

If one focused solely on the November 21, 1995 meeting, this might be a close question. However, this meeting must be placed in its proper context. The media fund was obviously a major part of the Clinton/Gore campaign; the Task Force has developed mountains of evidence highlighting the importance of the media fund. After the FEC clarified its allocation rules in the summer of 1995, the success of the media campaign depended upon the ability to generate both soft and hard money. Vice President Gore was an integral part of both the campaign strategy team and the DNC fundraising machine; wittingly or unwittingly, he raised a great deal of soft and hard money. As one of the two principal beneficiaries of this massive fundraising and spending effort, the Vice President certainly had good reason to become knowledgeable about at least the most basic mechanics of the media fund.

2. Other Evidence

As we have emphasized in our discussions this week, it is critical to look at the broader picture and not just the single meeting on November 21, 1995. This was just one event in a lengthy series of meetings, written communications, and other developments that referred to the two components of the media fund. The Attachment summarizes much of that evidence.

As one example, the Vice President received at least 13 relevant memos between August 1995 and July 1996. Most of the memos were crafted as a series of bullets or other brief summaries, designed to allow a busy person to grasp the essence of the message without a great deal of effort.[5] Not only did several of the memos refer to the hard money component of the media fund on the first or second page, many reflected a sense of urgency and sometimes even desperation to keep the money flowing.

While the Vice President dismissed these memos in his interview, remarking that he generally did not read memos authored by Harold Ickes, we need to critically examine these documents and ask whether that explanation makes sense. The Vice President was, after all, devoting a great deal of his personal time to the fundraising effort; presumably he understood that his future depended upon it. Does it make sense that the Vice President would blithely carry out the fundraising strategy without taking a minimal amount of time to learn what the campaign was doing and why?

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[5] In his presentation to the Deputy Attorney General, the Vice President's attorney scoffed at the notion that the Vice President would actually read the Ickes memos, essentially characterizing them as dense, voluminous missives. In fact, they typically were nothing of the sort.

The Ickes memos are just one piece of the larger picture. As described in the Attachment, there are inculpatory notes on the Vice President's call sheets, inculpatory statements by the Vice President himself, and regular Wednesday evening meetings.

Whatever we might conclude about the Vice President's culpability at the end of the day, there can be little question that this combined evidence is legally sufficient to satisfy the falsity element of a false statement charge. This is not to say that this would be a sound prosecution; there appears to be a consensus that the facts as known would not warrant prosecution. But that is not the issue before us.

B. Clear and Convincing Evidence/State of Mind

In light of the evidence described above and set forth in Attachment A, we do not believe the Attorney General can reasonably conclude by clear and convincing evidence that the Vice President lacked the requisite state of mind.

Congress clearly intended to set a high threshold before an Attorney General could close a case, either before or after a preliminary investigation, on the ground that the subject lacked the state of mind necessary to commit the alleged crime. In 1987, Congress amended the statute in an effort to curb what it viewed as a "disturbing" practice by the Department:

> A third problem with the Department of Justice's implementation of the statute is its practice in several cases to decline further proceedings, despite specific information from a credible source of possible wrongdoing, due to a lack of evidence of the subject's criminal intent. The decision not to proceed has sometimes been made even in the face of conflicting or inconclusive evidence on the subject's state of mind.
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> . . .
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> The Justice Department's demand for proof of criminal intent to justify continuing independent counsel cases is disturbing, because criminal intent is extremely difficult to assess, especially in the early stages of an investigation. Further, it often requires subjective judgments, which should ideally be left to an independent decisionmaker. It is not the type of factual question that the Attorney General should be resolving in light of the Attorney General's limited role in the independent counsel process and lack of access to important investigative tools such as grand juries and subpoenas.

1987 U.S.C.C.A.N. at 2159-60.

The conference agreement emphasized, "The conferees believe it will be a rare case in which the Attorney General will be able to meet the clear and convincing standard and in which such evidence would be clear on its face. It would be unusual for the Attorney General to compile sufficient evidence at that point in the process." Id. at 2190 (emphasis added).

The question before the Attorney General is whether this is one of those "rare cases." Under the circumstances, we do not believe it would be reasonable to make such a determination.[6]

III. Harold Ickes

We concur in the analysis and conclusion set forth in the memorandum from Lee Radek and Dave Vicinanzo. While we view this matter as a close issue,[7] particularly in light of the ambiguity of the question at issue, we believe there is legally sufficient evidence to satisfy the elements of perjury. Moreover, we do not think it would be reasonable to find by clear and convincing evidence that Ickes did not knowingly and willfully lie during the deposition.

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[6] During our discussions this week, a question was raised about whether the decision is a personal determination by the Attorney General. In other words, if the Attorney General was personally convinced, to a "clear and convincing" level of certainty, that the Vice President did not make a false statement, could she close the investigation at this point? While there is no question that the ultimate determination lies with the Attorney General, it seems clear that the Attorney General must apply a more objective standard that one involving a level of "personal" certainty. Notwithstanding the unique role of the Attorney General in the independent counsel scheme, there is nothing unusual about requiring a decisionmaker to divorce herself from personal beliefs and to apply some kind of "reasonable person" standard. In light of the fundamental purpose of the Independent Counsel Act, an objective standard is the only sensible result. Cf. 1987 U.S.C.C.A.N. at 2159 (criticizing the Attorney General for "personally" determining when a 90-day preliminary inquiry should begin).

[7] We believe the Ickes case presents the Attorney General with a much more difficult determination than that presented in the Vice President's case.

Recommendation to Seek Appointment of an Independent Counsel to Investigate Allegations against the Vice President of The United States

I. Introduction

In its memorandum to Assistant Attorney General James K. Robinson, the Public Integrity Section recommended against the appointment of an Independent Counsel based upon its conclusion that there is insubstantial evidence that the Vice President was aware of the hard money component to the media campaign, and therefore was unable to make a false statement when he denied that awareness. We disagree. We believe that the evidence - memoranda on the topic, witness statements of those who participated with the Vice President in meetings on the topic, and notations to some of the solicitation "callsheets" - is sufficient to support a finding that the Vice President knew that "hard" money was a component of the media fund, and that his denial of that awareness was false.

II. Relevant Memoranda on the Media Fund

Described below are thirteen memos deemed relevant to the knowledge of the Vice President. These memos, either directed to the VP, or "carbon copied" to him, detail discussions of "hard" money in relation to the media fund.

- 8/14/95 - Addresses issues relating, either directly or indirectly, to the 1996 Re-elect campaign which need to be focused on shortly after Labor Day. The issues include: Political Calendar; Electoral Map; Relationship between the White House and the DNC. "The DNC will pay for August 1995 MEDICARE spot time buy. Legally the funds paid by the DNC must be 60% hard or federal and 40% soft".

- 10/20/95 - The document summarizes a meeting regarding the DNC 1995 operation and media budgets held on 20 October. "The DNC has secured a 7 million dollar line of credit, of which 4 million is hard and 3 million is soft. Since the approximate ratio of hard & soft of the media purchases to date is app 40%/60% the $4.0 loan of hard dollars will cover the hard part of the 10 million for media".

- 11/20/95 - Self explanatory 23 October 1995 memorandum to Ickes from Don Fowler, et al., describing the source of funds for the calendar 1995 DNC operating budget and media fund. The attached document describes the total amount of money spent on the media fund thus far as being $3,400,000, which includes a breakdown of $2,400,000 coming from the operating budget and $1 Million in "federal" dollars being borrowed.

- 11/28/95 - Document summarizes a meeting between Ickes, DNC, and White House officials regarding an assessment of the DNC's financial situation. "Thus if additional monies are to be spent for media beginning Monday 4 December (air time has been paid for media through Thursday 30 November), the DNC will either have to raise additional monies ("new money"), or borrow additional money from the bank (of the $7 million line of bank credit, the DNC has borrowed $5.5, leaving only $1.5 million (all hard) to borrow against)".

- 12/20/95 - 4 page document captioned "DNC 1995 Budget Analysis" which reflects the information presented at the DNC budget/fundraising meeting on 21 November 1995. Also attached is a 2 page document captioned "DNC 1995 Budget Analysis - 11/21/POTUS Presentation") which details the usage of hard/soft dollars as components of the media fund budget.

- 2/11/96 - Self-explanatory 21 February 1996 memorandum to Ickes from Brad Marshall, the DNC's Chief Financial Officer, attached to a February 22, 1996 cover memo to the Vice President. The media buys each week require the following mix of money, on the average: 34% federal; 31% non federal corporate; 35% non federal individual.

- 2/27/96 - This memorandum describes (1) the estimated spending by the DNC and C/G '96 Re-elect ("Re-elect") during calendar 1996 (which is only 10 months -- January - October); (2) a breakout of proposed expenditures for media, production and polling; (3) a breakout of costs involved in fundraising for the DNC; and (4) the impact the proposed media expenditures and fundraising costs will have on the Re-elect's pre-convention budget. Details the current required mix of funds for DNC Media as approximately 34% Federal; 31% nonfederal corporate; and 35% non-federal individual.

- 6/3/96 - Document summarizes the topics of discussion at the weekly DNC/fundraising meeting held on 5/30/96 to include estimates of the "federal" and "nonfederal" spending components of the media fund.

- 7/5/96 - Summary of our weekly DNC budget/fundraising meeting, held on 3 July, attended by Chairman Fowler, B.J. Thornberry, Doug Sosnik, Karen Hancox, David Strauss, Brad Marshall and Harold Ickes. Details projected fundraising for calendar 1996, describes a serious question of whether enough "federal" funds will be raised to permit spending full amount expected to be raised, and details estimated DNC budgets, including $36.8 Million for the Media Fund.

- 7/24/96 - Two documents, the first captioned "Federal dollars", dated 7/18/96. The second is captioned "Summary of DNC estimated expenditures Calendar 1996 (January - October); Fundraising to date (7/9/96); and federal dollars needed", dated 7/14/96. These documents reveal that in order to meet the $128 million fundraising goal for all DNC budgets for Calendar 1996 (January - October), including a Media Fund budget of $36.8 million, an additional $47 million needs to be raised from major donors during the less than 4 months period of 7/9/96 - 10/31/96, of which $28 million (59.5%) must be "federal" dollars.[1]

- 7/29/96 - Document (authored by Ickes) addresses a "very serious federal dollar deficit". Ickes also references his memorandum of 24 January, 1996, [we believe he meant July] "a copy of which is attached" (see synopsis of the 7/24/96 memorandum infra).

The Vice President has remarked in two interviews that he did not read these memos as he did not as a general rule read memos authored by Harold Ickes on DNC budgetary matters. He, nonetheless, said that "the subject matter of the memorandums would have already been discussed in his and the President's presence."

III. Key DNC Budget Meeting (11/21/95)

On 11/21/95 a meeting was held in the White House Map Room at which the President and the Vice President were present. The purpose of the meeting was to discuss the election budget and the media fund. Notes written by David Strauss on the prepared agenda and portions of the handouts indicate that a discussion regarding "hard" money occurred. This discussion is further substantiated by several persons in attendance at this meeting. Listed below are relevant excerpts from the interviews that were conducted:

David M. Strauss

Identified documents as packet from meeting he believed was held 11/21/95 in Map Room of the White House. Did not specifically recall meeting. Advised meeting addressed DNC fundraising issues and proposals. Identified handwritten notes on documents 070968-070973 as his own. Increase of media buys, $7 million DNC debt and a need to raise $8 million in 5 weeks were issues at meeting. Handwritten notes on documents were: "65% soft/35% hard corporate or anything over $20k from an individual. Identified handwriting as notes he took during the 11/21/95 meeting.

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[1] CAMPCON notes that this document was produced from the Office of the Vice President.

Strauss could not recall who made the comments noted during the meeting, nor the extent to which the issue of "hard" and "soft" money was discussed by those attending. Hard/soft ratios, fundraising events, and the DNC budget were normally discussed in these types of meetings. Not required to be familiar with such DNC finance issues to perform his duties and was writing down what was said during the meeting so he might better understand DNC finances. Strauss had no knowledge of "hard"/"soft" money ratios as it pertained to DNC Media Fund. Not aware if his notes "65% soft/35% hard corporate or anything over $20k from an individual", taken during the meeting specifically applied to the Media Fund.

Strauss was not aware if any "hard" contributions received by DNC were allocated to the DNC Media Fund, or if there was a "hard" money component of that fund. No recollection of ever discussing any hard/soft money issues or the DNC Media Fund with VPOTUS. Strauss had no reason to believe that VPOTUS or any other attendee of 11/21/95 meeting was not present for the duration of the meeting. Could not specifically recall whether the VPOTUS left at any time during the meeting. Based on his handwritten notes VPOTUS participated in discussions of 11/21/95 meeting. As a rule POTUS and VPOTUS participate the most during meetings of this nature. Strauss could not recall if VPOTUS participated in discussion noted by Strauss as "65% soft/35%hard corporate or anything over $20k from an individual."

Albert Arnold Gore, Jr.

VPOTUS has no independent recollection of whether or not his schedule for 11/21/95 was kept. Did recall DNC budget, sources of income such as direct mail campaign and media campaign. Advised he and POTUS were at this meeting to give guidance and participate in the discussions. Something was given out to everyone as sort of a "road map" for the meeting. VPOTUS does recall, in general terms, that the DNC budget was discussed, as well as their activities relating to commercials and the direct mail campaign. Does not know if he left meeting, while it was going on, for any reason. Unaware of the way DNC allocated hard and soft money. His impression at this time of the meeting was that they needed more soft money than hard money. Did not recall any discussion of 65% soft/35% hard or any of this relating to the media fund.

He was well aware that the DNC had hard/soft money components but it was his belief that only soft money was being used for media commercials. Did not recall statement "corporate or anything over $20k from an individual" at the meeting, nor any type of discussion concerning definition of soft money. As of 11/21/95 VPOTUS was not aware there was a hard money component to the DNC media fund. Knew DNC required and had, hard/soft money components. Also knew that some expenses were paid with hard money and some with soft money. It was his impression at the time of the this meeting that they needed more soft money than hard money. He was told they needed soft money, and they could spend

it to buy commercials. VPOTUS stated he was unaware of the way DNC allocated hard and soft money.

He was not well versed on DNC accounting methods and procedures. Attitude was that it was fine for them to handle the nuances of their accounting procedures. Pointed out that he had been a candidate for 16 years and thought he had a good understanding of hard/soft money. VPOTUS concluded that Strauss is a truthful and diligent person. If he took those notes at 11/21/95 meeting, the VPOTUS would not dispute that what is reflected in the notes was said at that meeting. VPOTUS simply did not hear those things said. VPOTUS observed that he drank a lot of iced tea during meetings, which could have necessitated a restroom break. Pointed out subject matter discussed at 11/21/95 meeting was of no interest to him, which could explain why Strauss heard it and he did not. Recalled that there were almost always interruptions at this type of meeting.

Brian Bailey

Beginning in Summer of '95, Bailey gradually became assistant to Ickes in order to "work the numbers" in regard to the DNC budget and upcoming election campaign. Recalled 11/21/95 meeting and prepared attachment to memo titled "DNC 1995 Budget Analysis." The purpose of the budget analysis was to "lay out" the overall DNC budget for the remainder of the year. The 11/21/95 meeting addressed DNC's borrowing capacity, debt and expenditures. Bailey recalled that DNC Media Fund was an important topic of discussion during the meeting. Discussions included increasing the DNC's media budget and possible options of meeting the projected shortfalls of money. Bailey was not particularly familiar with the DNC Media Fund and did not recall any specific discussion regarding how the Media Fund impacted on the overall budget of the DNC.

Present at entire meeting and did not recall anyone dismissing themselves including the POTUS and VPOTUS. Recalls individuals discussing "hard" and "soft" money at the 11/21/95 meeting and advised "65 and 35 seems to be right". Bailey could not remember which attendees discussed "hard" and "soft" money. Bailey opined the "hard" and "soft" money may have been presented in one of possibly three contexts: First as it applied to the Media Fund, which consisted of $10 million split 65% soft and 35% hard. Second, the total amount of money DNC had consisted of 65% soft and 35% hard. Finally, DNC would raise money at a rate of 65% soft and 35% hard. Upon further review of the budget analysis, Bailey eliminated his second explanation.

Bailey recalled Media Fund was discussed during the meeting. Did not recall VPOTUS asking any questions or participating in any specific discussion during meeting. He did not recall any discussion of "hard" and "soft" money as it applied to the DNC Media Fund or fundraising phone calls made by VPOTUS.

Leon Panetta (8/12/98)[2]

Although Panetta could not specifically recall the 11/21/95 meeting in the Map Room of the WH, he did recall attending several meetings in the Map Room where DNC budget issues were discussed. There was a discussion at this meeting of the hard/soft components of the media fund, and about the types of events needed to raise each component. Additionally, Panetta recalled private talks with Ickes about this subject. It is also possible that the topic was discussed at other meetings. He recalled legalistic discussions at this 11/21/95 meeting and other similar meetings, concerning the breakdown of hard/soft money as it applied to the media fund, and the amount of each that needed to be raised. Concerning the DNC splitting or allocating contributions, recalls in general terms discussions of how much had to be raised and that so much of it was hard and so much soft. He could not recall any specific conversations relating this (a DNC practice of splitting contributions) to the media fund.

Leon Panetta (8/18/98)

11/21/95 meeting was 1 of 3 meetings held in the Map Room to discuss DNC budget. Hard/Soft money breakdown of media fund discuss at all 3 meetings. There was always a discussion and examination of the overall DNC budget and, at a minimum, a reference to the hard/soft breakdown of the Media Fund. Recalls the VPOTUS being there for all these discussions as part of gearing up for the re-election campaign. Meetings were structured around making presentations to POTUS and VPOTUS. Both were provided with whatever documents were being discussed and both always had something to say. POTUS AND VPOTUS would comment on what was being presented to them. Media Fund was focus of 11/21/95 meeting and the purpose was to make sure POTUS and VPOTUS were aware of what was going on with the Media Fund.

The discussions at the meeting pertained to the media fund, and the acquisition of funds to pay for the media advertisements. Panetta's attention was drawn to the DNC '95 Budget Analysis (EOP 070968), specifically the handwritten note, "65% soft/35% hard." He could not recall anyone making this specific statement at the 11/21/95 meeting. There was a discussion of the hard and soft components of the media fund. They discussed how the hard/soft breakdown applied to the media fund, and how much of each kind of money needed to be raised for Media Fund. They also discussed the

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[2] Panetta was interviewed twice after a difference of opinion developed between agents and prosecutors over precisely what he said in his first interview regarding the "hard/soft" components to the media fund. While prosecutors suggest that Panetta's recollection on this topic evolved over a series of interviews, the interviewing agents maintain that he spoke consistently, and unambiguously, on this topic throughout both interviews.

differences between hard/soft money at 11/21/95 meeting. Panetta believed he probably knew the least concerning the particulars of what was being discussed.

Sensed everyone in the room knew what was being discussed concerning hard/soft limits and breakdowns. Recalled having the impression that both POTUS and VPOTUS were following along with the discussion. Recalled them "walking through the papers" as the meeting moved along and also asking questions and making comments. Fundraising discussion focused on the need to involve POTUS and VPOTUS because of the large amount of money they needed to raise. Panetta could not recall if POTUS or VPOTUS left the meeting on 11/21/95 for any reason. He was not sure if the meeting would have been stopped if either one did leave the meeting, but emphasized the purpose of the meeting was to "make sure they knew what the hell was going on."

Bradley Marshall

Chief Financial Officer, DNC. Attended 11/21/95 DNC budget meeting. Meeting purpose: briefing POTUS, VPOTUS & WH Principals on DNC budget. Made comments during the meeting in response to general questions raised by other attendees regarding the DNC media campaign. Marshall could not recall which attendees asked questions. Marshall answered a question regarding the DNC general budget and the "spending side" of the DNC media campaign, primarily as it related to federal and non-federal "splits." In answering the question, Marshall clarified how much of the media campaign was comprised of federal money or a federal component. Marshall specifically responded that the DNC media campaign was comprised of "35% federal 65% non-federal.

Marshall provided a "one sentence" answer that the "Media Fund" was averaging "35% federal 65% non-federal. Recalled general discussion regarding the Media Campaign including how much the DNC had spent to date, how much "hard" money was needed and how much "soft" money was needed to fund the media campaign. Recalled there was a discussion regarding federal component of the Media Fund. At time of meeting, DNC had a $1.8 million "hard" line of credit to fund the shortfalls in fundraising for the media campaign. Discussion regarding how much money was needed to finance media campaign. The DNC's borrowing capacity which could be used along with the DNC direct mail contributions to fund the "hard cash" needed for the media campaign.

Direct mail contributions would generate "hard" money and that this "hard" money could be used for Media Fund. In meeting DNC preferred not to use direct mail contributions to fund the federal money component of the Media Fund. Preferred to use their federal line of credit for that purpose. Recalled more than one attendee of the meeting participating in this discussion of whether the DNC should use direct mail contributions or utilize their line of credit to fund federal component of the Media Fund. At 11/21/95 meeting it was pointed out that the DNC's direct mail contributions were "hard" contributions. Could not imagine anyone

attending meetings considering direct mail contributions anything but federal or "hard" money.

It was decided during the meeting to raise the additional money needed as noted in the option "b" of document EOP 070969. DNC had enough federal money for media campaign. Borrowing of federal money was intended to be drawn on the lines of credit from "facilities in place." POTUS did not want to borrow money needed to meet the shortfalls, or not increase the already established lines of credit. He felt "relieved" during meeting to hear President's position on not increasing the line of credit. Marshall could not recall if the topics of discussion regarding "hard" money component of the Media Fund were discussed at any other meeting attended by POTUS and VPOTUS. He characterized 11/21/95 meeting as briefing for the POTUS, VPOTUS and other WH principals. Marshall could not recall specific comments or level of participation by the VPOTUS. He recalled the POTUS did participate in the discussions of the meeting.

IV. Evidence of the VPOTUS Chief of Staff's Knowledge:

On or shortly before 9/12/95, Lyn Utrecht, while preparing for a meeting that date with the DNC General Counsel and the media consultants involved in the issue ad campaign, drafted a memo outlining the law of issue-advocacy. This draft, a copy of which is attached, explicitly and repeatedly discusses the "hard" or "federal" money component of issue ads. Although Utrecht prepared the draft only so that she and Sandler could discuss the advice they intended to impart to the media consultants during the 9/12 meeting, she ultimately furnished it to at least Morris among the consultants, and to Jack Quinn by facsimile on 9/15/95. In sending a copy to Quinn, Utrecht referenced a telephone call from Quinn the previous evening, a call which Utrecht described to the Task Force as a late-night inquiry from a White House meeting (Utrecht heard the President in the background) in which Quinn sought to confirm the nature of the legal advice Utrecht had earlier furnished the media consultants (the date of the late-night White House meeting is in dispute as there is a Morris agenda for 9/13, and Quinn does not recall an instance of two consecutive evening residence meetings - it is likely Quinn's call occurred on 9/13 or 9/14, with a possible error in Utrecht's stated 9/15 transmittal date).

As part of a Media Fund investigative interview, Quinn did not dispute having received the draft memo, but purported not to have read it. On 11/17/98, he was re-interviewed with an emphasis on what, if anything, he discussed with the Vice President. Quinn indicated he wanted to make sure Utrecht was being consulted on "issue ad" matters. When she sent him the memo via facsimile, he was not interested in the details. Quinn did not recall this specific memo nor does he recall telling the VPOTUS about this memo. He advised as a normal course, he would not have provided this much detail to the VPOTUS.

V. Vice President Participation in Wednesday (Residence) Meetings

Various witnesses place the first Wednesday evening residence meeting in February or March 1995 (the earliest Morris written agenda we possess is dated 4/27/95). The meetings continued, on roughly a weekly basis, through the 1996 election (some witnesses, including the President and Doug Sosnik, have advised that they continue as regular political meetings to this day). The last Morris we possess is dated 8/20/95.

Two of the Morris agendas (copies attached), dated 9/7/95 and 9/13/95, reference/suggest a "hard" money component to the DNC issue ads: The 9/7 agenda, in addressing how an "additional $33 million" for DNC ads can be raised, states "all soft money (enough mail to cover hard proportion)." The 9/13 agenda, when proposing $10 million in DNC issue ad expenditures from that date through 11/15/95, states "do it through state parties so only need 40% hard money." This second statement appears to refer to the use of Democratic state committees as conduits for ad money from the DNC to the media consultants, although such use would have actually allowed a more favorable hard/soft expenditure ratio than the 60/40 (or 65/35 during 1996) ratio enjoyed by the DNC. As noted below, there is some dispute as to whether the "9/13" meeting actually occurred on 9/14.

These agendas do not reflect the actual participants at these two meetings (nor do virtually any other of the agendas, which were retrieved by Morris at the conclusion of the meetings, reflect such participants). Both are redacted in part as unresponsive (although careful review of all of the agendas do not give rise to hope that unredacted versions of these two would likely reflect whether Vice President Gore was in attendance).

Numerous witnesses before the Task Force and the U.S. Senate have stated, and published accounts of the residence meetings by authors such as Bob Woodward and Dick Morris corroborate, that the Vice President attended residence meetings and participated in discussions concerning the DNC's issue ad campaign. The Vice President himself concedes this involvement. While Mr. Gore did not specifically advise the Task Force of the dates, or frequency, of his attendance, other key witnesses did. The President stated that the Vice President was "in most of the meetings...whenever he was in town." Ron Klain, a residence meeting attendee who became the Vice President's Chief of Staff in November 1995, when Jack Quinn left that job to become White House Counsel, stated that the Vice President "was usually there." Former White House Chief of Staff Leon Panetta similarly advised that the Vice President was usually in attendance. And Morris, who testified before the Senate that the Vice President was markedly less involved in furnishing input regarding proposed issue ads during the residence meetings than the President, nonetheless testified that Mr. Gore "was at all of the strategy meetings [residence meetings]." During Quinn's interview of

11/27/98, he advised it was the VPOTUS practice to attend residence meetings when he was in town or did not have a scheduled function. Quinn thought these meetings were detailed on the VPOTUS schedule, however, when shown two VPOTUS schedules without the notation, he could provide no explanation. He then suggested that perhaps the residence meetings were not annotated on the VPOTUS schedule. However, it should be noted that some VPOTUS schedule sheets do reflect meetings.

VI. Call Sheets Which bear Relevant Notations

Attached are three of the several call sheets prepared for the Vice President for his use in soliciting contributions to the media fund. One bears a notation that the potential donor had donated "no federal" money that year[3], while the others note that "soft money is permitted," and corporate-soft money is "ok". One could reasonably argue that references to soft money as "permitted", and "ok", (as opposed to soft money exclusively) suggests an alternative, i.e., federal hard money, as a means of contributing to the Media Fund. Further, why would there be any reference to a potential donor's federal money contribution history for the year, unless federal money was permitted?

VII. Relevant Statements by the VPOTUS

In reviewing the VPOTUS Press Briefing dated March 3, 1997 statements are made by him which imply that the Vice President was raising money for the re-election campaign. Listed below are a few excerpts in his own words which describe his role in fundraising for the campaign.

- First of all, to state the obvious, I was a candidate for reelection in the campaign. I worked very hard for the reelection of President Clinton and myself. I'm very proud that I was able to be effective in helping to reelect President Clinton, and I was very proud that I was able to also, as part of that effort, to help raise campaign funds.

- Everything that I did I understood to be lawful. I attended campaign--traditional campaign fundraising events as a principal speaker in many locations all around the country. The vast majority of the campaign funds that I've been given credit for raising came in that forum. I also made telephone calls to ask people to host events and to ask people to make lawful contributions to the campaign.

- My counsel advises me that there is no controlling legal authority or case that says that there was any violation of law whatsoever in the manner in which I asked people to contribute to our re-election campaign.

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[3] The Vice President, when interviewed, said that this particular hand-written notation was not on the call sheet when he used it to make his telephone call soliciting for the Media Fund.

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U. S. Department of Justice

Washington, D.C. 20530

November 20, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section
Criminal Division

David A. Vicinanzo
Supervising Attorney
Campaign Finance Task Force

SUBJECT: FBI's Recent Memo in Independent Counsel Matter involving the Vice President

On November 18, 1998, we received a memorandum from the FBI (hereafter "FBI Recommendation") that recommends appointment of an Independent Counsel. In support of this recommendation, the document cites evidence uncovered during our two preliminary investigations and finds it "sufficient to support a finding that the Vice President knew that "hard" money was a component of the media fund." After careful review, we conclude that the evidence cited in the FBI Recommendation does not challenge or refute the factual conclusions set forth in our 90-day memorandum.[1] This

[1] With the single exception of the recent Jack Quinn interview, all the evidence cited in the FBI Recommendation has been available to investigators since August 26, 1998, the

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memorandum responds to the FBI's analysis.

Ickes Memoranda

According to the FBI Recommendation, 13 memoranda from Harold Ickes, "directed to" the Vice President, "detail discussions of "hard" money in relation to the media fund."[2] However, as we noted at the conclusion of our section 607 investigation, the Vice President and several members of his staff have stated credibly that he did not read the Ickes memoranda. These statements are supported by others who, in their interviews, indicated that the Vice President showed little interest in DNC finances, the topic of these memoranda. In fact, we have developed no evidence during either investigation that indicates the Vice President even read these Ickes memoranda, let alone comprehended the brief references to the hard money component of the media fund contained therein. Moreover, as explained in some detail in our previous memorandum, an examination of the content of these documents shows that the Vice President, at the time of his interview last Fall, had little reason to falsely deny knowledge of a hard component to the fund since the DNC planned, at various stages throughout the life of the fund, to borrow the hard portion leaving only the soft portion to be raised by the phone calls and other events.

As noted at the end of our previous investigation, the Vice President, during his interview last Fall, when shown several of the Ickes memoranda mentioned in the FBI's Recommendation, said he did not typically read Ickes's DNC memoranda. By way of explanation, he noted that the Ickes budget analysis documents were ideological tracts used by Ickes to show that Dick Morris's

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beginning of the 90-day period.

[2] As a threshold matter, only the first seven of these documents are relevant to our inquiry because the Vice President's statement about his mistaken belief regarding the media fund was a statement about his belief at the time he made the telephone calls. Since the last calls were made on May 2, 1996, memos and meetings after this date are not relevant to show his state of awareness from November 28, 1995, when the calls began, to May 2, 1996, when they ended.

spending program would break the DNC. He noted that the memoranda would stay in his box until they were removed and destroyed.

In an effort to determine the accuracy of the Vice President's statement, we interviewed several of his staff members, including his two Chiefs of Staff. In addition, we spoke to Liz Cotham and Joel Velasco, two of the Vice President's secretaries and David Strauss, his Deputy Chief of Staff, about the paperflow through the Vice President's West Wing Office.

Jack Quinn was the Vice President's Chief of Staff through November 1, 1995. In an interview on November 17, 1998, when asked by one of the agents to describe the "paperflow" in the Vice President's office while he was Chief of Staff, Quinn described his frustration at the time with the amount of mail that piled up in the Vice President's in-box. According to Quinn, the Vice President's in-box typically had a "ton" of mail in it and the Vice President was not getting through it. Quinn was concerned at the time that the Vice President would not notice and read the important mail sent to him because it was contained in such a large pile of incoming material, some of which was not of importance to the Vice President. In light of this problem, according to Quinn, Beth Alpert and Quinn would go through the Vice President's in-box and separate the "wheat from the chaff." Quinn stated that he and Alpert did this "not necessarily" with the Vice President's knowledge that they were doing so.

According to Quinn, in going through the Vice President's in-box, he would have pulled out the Ickes DNC-related memos as documents that the Vice President did not need to see. Quinn also told us that he would be "amazed" if the Vice President had read Ickes' DNC-related memos.

Ron Klain, who became Chief of Staff on November 1, 1995, told us during his interview during the section 607 investigation that memoranda that would arrive in the Vice President's West Wing Office would be placed in the in-box. According to Klain, on his way in or out of the office, the Vice President would brush through the memoranda in the box and pluck out anything of interest to him. Approximately every two weeks when the memoranda in the box had stacked up, one of the secretaries would

send the stack to Klain's office, which would, in turn, route the memoranda to the staff member who had an interest in topics covered.

According to Klain, the Ickes memoranda were the "quintessential" example of a memo that was left in the box since they were not of particular interest to the Vice President. Klain's view was that the Vice President was not interested in these items because they did not call on him to take any action. Klain also added that memoranda such as the February 22, 1996 Ickes memo were "technical", leading the Vice President not to pay attention to them. In any event, Klain never saw the Vice President show an interest in an Ickes memorandum by taking it from the in-box.[3]

According to Klain, he would send the Ickes memoranda to Deputy Chief of Staff David Strauss. Strauss, when interviewed last Fall, confirmed receiving a steady stream of these documents. After receipt, Strauss would scan the documents to determine if he was required to take action.[4] If not, he would file the document in the proper file. Strauss noted that he had no reason to pay attention to references in the documents to the distinction between federal and non-federal contributions and never discussed these issues with the Vice President.

Finally, turning to the documents themselves, several contain references that indicate that the Vice President, at the time of his interview last Fall, had little reason to falsely

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[3] Both Cotham and Velasco verified Klain's description of the paperflow through the office. Both said that piles would stack up outside of the Vice President's office. Cotham recalls the Vice President would occasionally go through the large volume of stacked memos.

[4] It should be noted that in addition to reading the Ickes memoranda, including those documents discussed at the November meeting, Strauss attended the November meeting and actually took notes relating to the media fund composition. Despite his level of involvement in DNC budgetary matters that far exceeded that of the Vice President, Strauss was unaware during this period of a hard money component to the media fund.

deny knowledge of a hard component to the fund since the DNC planned all along to borrow the hard portion leaving only the soft portion to be raised by the phone calls and other fundraising events. For example, the October 20, 1995 memorandum notes at page two that "the $4.0 loan of "hard" dollars will cover the "hard" part of the $10 million for media." Again, the Fowler to Ickes memorandum attached to the November 20, 1995 Ickes memorandum defines the outstanding media budget goal of $6,600,000 in the following terms: "$3,600,000 in non-federal funds which will be raised and $3,000,000 in federal funds which will be borrowed. Finally, the memoranda dated December 18th (the Strauss notes document) and December 20th, with their attachments, contain numerous references to past and present efforts to raise soft money for the media -- some from "major donors" like the people called by the Vice President -- and borrow the hard component.[5]

Accounts of the November Meeting

As the FBI Recommendation notes, interviews conducted during our preliminary investigation establish that the Vice President attended a DNC budget meeting on November 21, 1995 that included a discussion of the DNC media fund.[6] In fact, the excerpts from the FBI 302s that are set forth as interview summaries serve to confirm the factual finding we set out in our 90-day memorandum:

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[5] As we noted in our section 607 memorandum and again in our 30-day report in this matter, we have found only one document that suggests the idea that the DNC may have been considering raising hard money for the media fund during this period. While this document, quoted in our section 607 memorandum, was attached to the December 20, 1995 Ickes cover memorandum and titled "DNC 1995 BUDGET ANALYSIS -- 11/21 POTUS PRESENTATION" it appears to be another version of, and, in part, at odds with the "Budget Analysis" we know was handed out at the meeting because of the presence of the Strauss notes. In any event, we uncovered no evidence that the Vice President read this or any of the other Ickes memoranda.

[6] We have found no reference in documents or FBI 302s that refer to the topic of discussion as the "election budget" as noted in the introductory section of this portion of the FBI Recommendation.

that only two of fifteen meeting participants, Bradley Marshall and Leon Panetta, were able to say that the use of hard money was discussed in connection with the media fund.[7] Nor do these excerpts challenge our conclusion that none of the attendees who did not arrive at the meeting with a pre-existing knowledge of the media campaign appear to have gained an understanding that the media fund required a mix of hard and soft money by attending the meeting. Significantly, the FBI Recommendation fails to identify any evidence to support a conclusion that the Vice President heard, understood, or retained whatever comments were made at all.[8]

In conclusion, the FBI Recommendation cites no evidence that the Vice President said or did anything either inside or outside

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[7] While the FBI Recommendation notes that Brian Bailey too recalls a mention of hard money at the meeting, Bailey did not know whether it was made in connection with the media fund or the overall DNC budget, an important distinction in our investigation. The Vice President freely admits that he was fully aware of the fact that there was a hard money component to the DNC budget overall. Moreover, it should be recalled that Bailey was unsure whether the media fund actually had a hard money component, a significant admission since he was at the same meeting and should have heard the same comments as the Vice President.

[8] It should be noted that the FBI Recommendation may appear to raise questions about whether Bradley Marshall clearly indicated that it was established at this meeting that the DNC needed to raise soft not hard money for the media fund at this point in time. Some of this confusion is removed, however, when the portions of the 302 edited out for the FBI Recommendation excerpt are replaced. For example, omitted from the excerpt are the following lines: "The DNC had already 'pulled down' all of the 'soft' line of credit available. There was still borrowing capacity on the 'hard' line of credit and therefore no need to increase it." With the addition of these two lines it becomes clear that the President's decision not to borrow by "increasing the line of credit" relates only to the soft money. As Marshall indicated, the President made the decision to raise soft money, not hard, and, as a result, the fundraising discussions did not involve a lot, if any, references to hard money. We have attached the entire 302 to avoid any confusion.

of the November meeting that would indicate that indeed he knew, whether because of what was heard or some other way, that the media fund was not all soft money or the hard money limit to the DNC was $20,000.

Evidence of the Chief of Staff's Knowledge

The FBI Recommendation also implies that Jack Quinn, the Vice President's Chief of Staff until November 1, 1995, may have learned about the media fund composition in September of 1995. In fact, Quinn told investigators that he is not sure about whether he read and understood a legal memorandum faxed to him by Lyn Utrecht that set forth the hard and soft components to the media fund.[9] In any event, no evidence has been uncovered that Quinn, or anyone else, told the Vice President about a hard money component to the fund.

Quinn stated during his November 17, 1998, interview that he does not specifically recall whether or not he provided Utrecht's memo to the Vice President, but he stated that he was "virtually certain" that he would not have given her memo to the Vice President because it had so much detail in it. Nor did Quinn recall ever briefing the Vice President on the subjects contained in Utrecht's memo. Quinn is confident that he never had any conversation with the Vice President concerning the fact that the DNC media fund had a "hard" money component.

Vice President's Participation in Residence Meetings

The FBI Recommendation implies that the Vice President may have been at one or two Residence Meetings where the topic of the media fund composition may have been discussed. As noted in the FBI Recommendation, this suggestion is made because two meeting

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[9] Quinn in his interview could not presently recall whether he read Utrecht's memo when she faxed it to him in September 1995. Quinn said that he may have read it then, gained some understanding of the subjects it covered, and forgotten about it since then, but Quinn stated that he also may not have read it at the time. His main concern at the time was to ensure that Utrecht was "in the loop" on election-related issues because she had "encyclopedic" knowledge of the relevant rules.

'agendas' -- one dated September 7th and the other dated September 14th -- prepared by Dick Morris have one line each that indicates that the DNC issue ads under consideration were going to be paid for, in part, with hard money. However, no evidence has been uncovered that indicates the topic was raised at these meetings. More importantly, the Vice President's schedules for the relevant dates indicate that he may not have attended. We are seeking more definitive evidence as to whether or not the Vice President was at either meeting.

During his interview, Quinn did not recall one way or the other whether the Vice President attended either or both of the Residence meetings reflected in the Morris agendas dated September 7 and September 13, 1995. Quinn stated that the Vice President usually attended the Residence meetings if he was in Washington and did not have a schedule conflict. Quinn stated that the Vice President's schedule very likely would reflect his attendance at such meetings. When shown the Vice President's schedule for September 7, 1995, which indicates that the Vice President was in Washington, DC that evening without another event scheduled but without any indication that the Vice President attended a Residence meeting that night, Quinn stated that it was possible that the Residence meeting scheduled for September 7 had "slipped" to another night. Alternatively, Quinn stated that he might be mistaken in his assumption that the Vice President's schedule would reflect his attendance at the Residence meetings. Quinn suggested that we look at the Vice President's schedules for other time periods to see whether the Residence meetings typically were reflected on the Vice President's schedule.[10]

Quinn was not sure if the Residence meeting scheduled for September 13, 1995, occurred on that night or on September 14, 1995. He said that it was possible that this meeting had "slipped" to the 14th, or that Utrecht's fax dated September 15, 1995, inaccurately referred to their conversation as having occurred "last night," rather than the "night before last."

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[10] We have in fact reviewed numerous Vice Presidential schedules and have found, in fact, that the Residence meetings are consistently entered giving both time and place.

For her part, Utrecht has stated that her telephone conversation with Quinn occurred after 10:00 p.m. on September 14, 1995. The Vice President's schedule for that evening reflects that he hosted a function at his own residence. In conclusion, Utrecht's recollection in combination with the language of the fax and the Vice President's schedule provides sufficient evidence to conclude that the Morris Residence meeting originally scheduled for the 13th was in fact held on the 14th without the Vice President in attendance.

Notations on Call Sheets

The FBI Recommendation suggests that notations on three call sheets used by the Vice President to make his fundraising calls raise the possibility that the Vice President was asking for hard as well as soft money in his telephone calls which would indicate that he knew that the media fund had a hard money component. As we noted in our memorandum at the end of the section 607 investigation, though, the circumstances surrounding these calls indicate that the Vice President was making a soft money request, and the Attorney General so found.

Turning first to the Becker and Bendheim calls sheets that contain David Strauss's notes reflecting the Vice President's phrases "soft money permitted" and "soft and corporate OK", the Vice President, in each of these instances, asked for $50,000 for the media fund.[11] A knowledgeable donor -- aware that he could give up to $20,000 per year in hard money to the DNC -- would have understood the Vice President to be asking for at least $30,000 in soft money.[12] The $30,000 could not only possibly be

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[11] While Bendheim did not recall the mention of soft money and remembers the request was for $25,000, this recollection is contradicted by Strauss's notes that indicate an initial request of $50,000 and a reference to "soft and corporate".

[12] In fact, Bendheim clearly understood that the Vice President was requesting soft money in his phone call. He based this understanding on a belief shared by several of the donors we interviewed during the section 607 investigation, that the DNC's media campaign was "issue driven" and, as such, could be funded entirely with soft money. This belief, of course, is the same

soft money; rather, it had to be soft money. There is no reason to believe that, in stating that soft money is "permitted" and "OK", the Vice President was trying to tell Becker and Bendheim that the first $20,000 or any other portion of their contributions could be given in hard money. If that had been the Vice President's intent he presumably would have said so directly. In our view, the only reasonable inference to be drawn from these statements to Becker and Bendheim is the one offered by the Vice President, that he was trying to make sure that they knew they had the option to make their contributions through their corporations.

Finally, the James Hormel call sheet containing a reference to hard money also contains the phrase "non-federal $ soft" in the Vice President's handwriting. And while Hormel does not recall a reference to soft money during the conversation with the Vice President, his own contemporaneous notes as to how his donation should be forwarded to the DNC -- "Check request: $30,000. Payable to: DNC-NonFederal Acct per V.P. Gore's request Send to Peter Knight 1615 L St. NW #650 W DC 20036 202659-3005" -- suggest that the Vice President asked him for a soft money contribution. There is no evidence that this notation, even if seen by the Vice President, changed his view of the media fund or led to a hard money request of Hormel.[13]

The Vice President's Press Conference

Finally, the FBI Recommendation sets forth excerpts from the Vice President's press conference that, according to the FBI Recommendation, "imply that the Vice President was raising money for the re-election" in his telephone calls. The FBI Recommendation fails to note that the Vice President clarified his references to the "campaign" and "candidate" later in the

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mistaken notion that the Vice President said he had during the period he was making the fundraising calls.

[13] While the FBI Recommendation correctly notes that the Vice President said that the notation was not on the call sheet when he made his call, his secretary, Joel Velasco, recalls that Peter Knight told him to make this notation before the call sheet was given to the Vice President.

press conference by stating that he was raising money for the DNC media effort, not the reelection campaign, in his phone calls and that there was a "clear distinction" and a "separate message" for these ads. Furthermore, there is no dispute that one of the purposes of the media campaign was to bolster the prospects of the reelection effort; as an exploration of the legal issues surrounding payment for the campaign has made clear, the requirements concerning how ads funded by the DNC must be paid for are driven by the content of the ads themselves, not the subjective purpose of the candidate. In any event, we have developed no evidence, in either investigation, that the Vice President, in his telephone calls, asked any of the individuals he contacted directly for funds to support his reelection or the election of any other federal official. Nor can his press statement be reasonably interpreted to show that he was aware of a hard money component to the media fund.

Conclusion

In conclusion, nothing in the FBI Recommendation provides reasonable grounds to believe that further investigation of this matter is warranted. It remains, therefore, our recommendation that an independent counsel not be appointed in this matter.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

EXHIBIT 53

November 20, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General

FROM: Lee J. Radek
Chief
Public Integrity Section

David A. Vicinanzo
Supervising Attorney
Campaign Financing Task Force

SUBJECT: Independent Counsel Matter: Potential Election Law Violations Involving President William Jefferson Clinton and Vice President Albert A. Gore, Jr.

As you know, the Public Integrity Section and the Campaign Financing Task Force have conducted a preliminary investigation to determine whether the President of the United States William Jefferson Clinton or Vice President Albert A. Gore, Jr., both of whom are covered persons under the Independent Counsel Reauthorization Act of 1994 (the Act), 28 U.S.C. §§ 591-599, may have violated federal criminal law in connection with the production and dissemination of broadcast media advertisements financed by the Democratic National Committee during the 1996 election cycle. As explained below, we have concluded that there are no reasonable grounds to believe that further investigation of this allegation is warranted and accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

The Attorney General must reach her decision in this matter no later than December 7, 1998, 90 days after she advised the Special Division for Independent Counsel Matters of the United States Court of Appeals for the District of Columbia Circuit of her decision to commence a preliminary investigation under the Act. See 28 U.S.C. § 592(a)(1). If the Attorney General agrees with this

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Attg. Names

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recommendation, we will provide the necessary paperwork to be filed with the Special Division in accordance with our recommendation.

INTRODUCTION AND SUMMARY

On August 7, 1998, the Department of Justice received the Exit Conference Memoranda of the Federal Election Commission's (FEC's) Audit Division on the Clinton/Gore '96 Primary Committee, Inc., and the Clinton/Gore '96 General Committee, Inc., and General Election Legal and Accounting Compliance Fund (collectively the "ECMs"). In those memoranda, the Audit Division concluded, albeit preliminarily, that certain expenditures by the Democratic National Committee ("DNC") for broadcast media advertisements during the 1996 election cycle constituted in-kind contributions by the DNC to the Clinton/Gore '96 Primary Committee or the Clinton/Gore General Committee, in violation of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-455, the Presidential Primary Matching Payment Account Act (PPMPAA), 26 U.S.C. § 9031 et seq., and the Presidential Election Campaign Fund Act (PECFA), 26 U.S.C. § 9001 et seq. At the time it received the ECMs, the Department also was aware, based on published accounts of the DNC media campaign and other information gathered by the Campaign Financing Task Force, that specific and credible information suggested that the President, and to a lesser extent the Vice President, personally participated in the conception and implementation of this DNC media campaign. Based on this information, and inasmuch as a knowing and willful violation of the FECA, PPMPAA, or the PECFA could constitute a criminal offense, the Attorney General triggered this preliminary investigation to determine whether "there are reasonable grounds to believe further investigation is warranted," 28 U.S.C. § 592(c)(1)(A), thus requiring the appointment of an Independent Counsel.

The potential criminal violations here revolve around the question whether, under the FECA, PPMPAA, or PECFA, the costs of the ads are attributable to one or the other of the campaign committees, such that they constituted in-kind "contributions" by the DNC to the candidates and "expenditures" by the candidates themselves. To the extent these advertising expenditures did constitute contributions to and expenditures by the campaign committees, they were unlawful, in that they would have violated, among other things, (1) the FECA's limits on contributions to candidates by multicandidate political parties like the DNC, and (2) the PPMPAA's and PECFA's expenditure limits on publicly financed elections. Any such violations made knowingly and willfully would potentially be criminal.

Whether these advertising expenditures were attributable to the campaign committees such that they violated the FECA, PPMPAA, or PECFA, turns on the content of the ads, and specifically

whether the ads referred to a clearly identified candidate and contained an electioneering message. In its memoranda, the Audit Division found, among other things, that the ads met these tests and accordingly constituted contributions to and expenditures by the campaign committees in violation of the referenced statutes. In conducting this preliminary investigation, we have not reconsidered these determinations by the Audit Division, for the simple reason that, in light of the presumed expertise of the FEC auditors in reaching such determinations, we would be unable to reach a definitive determination to the contrary and conclude on that basis that no further investigation would be warranted.

Our preliminary investigation has accordingly focused on two issues: (1) determining whether the President and Vice President were sufficiently involved in or exercised sufficient control over the DNC issue ad campaign as to be potentially criminally responsible for the violations found by the Audit Division; and (2) if so, determining whether the President and Vice President acted with the requisite "knowing and willful" mental state.[1]

As will be explained in detail later in this memorandum, with respect to the President's and Vice President's involvement in the issue ad campaign, there is little dispute that they both were intimately involved in the conception and implementation of the ad campaign throughout the 1996 election cycle. Indeed, as a practical matter, the President and Vice President exercised nearly absolute control over the ad campaign. As the head of the

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[1] During this preliminary investigation we have also considered the involvement and intent of former Deputy Chief of Staff Harold Ickes in the DNC-financed media campaign. Although the Attorney General has made no formal determination in this matter that under the conflict of interest provisions of the Act Ickes should be deemed to be a covered person, such a determination has been made in a separate matter and the same rationale would seem to apply here as well. As in the cases of the President and Vice President, we conclude that there are no reasonable grounds to believe that further investigation of this allegation is warranted as to Ickes as well. We base our conclusion on the fact that, as set forth below, there is clear and convincing evidence that Ickes lacked the intent to violate the law. Indeed, the facts show that Ickes was a conduit of much of the advice of counsel the President received, and attended most or all of the same meetings as the President and Vice President at which the legal advice and the ongoing involvement of the lawyers were discussed. Alternatively, we also conclude, as with the President and Vice President, that further investigation is not warranted in light of the written and other established policies of the Department of Justice.

national party, the President, and to a lesser extent the Vice President, had the ultimate authority to sanction the issue ad campaign, and they both were involved in nearly every aspect of it, including raising money to finance it, formulating the political strategy the ads were intended to advance, and reviewing and commenting on the ads themselves. Setting aside the issue of intent, we conclude that these facts show sufficient involvement of the President and Vice President in the issue ad campaign as to make them potentially criminally liable for the violations found by the auditors.

With respect to consideration of the intent element of a potential criminal offense, the Attorney General may not, as you know, conclude under the Independent Counsel Act that no further investigation is warranted based on lack of evidence of intent, unless there is "clear and convincing evidence" that the covered persons lacked the requisite state of mind. In reaching our conclusions here, we have considered the evidence of intent under this high standard.

The potential criminal violations under consideration here all require a "knowing and willful" mental state, meaning a violation is potentially a crime only if there is an intentional violation of a known legal duty. Our investigation in this regard has focused generally on the President's and Vice President's knowledge of the law and specifically on any advice they received as to the legality of the DNC issue ads. We have concluded, based on the uncontradicted statements of the principal participants in the ad campaign and a substantial amount of corroborating documentary evidence, that the President and Vice President were advised that the issue ad campaign was lawful and that lawyers were reviewing every ad to ensure full compliance with the law. In addition, there is no evidence suggesting either the President or Vice President ever harbored a subjective belief that they were violating the law or that the review undertaken by the lawyers was insufficient. As we will explain in detail later, in our view these facts establish clearly and convincingly that the President and Vice President lacked the requisite specific intent to violate the law.

In reaching this conclusion, we also have considered that the determinative legal standard at the time -- the FEC's "electioneering message" test -- was so ambiguous and ill-defined as likely to preclude showing that the persons involved in the DNC issue ad campaign ever intended to violate it. We conclude that under such circumstances, where there is no reasonable possibility of establishing the requisite mens rea for a criminal violation, then under the governing standard of the Independent Counsel Act there are no "reasonable grounds to believe further investigation is warranted."

Finally, the other substantial issue we have addressed during this preliminary investigation is whether, under the standard set forth in the Independent Counsel Act, "further investigation is warranted" in light of the "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations." As we set forth at the end of this memorandum, we have concluded that further criminal investigation of the DNC issue ad campaign is not warranted, in light of the written policy and established practice of the Department of Justice to defer to the FEC in cases involving, as here, the resolution of ambiguities in the reach of the FECA.

In sum, we have concluded that no further investigation of the allegation is warranted and accordingly recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

SCOPE OF THE INVESTIGATION

As we note above, our preliminary investigation has focused on the involvement of the President and Vice President in the DNC issue ads campaign and any evidence of their subjective beliefs as to the legality of those ads under the federal election laws. We have not reconsidered the determination by the Audit Division that the DNC ads referred to a clearly identified candidate and contained an electioneering message, recognizing that, in light of the presumed expertise of the FEC auditors, we would be unable to reach a definitive conclusion under the Independent Counsel Act standard that no further investigation of this issue would be warranted.

Even so limited, however, our investigation has been fairly wide-ranging and comprehensive. We have interviewed all of the principal participants in the DNC issue ad campaign, with the only notable exception being Richard Morris, as to whom we saw no need for an interview because he had been comprehensively deposed on this subject matter during the Senate's campaign finance investigation. In conducting this preliminary investigation, we also have had the benefit of all of the previous witness interviews touching upon this subject matter that have been conducted by the Campaign Financing Task Force over the past 18 months.

In addition, we have been able to take advantage of the documents previously gathered by the Campaign Financing Task Force. We also have made our own specific document requests to the President, Vice President, former Deputy Chief of Staff Harold Ickes, the Executive Office of the President (which includes the Office of the Vice President), the Clinton/Gore '96 committees, and the DNC. Each of these persons and entities has been requested to certify that, after a thorough search for all documents called for by the request, all responsive documents

THE POTENTIAL OFFENSES

A. The FECA

Under the FECA, all contributions and expenditures "for the purpose of influencing any election for federal office" are subject to regulation, including certain specified contribution and expenditure limits. 2 U.S.C. §§ 431(8)(A)(i) and (9)(A)(i). The contribution and expenditure limits are set forth in section 441a. With respect to a multicandidate political committee such as the DNC, the FECA specifies a $5,000 contribution limit to any candidate or his authorized political committee with respect to any election for Federal office, including President. Id. § 441a(a)(2)(A). For purposes of this $5,000 limitation, a contribution would include an "expenditure[] made by any person [including a political committee, see id. § 431(11)] in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . or [his] agents." Id. § 441a(a)(7)(B)(i). Subsection (b) of section 441a sets forth the expenditure limitations that apply to candidates receiving public funds in the primary and general elections for President, id. § 441a(b); at the time of the original enactment, this provision limited expenditures to $10 million and $20 million, respectively, in those elections. Subsection (c) provides for annual adjustments to those amounts based on increases in the price index. As a general matter, these provisions limited the amount of money that Clinton/Gore '96 could spend during the 1996 election cycle to approximately $37 million during the primary election campaign and $62 million during the general election campaign.

Despite these limitations, a national committee of a political party may make certain expenditures in connection with

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to consider the evidence of intent under the clear and convincing standard of the Act. Indeed, our investigation of the RNC ads has not been as complete as it has with respect to the DNC ads. For one, as mentioned above, the entities on the RNC side have not waived the attorney-client and work product privileges as they have on the DNC side. [redacted] (e)

[redacted]

Nevertheless, we conclude, as we have regarding the DNC, that in light of the ambiguity of the "electioneering message" standard, it is unlikely we could ever prove that the persons involved in the RNC issue ad campaign possessed the requisite intent to violate the law. For this reason, as well as under the written and other established policies of the Department of Justice, we recommend that this matter be closed as well.

the general presidential election campaign. See id. § 441a(d). Section 441a(d) provides:

> Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party . . . may make expenditures in connection with the general election campaign of candidates for Federal office [including President], subject to [certain specified limitations].

See H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for this subsection [441a(d)], these expenditures would be covered by the contribution limitations stated in subsections [441a(a)(1) and (2)]"). It is undisputed that the DNC spent its limit under this provision on things other than the DNC issue ads that are at issue here.[3]

The thrust of the Audit Division's allegation here is that the DNC-financed ads constituted coordinated expenditures under section 441a(a)(7)(B)(i), meaning that: (1) the DNC violated the $5,000 contribution limit of section 441a(a)(2)(A), and (2) Clinton/Gore '96 violated either the primary or general election spending limits, depending upon whether the DNC issue ad expenditures are attributable to the primary or general election committee. Alternatively, the Audit Division posits that even without coordination, the ads constituted national committee expenditures "in connection with" the general presidential election campaign, because the ads referred to "a clearly identified candidate" and contained "an electioneering message," the FEC's standard for determining whether an ad is broadcast "in connection with" a general election campaign. Inasmuch as the DNC had spent its 441a(d) limit on other things, the DNC expenditures on the ads at issue here violated the 441a(d) limit. In sum, the Audit Division asserts that the DNC's expenditures on the issue ads violated the FECA if either (1) irrespective of the content of the ads, the expenditures on them were in fact coordinated with the Clinton/Gore '96 campaign committee (such that 441a(a)(7)(B)(i) applied), or (2) irrespective of coordination, the content of the ads satisfied the "in connection with" test by referring to a clearly identified candidate and

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[3] The potential violations here involve the issue ads run between August 1995 and August 1996, inclusive, prior to the Republican National Convention.

containing an electioneering message (such that 441a(d) applied).[4]

At bottom, it makes no difference which provision -- 441a(a)(7)(B)(i) or 441a(d)-- applies, or whether both do, because contrary to the Audit Division's interpretation of the statutes, the FEC has interpreted them, at least in the context of national party committee broadcast ads, to embody the same content-driven test for determining whether expenditures on an ad are attributable to a candidate or his campaign committee; i.e., whether the ads refer to a clearly identified candidate and contain an electioneering message. In its brief to the Supreme Court in Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S. Ct. 2309 (1996) ("CRFCC Brief"), the FEC stated that under the regulatory scheme it has established,

> application of the statutory contribution limits to expenditures by political parties depends upon whether an expenditure is "allocable" or "attributable" to a particular candidate. FEC Advisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185 (May 30, 1985) (AO 1985-14); see FEC Advisory Op. 1984-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5766 (May 31, 1984). "Generic" appeals for public support for a party's federal candidates (e.g., "Support Republicans for Congress") are considered "expenditures" (because they are made "for the purpose of influencing" federal elections, 2 U.S.C. § 431(9)(A)(i)), but they are not allocable or attributable to particular candidates. See AO 1985-14, at 11,185-11,186. They are therefore not deemed to be "coordinated" expenditures -- expenditures made "in cooperation, consultation, or concert, with" a candidate or the candidate's agents, 2 U.S.C. 441a(a)(7)(B)(i), and are, consequently, not subject to the Act's contribution limits. Where a party expenditure is used to finance communicative activities, the Commission has determined that the expenditure will be considered attributable or allocable to a particular campaign committee only if the communication refers to a "clearly identified candidate" and contains an "electioneering message." AO 1985-14, at 11,185.

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[4] But see Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309, 2318 (1996) (must show actual coordination between candidate and party for expenditures to fall within section 441a(d)). This fact is not in dispute here.

CRFCC Brief at 3. In the same section of the brief, the FEC notes that notwithstanding section 441a(a)(7)(B)(i)'s limitation, the national parties may make coordinated expenditures in connection with the general election campaign of candidates for Federal office, up to certain specified amounts, citing section 441a(d). Furthermore,

> [i]n determining whether a party expenditure for communicative activity is made "in connection with" a general election campaign for purposes of Section 441a(d), the Commission employs the same test (depiction of a "clearly identified candidate" plus communication of an "electioneering message") that it utilizes in determining whether an expenditure is attributable to an individual candidate. See AO 1985-14, at 11,185; FEC Advisory Op. 1980-119, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5561, at 10,691 (Oct. 24, 1980).

CRFCC Brief at 4-5 n.6.

Inasmuch as the United States took this position in the Colorado Republican case, and adopted the position that national party committee ads constitute coordinated expenditures under either provision only if they refer to a clearly identified candidate and contain an electioneering message, we cannot argue that a different standard should apply in this criminal case. Thus, contrary to the Audit Division's opinion, coordination alone, at least in the context of national party committee ads, does not mean an expense is allocable or attributable to a candidate under section 441a(a)(7)(B)(i). Rather, the appropriate test under either provision is whether the ads refer to a clearly identified candidate and contain an electioneering message.

As you know, the FEC auditors found that all of the DNC-financed issue ads referred to a clearly identified candidate and contained an electioneering message. The auditors further found that these advertising expenditures were made by the DNC in consultation and cooperation with President Clinton and his reelection committees. The auditors accordingly concluded that the DNC's expenditures on these ads violated the Act.

In reaching this conclusion, the Audit Division defined "electioneering message" to "include[] statements designed to urge the public to elect a certain candidate or party, or which would tend to diminish public support for one candidate and garner support for another candidate." Primary Committee ECM at 6. The Audit Division contends that the Commission adopted this definition of "electioneering message" in Advisory Opinion 1984-15. Although some of the language on which the Audit Division relies does appear in that opinion, it is in the context of a

broader discussion, including the observation that the ads in question there "effectively advocate the defeat of a clearly identified candidate in connection with the [presidential] election." AO 1984-15, at 11,069-11,070. Moreover, the ads in that Advisory Opinion contained an explicit call to action ("Act today to preserve tomorrow. Vote Republican."), which is a considerably stronger electioneering message than the Audit Division's restatement of the standard in the ECM here would seem to suggest.

A later advisory opinion, AO 1985-14, states only generally that an electioneering message "includes statements 'designed to urge the public to elect a certain candidate or party.'" AO 1985-14, at 11,185 (*quoting* United States v. United Auto Workers, 352 U.S. 567, 587 (1957)).[5] With the exception of this limited guidance, the FEC has shied away from giving any more content to the "electioneering message" test. See Clifton v. FEC, 114 F.3d 1309, 1316 (1st Cir. 1997) (criticizing the FEC for "not even pretend[ing] to explain what [it] means by 'electioneering message'" and acknowledging that the vagueness of the standard "is readily apparent"). Indeed, in Advisory Op. 1995-25, the Commission

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[5] As the Audit Division recognized, the determination whether a communication refers to a clearly identified candidate and contains an electioneering message is based on the content of the ad. See Primary ECM at 20 (basing conclusion that ads contain electioneering message on a review of the content of the ads). In AO 1985-14, the Commission applied this content test and found that the ads did not count against the 441a(d) limit presumably because they did not mention a clearly identified candidate. Even in the one ad that exhorted voters to "let your Republican Congressman know" and to "vote Democratic," the Commission split, by tie vote, on whether the ad should count against the 441a(d) limit. This was so even though the Democratic Congressional Campaign Committee acknowledged that the purpose of the ads was to influence voters' perceptions of the Republican candidates and weaken their reelection prospects. Similarly, in United States v. United Auto Workers, supra, only the content of the ad was considered in determining whether the allegations of the indictment made out a potential violation of the statute. See id. at 584. And the FEC itself has said in published comments in the Federal Register that with respect to communications containing both issue advocacy and electoral advocacy "the subjective intent of the speaker is not a relevant consideration because the inquiry [focuses] on the audience's reasonable interpretation of the message." 60 Fed. Reg. 35292, 35295 (1995).

> [declined] to express any opinion as to what is or is not an electioneering message by a political party committee. The courts and the Commission have addressed the issue of what constitutes an electioneering message by a political party in other circumstances. See Advisory Opinions 1984-15 and 1985-14; Federal Election Commission v. Colorado Republican Federal Campaign Committee, Nos. 93-1433 and 93-1434, 1995 Westlaw 372934 (10th Cir. (Colo.), June 23, 1995.

2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6162, at 12,108. It bears noting in this regard that the cited Tenth Circuit case merely quotes Advisory Opinions 1984-15 and 1985-14 in setting forth the "electioneering message" test.

The upshot of this analysis is that there was very little guidance available for one to look to in determining the precise scope of what the Commission meant by an "electioneering message." The auditors themselves qualify their "electioneering message" conclusions by stating only that "[i]n Audit Staff's opinion" the ads "appeared" to convey electioneering messages. Primary ECM at 19, 20. Indeed, a fair reading of the FEC's previous enforcement actions suggests that the auditors may have applied too broad a test, and that the Commission itself will only find an electioneering message where the ad contains some "call to action" in reference to a federal election, through either the mention of a candidacy, an election, voting, or contributions.[6]

Whether or not the DNC issue ads contained an electioneering message is not the issue here, because the auditors concluded they did and we see no purpose to second-guessing that conclusion in the context of an Independent Counsel Act preliminary investigation. But one of the issues in this preliminary investigation is whether the violations found by the auditors were potentially criminal, which they would be only if committed knowingly and willfully. See 2 U.S.C. § 437g(d)(1)(A). Such a standard of intent requires proof of a "voluntary, intentional

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[6] For example, the Commission took no action against a state Democratic Party whose ads, broadcast in late August to mid-September of 1996, criticized the Gingrich agenda and identified Congressman Hutchinson with that agenda, and then urged the voters to call the Congressman and tell him to "stop listening to Newt and start listening to us!" It also took no action against another state Democratic Party whose ads mentioned a candidacy and specifically criticized the Republican candidate for Senator ("Now [Chuck Hagel] thinks he can just walk in and run for Senator from Nebraska . . . Nebraska deserves better.")

violation of a known legal duty," United States v. Bishop, 412 U.S. 346, 360 (1973), and in that regard, any ambiguity in the meaning of the "electioneering message" test is important, as we discuss in our analysis below.

B. The Public Funding Statutes

Public funding is provided for presidential primary and general elections through the PPMPAA and PECFA, respectively. Under the PPMPAA, candidates seeking their party's nomination for the presidency can qualify to receive matching funds by raising over $5,000 in individual contributions of $250 or less from each of 20 states; qualifying candidates may then receive public funds to match the first $250 of each individual contribution. To be eligible to receive those funds, the candidate must certify that he and his primary committee "will not incur qualified campaign expenses in excess of [the expenditure limits applicable under FECA]." 26 U.S.C. § 9033(b)(1). See 26 U.S.C. § 9035(a); 2 U.S.C. § 441a(b)(1)(A). PECFA provides for full public funding of the presidential general election campaign out of the Presidential Election Campaign Fund. Under the statute, a presidential nominee electing to receive public funding of his campaign must agree that he and his committee "will not incur qualified campaign expenses" in excess of the amount of public funding they receive. 26 U.S.C. § 9003(b)(1). The nominee also must agree not to accept private contributions for the general election campaign. Because the DNC issue ads were broadcast only during time periods covered by the PPMPAA, we do not discuss further the provisions of the PECFA.

Under the PPMPAA, the term "qualified campaign expense" means:

> a purchase, payment, distribution, loan, advance, deposit, or gift of money or of anything of value --
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> (A) incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election . . . .
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> For purposes of this paragraph, an expense is incurred by a candidate or by an authorized committee if it is incurred by a person specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or the committee.

26 U.S.C. § 9032(9). There is a dearth of case law or regulation defining the term "in connection with" for purposes of this provision. However, the phrase also appears in the FECA in section 441a(d), defining expenditures by national committees, and, as noted above, has been interpreted by the FEC in the

context of national party advertisements to require a clearly identified candidate and an electioneering message. The same meaning here would make sense, particularly in light of the fact that the PPMPAA expressly incorporates the FECA's expenditure limit, suggesting that Congress intended the two statutes to be similar in scope. Under the FECA, a primary candidate who accepts matching funds may not make "expenditures" in excess of $10 million (adjusted for inflation). 2 U.S.C. § 441a(b)(1)(A). Similarly, the PPMPAA limits a candidate to the same $10 million amount in "qualified campaign expenses" and accomplishes this result by incorporating by reference the limit imposed by the FECA. 26 U.S.C. §§ 9033(b)(1); 9035(a). Under these circumstances, it would be totally illogical for a national party advertisement to be treated differently under the two statutes. This is consistent with the ordinary rule of statutory construction that identical words used in related statutes should be interpreted to mean the same thing. Sullivan v. Stroop, 496 U.S. 478, 484 (1990); see also Commissioner v. Lundy, 116 S. Ct. 647, 655 (1996) (identical terms in same statute). Nothing in either statute suggests that different definitions of the same term should apply here.

As this analysis suggests, the DNC-financed issue ads could constitute "qualified campaign expenses" potentially in violation of the PPMPAA's spending limitation only if they referred to a clearly identified candidate and contained an electioneering message.[7] Thus, the ultimate determination of a potential violation under this statute is the same as under the FECA.

The PPMPAA also criminalizes certain violations. Under the statute, any candidate accepting matching funds who "knowingly" incurs qualified campaign expenses in excess of the limits imposed commits a felony. 26 U.S.C. § 9042(a). Despite slightly different language, it appears that the "knowingly" intent standard here is meant to embody the same intent standard as the FECA, namely an intentional violation of a known legal duty. Given that the two statutes criminalize identical conduct, i.e., exceeding the spending limitation, it would be incongruous for the FECA misdemeanor offense to require a higher level of intent than the PPMPAA felony. In addition, 2 U.S.C. § 437g -- which addresses civil and criminal enforcement of the FECA as well as the PPMPAA -- refers to both statutes requiring evidence of a

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[7] Of course, under the definition of "qualified campaign expense," the expense also would have to have been either "incurred" by the candidate or his committee or "incurred by a person specifically authorized in writing by the candidate or committee . . . ," a factual issue we do not find it necessary to explore.

knowing and willful violation for (1) the imposition of enhanced civil penalties by the FEC, id. § 437g(a)(5)(B), (2) referral by the FEC to the Attorney General, id. § 437g(5)(C), and (3) the imposition of enhanced civil penalties by a court, id. § 437g(6)(C).

In sum, the potential offenses at issue in this preliminary investigation revolve around whether the DNC-financed issue ads can be attributed to the Clinton/Gore committee, whether as "expenditures" under the FECA or as "qualified campaign expenses" under the PPMPAA. In either case, the resolution of this issue turns on the content of the ads and whether the ads referred to a clearly identified candidate and contained an electioneering message. We assume they did, in light of the auditors' conclusions, and that they therefore violated the FECA and PPMPAA. We have accordingly focused our preliminary investigation on whether the President and Vice President were sufficiently involved in the DNC ad campaign as to be potentially criminally liable for the violations found by the auditors, and whether in so doing they had the requisite "knowing and willful" mental state.

THE FACTS[8]

A. The Genesis of the Issue Ad Campaign

According to all of the witnesses, the defeat of the Democrats in the 1994 midterm election directly precipitated the DNC issue ad campaign. The President and his advisors believed that they had not successfully informed the American public about his Administration's objectives and accomplishments. The President felt that he needed to convey more effectively his vision to the American people to counter that of the Republicans. This prompted him, in approximately December 1994,[9] to hire Richard (Dick) Morris, whom he had previously worked with in Arkansas, as a consultant to assist in his reelection effort. As a condition of agreeing to work for the President, Morris insisted that the President hire the polling firm of Schoen and Penn to conduct opinion polling, that he place a staff person in the White House to serve as Morris's liaison, and that he meet

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[8] Special Agent [redacted] of the Federal Bureau of Investigation, the case agent in this matter, has reviewed and verified the facts contained in this memorandum.

[9] Morris also had conducted some polls for the President in the fall of 1994 but at that time there was no long-term plan for Morris to work for the President.

weekly with Morris to discuss political strategy. The President eventually agreed to all three conditions.

As part of his strategy to help the President get his message out to the American public, Morris advocated early and frequent paid advertising as a means to communicate broadly the President's message. He assembled a team of consultants, including Douglas Schoen and Robert Squier, a media consultant, to help develop this strategy The group later expanded to include Schoen's partner, Mark Penn, Squier's partner, William Knapp, and a few other media consultants. The overall strategy underlying the ad campaign, which remained constant throughout its existence, was to emphasize the President's and the Democratic Party's positions on key issues that set them apart from the Republican's "Contract with America." Because the differences between the parties were stark, they believed, the ensuing legislative battles provided a unique opportunity to communicate the President's message. And while they had every reason to believe that these advertisements would assist the President in his reelection bid, the consultants agreed that the President had to win key legislative battles, most notably the budget battle, to assure his viability as a candidate.

As agreed, the President met weekly with Morris to discuss political strategy, and their group steadily expanded to include the First Lady (who at some later point dropped out), Vice President Gore, Harold Ickes, Jack Quinn, Leon Panetta, Senator Christopher Dodd, the consultants, and various other Cabinet members and political advisors. Morris prepared detailed written agendas for these meetings, commonly referred to as the "Wednesday night residence meetings," since they typically occurred on Wednesday nights initially in the Treaty Room and later in the Yellow Oval Office in the White House residence.

According to Morris, the Wednesday night residence meetings focused on political strategy, including media, polling, speeches, issues, and policy positioning. According to Ickes, the meetings almost exclusively focused on the issue ad campaign. Ideas for upcoming ads were discussed, animatics (or rough versions of the ads) were viewed, scripts were reviewed, and opinion polls measuring the impact of the ads were discussed. The President's reelection was a constant theme of the meetings. The agendas show that the topic of paid media advertising was discussed as early as March 2, 1995.

The ad campaign was a source of constant friction between Morris and Ickes. Morris, as mentioned, advocated frequent and continuous paid advertising, and he believed that all other political efforts should be subordinated to it, including spending whatever time was necessary to raise funds to finance this effort. Morris also advocated rejecting federal matching funds for the primary campaign so that there would be no limit on

the campaign's spending under the FECA and PPMPAA. Ickes was highly skeptical of early advertising and was concerned that such an effort both would bankrupt the DNC and use too great a proportion of Clinton/Gore primary committee funds too early in the election cycle. In a memorandum to the President dated August 14, 1995, Ickes and Douglas Sosnik outlined the problems with spending Clinton/Gore reelection money in the fall of 1995 and the political risks in rejecting matching funds and the spending limits. One of their fears was that they would have no money left by the spring of 1996 to respond to anticipated Republican attacks financed by the RNC and other "independent" but Republican-aligned groups using "generic" ads. Ickes and Sosnik discounted the possibility of responding with similar generic DNC ads in anticipation that all fund-raising efforts would have to be devoted to replacing the federal matching funds that had been rejected. They also laid out in detail in this and a subsequent August 24th memo the applicable spending limits for the Clinton/Gore primary committee if it accepted matching funds. The President apparently never seriously considered refusing public funds, and ultimately informed Morris of this.

While this debate was ongoing, the Clinton/Gore primary committee ran a series of ads focused on the crime issue. As described by their creator, Bill Knapp, these ads were designed as a "one shot" effort to "resuscitate" the President and to tout the Clinton Administration's record on crime issues. The ads were run in July 1995 at a cost of $2.4 million. The record is unclear why these ads were paid for by Clinton/Gore rather than the DNC. There appears to have been little discussion of the funding for these ads. Lyn Utrecht, the general counsel for the Clinton/Gore reelection committees, believed that the DNC simply lacked the money at the time to pay for the ads. Jack Quinn, who at that time was Vice President Gore's Chief of Staff, believed that Morris had persuaded the group that the ads had to run immediately and the Clinton/Gore reelection committee had the funds on hand. Both Utrecht and Joseph Sandler, the general counsel for the DNC, stated that it was their opinion at the time that the ads could have been funded by the DNC. Nevertheless, prior to the running of these crime ads, the possibility of funding issue ads through the DNC had been considered. In his agenda for the June 21st residence meeting, Morris presented the rationale for advertising on the crime issue and wrote, "[d]o it [paid media on crime issues] through DNC and take Republican complaint which we probably win."

The date of this initial consideration of issue ads is somewhat inconsistent with Morris's testimony before the Senate Committee on Governmental Affairs, where Morris recounted that his discovery of the issue-ad concept was precipitated by a conversation he had had with Erskine Bowles in July 1995. During that discussion, Bowles informed him that the President was unlikely to reject federal matching funds, and that Morris needed

to formulate an alternative course of action for funding a media campaign. Morris testified that although he had a general notion of issue ads, he had not focused on them in detail because he had assumed that the reelection committee could fund the media campaign. Morris testified that at some later point he learned more about issue ads, either from Sandler, Utrecht, or Bill Knapp, and realized that the DNC could finance precisely the sort of ads he wished to run without running afoul of federal spending limits. As Morris recalled in his testimony (pp. 134-36):

> When I found out that you could run advertising that was related to issues that did not explicitly urge the election of a candidate, I realized that that was precisely what I had in mind, anyway, doing. . . .
>
> So it was not a question of finding a loophole in which we could restructure the advertisements to achieve a different goal in a different way in order to get under the DNC label. It was that the goals that I had in mind strategically were a precise description of what that label -- of what issue advocacy entailed. . . .
>
> * * *
>
> So that, when I found out that there was a kind of advertising, advertising that could be done, that was so congruent with my political purposes at that point, which was to win an issue before the Congress, I was thrilled because it showed me -- because it gave me the answer.

B. The First DNC-Financed Issue Ads

Morris and the other consultants were heartened by the results of the Clinton/Gore crime ads, which they said proved the effectiveness of their paid media strategy. A Morris agenda shows that on July 26th he presented to the President a plan to have the DNC pay for ads during the recess months to sway the votes of moderate Republican Senators on the upcoming budget battle. The strategy was to run the ads in markets with large numbers of persuadable voters who in turn would pressure their swing Senators to support the Administration's plan. In the agenda, Morris listed the Senators and the markets he wished to target. While the DNC would pay for the ads, "we control production." By the next week, the agenda contained the same strategy as part of a more long-term and elaborate plan that envisioned spending $5 million for 1500 points[10] of advertising.

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[10] A point is the percentage of television households that

Ickes continued to attempt to curb Morris's plans. On August 4, 1995, Morris wrote a memo to the President, complaining that Ickes, who he referred to as "the God of Strife," had indicated that Morris could not use Squier because Squier was already working for the "re-elect committee." This memo is an important indicator that by this time, Morris (and presumably the President) was aware of potential legal issues surrounding the DNC's financing of the issue ads, because he noted that:

> The legal issue on the DNC's ability to pay for the medicare ads is not even a close one. (Harold himself even thought the July ads — much, much more Clinton oriented than these — could have been paid for by DNC).

The first issue ads that the DNC funded were a small-scale "flight" focused on the Medicare debate, which itself was a subset of the looming budget battle. These ads ran in August 1995 and cost the relatively modest sum of $.9 million. At the time, most of the principal participants in the media campaign did not view their airing as an endorsement of Morris's media plan, but instead approval for the particular ads in question.

By the time of the September 7th residence meeting, Morris's plans had become more grandiose. He deemed the Medicare ads to be a success, and he believed that more were needed to "hammer the point home." Morris proposed at that meeting running $50 million in pre-convention ads, to be split between the DNC and the Clinton/Gore primary committee. In total, he proposed the DNC would pay $33 million and the campaign would pay $17 million. Morris's agenda for the meeting included some key questions, such as whether the campaign could limit other spending so that it could afford an additional $17 million on ads, and whether the additional net amount of $40 - $45 million could be raised. Morris's agenda concluded with the question: "Can we stop DNC from spending the money on things other than our ads[?]"

The next week's agenda elaborated on the strategy, and Morris established priorities for running ads according to time periods (e.g., September through November 15th was his first priority for running ads; November 15th through January 15th was his lowest priority). For the time period January 15th through April 15th, which Morris listed as his third priority, he noted that they had to "work" to make it appropriately funded by the DNC. Thus, they had to:

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can be reached during a "flight" of ads. Five hundred points indicates that an ad will be seen an average of five times per week for each household targeted.

1. Create relationship to current legislation
2. Defend more Dems than Clinton; attack more Republicans than Dole
3. Run in non primary states as well
4. Run in some areas well before primary.

While most of the witnesses stated there was no particular meeting or moment when it was decided to run a more extended set of ads, Donald Fowler, the DNC's national chairman, described a significant meeting on September 10, 1995. That meeting, attended by the President, Vice President, Ickes, Leon Panetta, Bowles and perhaps others, focused on whether the DNC should undertake the media campaign and whether it could be afforded. The legality of the campaign was not discussed, except to acknowledge that it was, in fact, legal according to Utrecht and Sandler. Fowler recalled that the meeting was "collegial," and that all agreed in principle to the idea of running a continuing series of ads. As the individual who was "more equal among equals," the President endorsed the plan. The initial decision was to run ads addressing the pending budget battle and (what later became) the government shutdown for 10 weeks beginning in October, to carry almost through the end of the year, at a cost of $1 million per week. Ultimately, because of the government shutdown, the ads were run through the end of the year, for a total of 12 weeks in 1995.

C. The Formalized Issue Ad Campaign

By October the process for developing, testing, and approving the issue ads was well underway. According to Morris and others, the ads were to focus on the predominant issues of the day, including the budget, tax cuts, and Medicare, and were to promote the President's legislative agenda. The media team, sometimes after discussions at the residence meetings, would develop concepts to be tested as topics for particular ads, and then Penn and Schoen, the pollsters, would develop lengthy questionnaires to measure the import of these topics. The polls also would test the President's approval rating and approval ratings for Bob Dole and other potential Republican presidential candidates. Based on the results of the polls and what they indicated about which topics were effective, the consultants would develop scripts and animatics (very rough video presentations of the ads). The animatics were then tested in shopping malls throughout the country, in which individuals would be questioned about their views of the ads and their impressions regarding whether Clinton (or his Republican adversaries) "takes clear stands on issues," "has a plan to balance the budget," is "in touch with my values," is "working to give families a tax cut," and the like. The mall tests also tested for Clinton and Republican approval ratings.

The results of the polling and mall tests were then discussed at the Wednesday night residence meetings. The participants also frequently viewed the animatics. Following the meetings, the consultants would refine the ads and obtain the final approvals needed, both from the lawyers, as described below, and from Ickes or Sosnik. A form was developed so that the White House could authorize the Squier, Knapp firm to produce animatics or the ads, or to purchase air time. The form sometimes included the maximum amount authorized and noted how the costs would be allocated between the DNC and Clinton/Gore '96. In the alternative, the form would note that the attorneys would determine the allocation.

Most of the ads were actually paid for through state Democratic parties. This was done to take advantage of FEC regulations allowing the state parties to use higher percentages of soft money than the DNC could to pay for the ads. At least one day before the tapes and checks were mailed to the stations, the Squier, Knapp firm would send to Brad Marshall, the DNC's Chief Financial Officer, a list of states in which the ads were to run and the amounts for the buy. The firm also would enclose an invoice for the state party that showed the amount the state party had to pay for the flight. The DNC did not transfer money to the state parties until someone from the White House (either Ickes, Sosnik or Karen Hancox) approved the expenditure. Once the White House authorized the purchase, Marshall would wire transfer the funds to the state parties. The state parties were instructed to then wire the funds to the Squire Knapp Ochs' bank account. It was expected that any refunds that the state parties received because of unplaced ads would be returned to the DNC.

Although it appears that the state parties had little involvement in decisions concerning the issue ad campaign, both Sandler and Fowler stated that many state chairs requested that the ads be shown in their states because of their effectiveness and benefit to Democrats across the board. In addition, a few state chairs specifically declined to run ads, and some requested modifications to ads to make them more appropriate in their particular regions.

In addition to endorsing the plan for DNC-sponsored issue ads and in controlling the DNC's expenditures on them, the President and Vice President were actively involved in raising the money to finance the ad campaign and in reviewing the ads themselves -- in script, animatic, or final form -- and thereby controlling the content and message of the ads. Though by most accounts Morris was exaggerating when he wrote in his book that the President frequently edited ad scripts, all the witnesses agreed that the President and Vice President reviewed most of the ads in some form or another, made suggestions to the content, and ultimately approved them.

In total, DNC issue ads were run from August 16, 1995, through August 6, 1996. The DNC subsequently ran "441a(d)" ads until the Democratic National Convention on August 28, 1996. The FEC auditors determined that the DNC spent a total of $42,373,336 on issue and "441a(d)" ads. After the initial flight of Clinton/Gore '96 crime ads run in July 1995, the campaign committee did not run further ads until March 1996. The FEC auditors determined that Clinton/Gore '96 spent a total of $11,731,101 on preconvention ads.

D. The Lawyers' Involvement

All the witnesses gave a consistent account of the lawyers' involvement in the process. From the inception of the issue ad campaign, Utrecht and Sandler were involved in reviewing and approving the ads to ensure that the DNC's expenditures on the ads would not be attributed to the Clinton/Gore primary committee. Many of the persons involved recognized that inasmuch as 1995 was the start of a presidential election cycle, there were particular legal rules that would govern such a determination. Harold Ickes in particular was instrumental in getting Utrecht and Sandler involved. When the idea of issue ads first arose in the late spring or early summer of 1995, Ickes asked Sandler and Utrecht for advice as to whether and under what circumstances the DNC could run paid media without it being attributed to the campaign committee. According to Ickes, both the President and Vice President were sensitive to the legal issues and would not have pursued the idea had they not been assured of its legality by the lawyers.

Ickes stated that Utrecht and Sandler advised that issue ads could be run by the DNC during the presidential election cycle without being attributed to the campaign committee so long as the ads did not expressly advocate the election or defeat of a particular candidate.[11] All that mattered in determining whether

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[11] In their interviews, Sandler and Utrecht stated that they consistently applied the "electioneering message" legal standard, not the express advocacy standard, when they reviewed the content of the DNC ads. Yet virtually every other witness recalls Sandler and Utrecht's advice in terms of express advocacy. We do not view this apparent inconsistency as being particularly significant, however. First, the advice-of-counsel defense depends exclusively on the subjective intent of the principals. Even if the advice was incorrect or misunderstood, the subjective intent of the principal to intentionally violate the law is still lacking. Second, we conclude from the evidence that the lawyers in fact applied the electioneering message test, though in discussing the standard with others they oversimplified

the ads would be attributed to the campaign committee was their content. Ickes recalls discussing with the President and Vice President the advice received from the lawyers and his view that the lawyers should be involved at every stage of the process, including review of the ads themselves, to ensure that the ads met the applicable legal standards. According to Ickes, the President and Vice President agreed and were assured that the lawyers would stay involved. Every subsequent indication to the President, Vice President, and Ickes was that the lawyers did stay involved, inasmuch as Ickes specifically recalls the consultants periodically complaining during the Wednesday night residence meetings about the constraints the lawyers were placing on them. An RNC ad that featured Dole's biography especially angered Morris and led to his efforts to have the lawyers relax their standards. On this and other such occasions, the President, Vice President, and Ickes all were of the view that the consultants simply had to follow the lawyers' advice.

Another person who played a role in getting the lawyers involved and conveying their advice to the President and Vice President was Jack Quinn. Quinn recalls being sensitive to the potential legal issues before the first issue ads were run in August 1995. At the time, Quinn was the Vice President's Chief of Staff, and in that role he attended the Wednesday night strategy meetings in the White House residence. When the idea to run issue ads first arose, Quinn was familiar enough with the law to know that there had been a number of recent legal developments both before the FEC as well as the courts, and Quinn insisted that Utrecht, as counsel for the campaign committee, be consulted. Quinn recalls someone, possibly Ickes, telling him that the lawyers already had been consulted.

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it to speak simply in terms of express advocacy. For example, Ickes recalls only references to "express advocacy" in his discussions with Sandler and Utrecht, yet Sandler's February 8, 1996 memo to Ickes discussing the DNC's position in the Colorado Republican litigation refers explicitly to the FEC's "'electioneering' message" test and states, "[t]his is the standard we are applying (albeit aggressively) in the current DNC media campaign, to avoid having the ads count towards the limit on expenditures for Clinton/Gore." In addition, the ad scripts themselves and related notes show that the lawyers were not simply applying an "express advocacy" test because although the scripts for DNC ads never contained express advocacy, the lawyers often insisted on changes that would have been unnecessary had they been applying that test. At least two contemporaneous notes refer to consideration of the electioneering message test (undated note from February 1996 referring to express advocacy and "electioneering" in comparing a DNC ad and a Clinton/Gore ad; note dated 4/2/96 referring to an ad being "close to electioneering").

Quinn stated that the President and the Vice President wanted to be certain that all the legal guidelines were followed, particularly in light of Administration policies on campaign finance reform. Quinn recalls initially discussing issue ads at a White House meeting where the President and Vice President were assured that the lawyers had been consulted and would remain involved in the issue ad campaign to ensure compliance with FEC regulations. Though Quinn does not specifically recall what was said at the meeting, he, and similarly the President and Vice President, clearly had the impression that lawyers had been consulted and that no ad would move forward without the lawyers' approval. Quinn recalls that this took place before the first issue ads were run in August 1995.

According to Utrecht and Sandler, no formal process had been set up for their review and approval when the first DNC issue ads were run in August 1995. Nevertheless, it was clear to them and to the consultants creating the ads that Utrecht and Sandler's approval was necessary before an ad could be run, and Utrecht and Sandler did approve those ads before they were broadcast.

Once it was decided that the DNC would run the $10 million ad campaign, the consultants requested that the lawyers provide to them clear guidance concerning the legal parameters governing the issue ads. In response, Utrecht drafted some legal guidelines, which she provided to the media consultants, that discussed the applicable legal standards, but which also strongly suggested that she and Sandler review each ad. According to the media consultants, they were amenable to such a procedure because in particular they were concerned that time and money not be spent on an ad, including getting Presidential approval, only to have the lawyers determine later that the ad could not be run. Utrecht reiterated these guidelines and her suggestion to Quinn during a late night telephone call she received from Quinn while he was with the President in the White House residence on September 14, 1995 (corroborated by a fax the next day from Utrecht to Quinn). It was accordingly decided that Utrecht and Sandler would be integrated into the ad creation and review process, so that even before actual production started the lawyers would vet and approve the ads as within the statutory and regulatory guidelines, and a written protocol to that effect was established. From that point on, Sandler attended most of the consultants' creative meetings to enable him to comment immediately on ideas for ads and proposed scripts. Under the written protocol, and in practice according to the witnesses, Sandler, Utrecht, and Deputy White House Counsel Cheryl Mills were consulted for their legal opinions on ad content and timing

at several stages in the ad creation and approval process.[12] According to every witness we interviewed, the lawyers had absolute veto power over every proposed ad. They reviewed all changes to the ads after their initial legal review and approved each final ad before it was broadcast.

These procedures were memorialized in a contemporaneous document titled, "Procedures for Generic Media Buys." In response to our requests for voluntary production of documents, several versions of these written procedures were produced, reflecting changes to the procedures over the course of the 12-month issue ad campaign. Each iteration of the procedures stated that draft scripts were to be provided to Utrecht and Sandler before the ad concepts were tested and that animatics of the ads would be provided to the lawyers as soon as they were available. Sandler was responsible for obtaining final script approval from Utrecht and Cheryl Mills. The lawyers also were provided tapes of the final ads for approval.

Other available documentary evidence corroborates that this protocol was followed. Sandler's and Utrecht's calendars and diaries reflect many meetings between the lawyers and the consultants, and in particular Sandler's participation in the consultants' creative meetings. There are also memoranda corroborating both that the lawyers were to be involved in reviewing everything (e.g., Utrecht memo provided to Morris and Quinn stating, "Sandler and I can provide the best advice if we have sufficient time to consider all of the circumstances surrounding a particular ad campaign [which means] an opportunity to review the ads, to understand the selection of the markets and the timing") and that the lawyers periodically gave the consultants general advice (Schwartz memo to Morris, et al., memorializing 12/20/95 meeting with Utrecht and Sandler). More important, however, is that Clinton/Gore '96 and the DNC produced numerous documents, principally facsimiles, reflecting scripts being sent back and forth among the lawyers and the consultants for lawyer approval and comment. Many of these scripts reflect the lawyers' advice, such as ensuring that DNC issue ads referred to Bob Dole in the context of his legislative proposals instead of simply to Bob Dole. A December 8, 1995, memorandum to the President from the co-chairmen of the DNC states that the DNC General Counsel's office "continue[s] to work with counsel for the re-elect, the media team, and DNC and White House staff to refine legal ground rules for the DNC generic media campaign."

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[12] White House counsel was consulted for the limited purpose of ensuring no misuse of official resources or insignia.

These documents strongly corroborate that the lawyers were intimately involved in reviewing the content of the ads. Morris's agendas for the Wednesday strategy meetings further corroborate the lawyers' involvement, in that the agendas contain several references to the lawyers' review of the ads: December 7, 1995 ("[w]e will work with lawyers on placement and content to avoid spending campaign money before April"); February 7, 1996 ("[l]egal opinion is that we must use Cl-Gore money inside 28 day windows before primaries"; May 2, 1996 ("[w]e are now operating under a unilateral ruling by [Lyn] Utrecht and Joe Sandler that we cannot run DNC ads after memorial day unless we use up our 441 general election money[;]" "[t]here is no statutory or caselaw basis for this deadline, it is just their attempt to be cautious"). Although some of the lawyers' contemporaneous notes suggest a concern that they needed more time to consider and review ads, there is no indication that the process ever actually broke down or, more important, if it did, that the principals ever had reason to believe it had broken down.

There was only one indication that any of the lawyers questioned the appropriateness of the DNC issue ads that were approved and run. In a memo to Fowler dated February 2, 1996 concerning the possible positions that the DNC could take in the Supreme Court in the Colorado Republican case, Sandler described the standard that he was applying to the issue ads at that time as follows:

> The FEC has adopted a vague and fuzzy test for determining when a party communication counts as an expenditure for a federal candidate -- and therefore counts against the above limits. The test is that a communication counts if it contains an "electioneering" message about a clearly identified candidate. . . .
>
> Under this test, the DNC is bumping up right against (and maybe a little bit over) the line in running our media campaign about the federal budget debate, praising the President's plan and criticizing Dole by name.

Despite this memo, Sandler insisted that he never believed that the DNC issue ads in fact crossed the line. He stated that he had included this language in the memo because others could believe that the DNC ads contained an electioneering message and he wished to emphasize the stakes involved. Fowler, the recipient of the memo, did not recall the parenthetical, and remembered only discussions about the political consequences of the Colorado Republican case. He recalled that Sandler consistently had informed him that the ads were "within the law." In any event, there is no indication that such a view was ever communicated to the President or the Vice President, and indeed, when this same memo was prepared to go to Ickes in the White

House, it was changed to state that the "electioneering message" test "is the standard we are applying (albeit aggressively) in the current DNC media campaign . . . ."

As you know, the President and Vice President were both interviewed as part of this preliminary investigation, and both stated it was their understanding that the lawyers had expressly sanctioned the idea of DNC-financed issue ads during the election cycle and had in fact reviewed every ad to ensure compliance with the applicable legal standards. In addition, both the President and Vice President denied ever having harbored any subjective doubts as to whether the ads were violating the law or whether the legal review undertaken by the lawyers was sufficient.

E. The Purpose of the DNC Issue Ad Campaign

The witnesses described the issue ad campaign as having several purposes. Although all acknowledge that the President's reelection was one of these, they also said it was not the primary one. Morris, as the self-proclaimed architect of the media campaign, described its purpose as follows:

> Specifically, I was not very concerned in the early part of '95 or throughout most of '95 with the President's re-election, per se, because I felt that for the President to have a hope of being re-elected, he first had to win the fight over the budget. He first had to defeat the agenda of the Gingrich-Dole Congress and win the battle associated with the budget and tax cut issues, and I felt that winning that battle was a condition prior to being able to be re-elected President. I felt that if he failed to win that fight, there was no way that he would ever be reelected. . . . So I wasn't much interested at that point in trying to get votes for Bill Clinton for President.

(Morris testimony at 135-36.)

> What I'm saying is that these DNC ads were aimed primarily at winning the budget fight in Congress and this document [July 26, 1995 agenda] shows how we targeted individual Senators and designed the time buy not primarily with a view toward winning Clinton's reelection but primarily with a view toward breaking the Republican support in Congress and defeating the budget cuts.
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> * * *
>
> My testimony today is that at any point in a presidency, any advertising, any issue advertising the President does whether for health care reform or for

> the stimulus package or to win the budget fight would eventually accrue to his benefit in the reelection.
>
> And defeating the Republican budget cuts would ultimately accrue to his benefit in winning the election. But my testimony today is that the purpose of these issue advocacy ads was not to sure [sic] the President's reelection primarily but it was primarily to win the budget fight.

(Morris testimony at 292-93.)

These views were echoed by others. The President acknowledged that, if effective, the issue ads would help his reelection, but also would assist all Democrats. The fortunes of the Democrats in Congress were inextricably tied to his own, as were those of the Republicans in Congress tied to their leaders, Newt Gingrich and Bob Dole. If Americans favored the Clinton positions over the Gingrich/Dole views, all Democrats benefitted. The budget battle provided a unique opportunity to contrast the parties' opposing views. We do not view this as inconsistent with the President's acknowledgment at the time, as recorded at various fund-raising events, that the DNC ads were having a substantial impact on his public approval rating, which presumably strengthened his hand in dealing with the Congress on legislative issues as much as it improved his chances for reelection.

Vice President Gore had a similar view. The overall goal of the ad campaign was to prepare for the clash between the Republicans and Democrats over the budget. As early as February 1995 he had predicted that the budget battle would lead to a government shutdown. The secondary goal of the media campaign was to frame the Democratic position for the reelection in 1996.

Both Sandler and Fowler talked about the importance of the issue ad campaign to the Democratic party. If the ads benefitted the President, they benefitted the party as well. Because the President is head of the party, it is impossible to separate the value to him from the value to the party and its candidates.

Documents indicated that the reelection of the President was very much a focus of the issue ad campaign. For example, both the mall tests and the opinion polls frequently tested the President's popularity and included "head to head" comparisons between the President and Republican hopefuls.[13] And the ads,

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[13] The DNC and Clinton/Gore '96 would apportion the costs of the poll depending on the nature of the questions asked.

while apparently run in markets aimed at persuading Republican and Democratic moderates to support the President's budget plan, also ran in "swing states" geared toward influencing the President's reelection. In the face of this evidence, both Sandler and Utrecht were emphatic in their view that the purpose behind the running of the issue ads was irrelevant to determining whether the ads constituted an excessive in-kind contribution to the Clinton/Gore campaign. More important, this was also their advice at the time to Ickes and, through him, to the President and Vice President.

As a final matter, there was little dispute that the DNC issue ad campaign was not only coordinated with the White House but controlled by it. Fowler described the White House control as "near absolute." The most telling example of this control is exemplified in a memo that Ickes drafted to "Chairman Fowler," with copies sent to Chairman Dodd, other officials at the DNC and White House staff, dated April 17, 1996, in which he confirmed matters raised at a meeting that had taken place among Fowler, Sosnik, and Ickes on April 15th:

> This confirms the meeting that you and I and Doug Sosnik had on 15 April 1996 at your office during which it was agreed that all matters dealing with allocation and expenditure of monies involving the Democratic National Committee ("DNC") including, without limitation, the DNC's operating budget, media budget, coordinated campaign budget and any other budget or expenditure . . . are subject to the prior approval of the White House. (Emphasis in original).

While it does not appear that Ickes sent this memo, Fowler stated that it accurately reflected the April 15th meeting, and that the DNC had followed that directive.

Thus the ads resulted from the Wednesday night residence meetings, which were in large part controlled by the White House. After the decisions were made, it was Ickes and others in the White House who maintained control over the DNC and approved all expenditures. While Ickes attributed this approval to the need to avoid erroneous expenditures, officials in the DNC acknowledged that no money could be spent on the ad campaign without such approval. The Procedures for Generic Media Buys confirmed that "no money will be moved by the DNC unless and until DNC has received confirmation from Harold of the total amount approved to be spent."

Sandler and Utrecht reviewed the polls question by question to determine the appropriate attribution.

The fact that the same consultants and pollsters worked for both the DNC and the Clinton/Gore primary committee on advertising also guaranteed complete coordination. In fact, Morris had insisted on the selection of these individuals to work on the entire media effort, and complained to the President in an August 4, 1995 memo that "unless I keep control — through Squier, (I can't through Greer), the whole play won't work."

In Morris's eyes, the DNC ads were virtually indistinguishable from Clinton/Gore ads in their intended purpose and effect. In the agenda for the December 7, 1995, residence meeting, Morris outlined his strategy for the next several months. He estimated that he would need $15-18 million for paid media in January through early April and assumed the DNC could fund it so long as they "work[ed] with lawyers on placement and content to avoid spending campaign money before April."[14] Similarly the May 6th agenda indicates that it was unlikely that the DNC would not be able to fund specific ads because "content can always be adopted to reflect legislative priorities." An Ickes memo also reflects the view that Morris believed that the DNC and Clinton/Gore ads were interchangeable.

ANALYSIS

In analyzing this matter, we have considered whether the President and Vice President potentially may have committed criminal violations of the PPMPAA and the FECA, and whether further investigation of those potential violations is warranted. As set forth above, we have not reconsidered the Audit Division's conclusion that the DNC issue ads referred to a clearly identified candidate and contained an electioneering message. Rather, we have assumed for purposes of this preliminary investigation that the DNC expenditures on issue ads violated the contribution and expenditure limits of the FECA and the PPMPAA. The issues we have focused on during this preliminary investigation have been whether the President and Vice President were sufficiently involved in the DNC media campaign to be potentially criminally responsible for the violations found by the Audit Division, and whether the President and Vice President committed any such violations "knowingly and willfully," as required by the statutes.

As set forth above, although there is some disagreement among the witnesses as to the precise nature of the President's

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[14] This in fact did not occur. Because the lawyers had insisted that no DNC ads run in the 28-day period before a primary or caucus, Clinton/Gore ads would replace DNC ads during that window of time.

and Vice President's involvement in the ad campaign, it is clear that they both were sufficiently involved to be deemed coconspirators or aiders and abettors of any potential criminal violations of the FECA or PPMPAA. The President and Vice President not only authorized the DNC issue ad media campaign, but they were regularly apprised of what was being done, actively participated in raising funds to finance the ad campaign, and approved and occasionally edited the ads themselves. The only substantial issue here is whether the President and Vice President knew they were violating the law in doing so.

Our analysis of the President's and Vice President's intent focuses primarily on the advice they received concerning the legality of the DNC-financed issue ads and the involvement of counsel in reviewing and vetting the ads to ensure their compliance with the law. Based on our investigation, we have concluded that there is "clear and convincing" evidence that the President and Vice President did not intend to violate the law. As set forth more fully below, we base our conclusion on the uncontradicted testimony and statements of all of the principal participants in the media campaign, who uniformly confirmed that the President and Vice President were advised that according to DNC and Clinton/Gore counsel the issue ads could be run, with certain limitations, during the presidential election cycle without attribution to the campaign and that the lawyers would be involved in reviewing every ad to ensure full compliance with the law. This testimony is further corroborated by the documentary evidence, which shows that the President and Vice President were advised of the lawyers' advice and received periodic indications that the lawyers remained involved in reviewing the ads throughout the relevant time period. Further, the President and Vice President both stated that to their knowledge no ad had ever been run without the lawyers' approval and that at no time had either one of them harbored any doubts as to the legality of the issue ad campaign or the efficacy of the legal review procedure. This too is corroborated by the documentary evidence, which shows that the lawyers diligently reviewed the ads for legal compliance and had the final say on whether an ad could be run or not.

The factual record establishes clearly and convincingly that the President and Vice President lacked the specific intent to violate the law. In reaching this conclusion, we also have considered that the determinative legal standard at the time -- the FEC's "electioneering message" test -- was so ambiguous and ill-defined as to preclude showing that the persons involved in the DNC issue ad campaign ever intended to violate it. We conclude that under such circumstances, where there is no reasonable possibility of establishing the requisite mens rea for a criminal violation, then under the governing standard of the Independent Counsel Act there are no "reasonable grounds to believe further investigation is warranted."

A. The Standard Under the Independent Counsel Act

Under the Independent Counsel Act, the Attorney General may not base a determination "that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind." 28 U.S.C. § 592(a)(2)(B)(ii). Given this stringent standard under the Independent Counsel Act, the mere lack of affirmative evidence that the President and Vice President acted with criminal intent, without more, would not be grounds to close the matter. Rather, there must be clear and convincing evidence of a lack of intent.

The "clear and convincing" evidence standard of proof has been described as an intermediate standard, lying somewhere between the "beyond a reasonable doubt" standard and the "preponderance of the evidence" standard. See Santosky v. Kramer, 455 U.S. 745, 756 (1982); Buildex, Inc. v. Kason Industries, 849 F.2d 1461, 1463 (Fed. Cir. 1988). The clear and convincing evidence standard of proof by its very terms demands consideration of both the quality and the quantity of the evidence. See Santosky, 455 U.S. at 764. Its function "is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" Addington v. Texas, 441 U.S. 418, 423 (1979), *quoting* In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J. concurring). As one evidence commentator has noted,

> standards like clear and convincing evidence (or preponderance of the evidence, or even proof beyond a reasonable doubt), are selected to govern a decision by a trier of fact, Judge or jury, who is expected to take credibility into account. The standard represents a confidence level, not an abstract measure of the quantity or quality of evidence presented in any case. For example, a jury might convict a defendant -- i.e., find him guilty beyond a reasonable doubt -- on the basis of a single witness' testimony, despite contrary testimony by two defense witnesses. It may do so even if the Trial Judge would not have believed the single witness. The same is true of cases when clear and convincing evidence is the standard.

Saltzburg, 1 Federal Rules of Evidence Manual 389 (7th ed. 1998) (discussing problems with clear and convincing standard in 404(b) context). Courts and commentators frequently cite the Supreme Court's articulation of the standard in Colorado v. New Mexico, where the Court stated that the clear and convincing evidence

standard requires that the entire body of evidence "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'" 467 U.S. 310, 316 (1984). See C. McCormick, Law of Evidence, § 320, p. 679 (1954) (standard requires that the factfinder "be persuaded that the truth of the contention is 'highly probable'").

As this discussion makes clear, the term "clear and convincing" does not mean uncontradicted. The evidence on both sides of the issue must be considered and weighed both qualitatively and quantitatively. The fact that there may be some evidence tending to establish criminal intent does not mean the opposing body of evidence cannot be clear and convincing, and vice versa. A determination whether there is clear and convincing evidence of a lack of intent requires that all of the evidence of intent be weighed, and a judgment reached, in light of that entire body of evidence, whether it is "highly probable" that the covered persons lacked the requisite state of mind in committing an offense.

B. The Intent Standard of the Potential Offenses

Only knowing and willful violations of the FECA and PPMPAA are potentially criminal. Under those statutes, consideration of this intent standard has more often arisen in the context of the imposition of enhanced civil penalties -- which also can only be imposed for knowing and willful violations -- than it has in the context of criminal prosecutions. In the civil enforcement context, the knowing and willful standard has been interpreted to mean an intent purposely to violate a statutory standard known and understood by the offender. See National Right to Work Committee, Inc. v. FEC, 716 F.2d 1401, 1403 (D.C. Cir. 1983); AFL-CIO v. FEC, 628 F.2d 97 (D.C. Cir. 1980). Thus, knowledge of illegality is an essential element of the potential offenses. See also Cheek v. United States, 498 U.S. 192, 201 (1991) (willfulness intent standard requires proof of "a voluntary, intentional violation of a known legal duty"). In the context of the potential offenses here, our intent inquiry boils down to whether the President and Vice President knew the applicable standard for determining what constituted an appropriate issue ad and whether they knew that the DNC issue ads violated that standard.

Relevant considerations in this regard include the clarity of the applicable legal standard under which the conduct would be judged and the principals' subjective beliefs, based on advice of counsel or otherwise, whether they were violating that standard. In National Right to Work Committee, supra, the court considered whether certain violations of the FECA by the NRWC were committed knowingly and willfully. For reasons not relevant here, that determination depended upon whether the NRWC knew the meaning of the terms "member" and "membership organization" as defined by the

FEC. The court concluded that ambiguities in the statute and the failure of the FEC to provide any guidance as to the meaning of the terms precluded a finding of a "knowing, conscious, and deliberate flaunting of the Act" as required by the knowing and willful standard. Id. At 1403. Similarly, in AFL-CIO v. FEC, supra, the court concluded that uncertainties in the meaning of the law and the principal's good faith belief in the legality of its actions precluded a finding of willfulness. Id. at 101. See Cheek, supra, 498 U.S. at 201-202 (it is well established that willfulness under a criminal statute is negated by a subjective good-faith belief based on advice of counsel that one's actions are lawful; a good-faith misunderstanding of the law; or a good-faith ignorance of the law).[15]

Our investigation has uncovered no evidence to suggest that the President or Vice President ever subjectively believed that the DNC's financing of the issue ads was a violation of the law. The President, and to some degree the Vice President, knew that the PPMPAA and the FECA limited how much money they could spend during the primary; that if these ads counted they would be over the limits; and that these ads would count if their content impermissibly advocated the President's election or Dole's defeat.[16] But there is no evidence that they knew the meaning of

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[15] Ignorance of the law is not the same as "willful blindness." Willful blindness with respect to knowledge of the requirements of the law is inconsistent with a good-faith misunderstanding of the law, and will preclude a good-faith defense. The Ninth Circuit explained the reasons for the willful blindness rule in United States v. Jewell, 532 F.2d 697, 700 (9th Cir.)(en banc), cert. denied, 426 U.S. 951 (1976), as follows:

> The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, "positive" knowledge is not required.

There is no evidence here to support the inference that the President or Vice President consciously avoided knowledge of the legal standard or deliberately ignored learning the facts.

[16] Of course, proof of knowledge of other facts and

an electioneering message or that any of these ads contained one. As in NRWC and AFL-CIO, this lack of intent is bolstered by the fact that the applicable legal standard itself was vague and ambiguous. Such a factual record -- where there is no evidence that the covered person had subjective knowledge of the standard and even if he attempted to determine the standard he would have no certainty as to what the law required -- in and of itself makes it "highly probable" that he lacked the intent to knowingly violate the legal standard.

Indeed, the "electioneering message" test was so ambiguous and ill-defined at the time as likely to preclude one from ever showing under these facts that the persons involved in the DNC issue ad campaign intended to violate that standard. See United States v. Harris, 942 F.2d 1125 (7th Cir. 1991) (lack of clarity in applicable tax law prevents finding of willfulness and deprived defendant of fair notice; "criminal prosecutions are no place for the government to try out 'pioneering interpretations of tax law'"). This principle is illustrated by United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974). There, in the context of a tax prosecution, the Fourth Circuit reversed a conviction on the ground that, since the question whether the income had to be reported was so doubtful, the defendant lacked the requisite intent to evade:

> As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions. As a matter of law, the requisite intent to evade and defeat income taxes is missing. The obligation to pay is so

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applicable legal standards would suggest other potential knowing and willful violations. For example, the following facts would constitute "knowing and willful" violations of other applicable FECA and PPMPAA provisions: (1) proof that the President and Vice President knew there was a legal limit on DNC contributions to the re-elect committee, that if these ads counted toward that limit the DNC would exceed it, and that these ads would count if they contained an electioneering message (and referred to a clearly identified candidate); or (2) proof that the President and Vice President knew that under the FECA a national party committee could never use soft money to pay any portion of the costs of an ad containing an electioneering message (and referring to a clearly identified candidate) and that these ads were paid for in part with soft money. But with respect to all such potential violations, the intent issue always boils down, in part, to whether the President and Vice President knew the standard for what constituted an electioneering message and knew that the DNC ads violated it.

> problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required.
>
> It is settled that when the law is vague or highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it.

Id. at 1162. See Harris, supra, 942 F.2d at 1132 n.6 ("[a] claim of objective ambiguity [in the applicable law] requires that the court examine all of the relevant precedents and dismiss the indictment if it concludes that the tax obligation is ambiguous as a matter of law").

In our view, at the time of the DNC ads in question, the definition of an electioneering message was so vague that it would be similarly problematical to predicate criminal liability on a violation of that standard.[17] As we discuss earlier in this memorandum, the FEC has never clearly defined what it means by the term "electioneering message." Former FEC Vice Chairman Trevor Potter, two years prior to the commencement of the DNC issue ad campaign under investigation here, implored his colleagues to establish a clearer standard. See Statement of Reasons of Vice Chairman Potter, MUR 3524, Sep. 15, 1993. And one court has expressly criticized the FEC for "not even pretend[ing] to explain what [it] means by 'electioneering message.'" Clifton v. FEC, supra, 114 F.3d at 1316.

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[17] Indeed, it is debatable whether the "electioneering message" test is even the appropriate legal standard. In Federal Election Commission v. Colorado Republican Federal Campaign Committee, the District Court held, on grounds of statutory construction, that the applicable legal standard was express advocacy. 839 F. Supp. 1448, 1455 (D. Colo. 1993). The Court of Appeals reversed, and without expressing an opinion on the clarity of the electioneering message standard, held that the ad in question violated that standard. 59 F.3d 1015 (10th Cir. 1995). The Supreme Court in turn reversed the Court of Appeals, but did not reach this issue. 116 S. Ct. 2309 (1996). In their submission to the Department of Justice on August 11, 1998, the lawyers representing the reelection committees and the DNC make a credible argument for why the courts will ultimately hold that express advocacy is the appropriate standard. Under these circumstances, even if the electioneering message test were clear, there would be a strong argument that the President and Vice President lacked the requisite intent to violate the legal standard inasmuch as it is undisputed that the issue ads did not contain express advocacy.

We conclude that under such circumstances, where there is no reasonable possibility of establishing the requisite mens rea for a criminal violation, then under the governing standard of the Independent Counsel Act there are no "reasonable grounds to believe further investigation is warranted." This is a sufficient reason in itself to conclude that the appointment of an independent counsel is not warranted here. But in any event, the overwhelming evidence shows that the President and Vice President affirmatively believed, based on the involvement and advice of DNC and Clinton/Gore counsel, that the DNC issue ads were in full compliance with the law.

C. Advice of Counsel

It is well established that willfulness can be negated by advice of counsel. Simply put, one who believes his actions are lawful based on advice of counsel lacks willfulness because he has not intentionally violated his legal duty. Strictly speaking, advice of counsel is not a defense, but rather goes to whether the individual possessed the requisite criminal intent. In a case such as this under the Independent Counsel Act, therefore, advice of counsel may be considered only under the clear and convincing evidence standard of the Act, and the Attorney General may decline to seek the appointment of an independent counsel in such a case only where there is clear and convincing evidence that the covered persons relied on advice of counsel.

To be entitled to assert a defense of advice of counsel, a person must show that he made full disclosure of all material facts to his attorney and that he relied in good faith on advice that the conduct was lawful. United States v. DeFries, 129 F.3d 1293, 1308 (D.C. Cir. 1997); United States v. Lindo, 18 F.3d 353, 356 (7th Cir. 1994). While some courts require evidence that the defendant initially sought the advice in good faith, see e.g., United States v. Cheek, 3 F.3d 1057, 1061 (7th Cir. 1993), cert. denied, 114 S. Ct. 1055 (1994), the D.C. Circuit in DeFries rejected that approach, holding instead that the individual's initial motivation in seeking counsel's advice is irrelevant. See DeFries, 129 F.3d at 1308 n.7.

In the context of this case, full disclosure cannot be seriously disputed. Here, the legal review was set up in such a way as no representations would have to be made to the lawyers, because the lawyers were part of the ad creation process itself. This process was largely necessitated by the amorphous and uncertain "electioneering message" standard. The rationale for the lawyers' involvement was to keep an electioneering message out of the ads, so the only relevant factual information was the content of the ads themselves. Because both Sandler and Utrecht reviewed all of the ads, they were fully aware of all material information before rendering their opinions. Moreover, to the

extent relevant, if at all, the attorneys were fully aware of the facts surrounding the issue ad campaign, including the purpose of the ad campaign, the identity of consultants between the DNC and the reelection committees, and the control of the ad campaign by the White House. Our investigation has uncovered no evidence suggesting that either the President or Vice President withheld any information that could have affected the nature of the attorneys' legal advice.

An advice-of-counsel defense could fail if the President and Vice President did not rely on the attorneys' advice in good faith. For example, courts have declined to instruct juries on advice of counsel where the evidence indicated that the attorney was not disinterested in the outcome. In United States v. Shewfelt, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944 (1972), the defendant retained attorneys to facilitate his fraudulent scheme. In affirming the district court's refusal to give an advice-of-counsel instruction, the Court of Appeals stated:

> Here the evidence beyond question indicates that appellants retained counsel to insure the success of their mendacious scheme, not to secure legal advice. The attorneys in question merely implemented in the most expeditious manner the plan concocted by their clients . . . . Legal assurance was not sought because acting within the framework of the law was not the reason appellants elected to deal with members of the Bar.

Id. at 839. See also United States v. Carr, 740 F.2d 339, 347 (5th Cir. 1984), cert. denied, 471 U.S. 1004 (1995) ("[w]hen the lawyer is a partner in a venture, takes a share of the profits, or is 'not a lawyer who had no interest save to give sound advice for a reasonable fee,' the advice of counsel defense is unavailable"); United States v. Piepgrass, 425 F.2d 194 (9th Cir. 1970) (in challenge to sufficiency of the evidence, court found that jury was entitled to discount advice-of-counsel defense because attorney had a financial stake in the venture); United States v. Cheek, 3 F.3d 1057 (7th Cir. 1993) (after remand from the Supreme Court and subsequent reconviction, court of appeals held defendant's reliance on attorney's advice was not in good faith, because among other reasons he relied on an attorney who confirmed his views that tax system was voluntary and disregarded advice that failure to file might result in criminal prosecution).

With respect to the facts here, it is clear that Sandler, as general counsel for the DNC, and Utrecht, as general counsel for the Clinton/Gore re-election committees, worked for organizations with an unmistakable interest in ensuring the reelection of President Clinton. While the issue ad campaign was conceived in

part to further the goal of reelecting the President, there is no evidence that the lawyers' advice was shaped or tainted in some way also to further that goal. Moreover, Sandler and Utrecht are experts in the field of federal election law, and the Vice President, Quinn and Ickes all described Utrecht in particular as one of the preeminent lawyers in this field.

The lawyers' description of their advice as conservative in the face of uncertain and perhaps unconstitutional restrictions by the FEC was borne out by the interviews and documents. For example, the lawyers' invocation of the 28-day rule, in which they would not permit the running of DNC issue ads during the four-week period preceding a primary or caucus, was not required by law. Similarly, their reevaluation of the DNC ads following key events, such as Dole's resignation, indicated a sensitivity to the ambiguities surrounding party issue ads. Finally, their decisions remained firm despite pressure from Morris and the other consultants to loosen their guidelines (especially in light of the Dole "bio" ad), and they were backed up wholeheartedly by the President, Ickes, and others.

The only evidence that any of the lawyers suggested that the ads may not have been proper was the February 2nd Sandler memo to Fowler, described above. While Sandler's explanation was not especially persuasive, we found no evidence that the President or Vice President ever received such advice or that any concern about the ads was brought to their attention.

In short, it was entirely logical that the President and Vice President would turn to these attorneys to ensure that the issue ad campaign was legal, and there is no evidence that they received any information whatsoever to the contrary.

There are two additional facts in this investigation that could affect the validity of an advice-of-counsel defense. The first is that the attorneys never advised the President or Vice President directly. When intermediaries are the source of the legal advice, there must be evidence that the principals received the advice and relied on it. See United States v. Bostian, 59 F.3d 474, 480 (4th Cir. 1995), cert. denied, 116 S. Ct. 929 (1996). In addition, if the advice was conveyed by individuals with their own biases or motivations, the covered persons' reliance on such advice may be misplaced. Second, the President himself is an attorney and both he and the Vice President have been involved in numerous campaigns. As a result, one could argue that they should have known that the issue ads contained electioneering messages and were funded in violation of FEC law. Proof that an individual harbored criminal intent despite an attorney's advice would defeat a good-faith reliance on counsel. United States v. Poludniak, 657 F.2d 948, 959 (8th Cir. 1981), cert. denied, 455 U.S. 940 (1982) ("no one can willfully and knowingly violate the law and excuse herself from the

consequences by claiming that she followed the advice of counsel"). See also Williamson v. United States, 207 U.S. 425, 453 (1907).

However, the evidence establishes that Ickes, Quinn, and perhaps others told the President and Vice President of the lawyers' advice and that the President and Vice President relied on it. Moreover, we found no evidence that the President or Vice President had any reason to doubt the accuracy of the advice that Ickes and Quinn conveyed to them. The Vice President described Ickes and Quinn as sticklers, and recounted how Quinn had insisted early on that the lawyers become involved in the process. The Vice President felt confident that Quinn, who had some expertise in this area and was a good lawyer, had ensured that the ads were legal. In fact Quinn's telephone call to Utrecht confirms that he wanted to make sure for himself that the lawyers were involved and that he would not rely solely on Morris and the other consultants' representations.

Similarly, Ickes took steps to ensure that the lawyers remained involved, and he was satisfied that they were, especially in light of the consultants' complaints that the legal advice was too restrictive. Although Ickes received a version of Sandler's February 2nd memo, the memo Ickes received described the standard as being applied "aggressively" and made no mention that the ads were "over the line." Ickes had no motive to inaccurately convey the lawyers' advice to the President, and in the context of his well-known disputes with Morris over the issue ad campaign in general, it can be fairly assumed that he would have put an end to the funding of these ads if there was some basis to do so. Moreover, the President stated explicitly that he believed that Ickes faithfully related the advice.

Finally, there is absolutely no evidence suggesting that the President or Vice President had independent knowledge of the "electioneering message" standard or ever entertained a subjective belief that they might be violating it. Both President Clinton and Vice President Gore insisted that although they had some passing knowledge of the law in this area, they knew that they needed lawyers to determine that the issue ads were legal. The evidence suggests they acted conscientiously at all times to ensure that at least the letter of the law was followed. Indeed, it is hard to imagine a more compelling set of facts establishing an advice-of-counsel defense.

D. Conclusion

As the foregoing analysis demonstrates, the evidence is "clear and convincing" that the President and Vice President lacked any intent to violate the law in connection with the DNC issue ad campaign and reasonably believed that the ad campaign was lawful and that DNC and Clinton/Gore counsel reviewed every

ad to ensure compliance with the law. For that reason, we conclude that no further investigation of this matter is warranted and we recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

WRITTEN OR OTHER POLICIES OF THE DEPARTMENT OF JUSTICE

We have also explored during this preliminary investigation whether "further investigation is warranted" in light of the "written or other established policies of the Department of Justice with respect to the conduct of criminal investigations." As set forth below, we have concluded that based on these entirely separate grounds further investigation is not warranted, in light of both the written policies and established historical practice of the Department of Justice to defer to civil FEC enforcement in certain matters involving the application of regulatory campaign financing legal standards.

A. Background

Prior to the enactment of the FECA, the Department prosecuted campaign financing violations under statutes codified in Title 18. For the most part, these offenses were strict liability crimes, imposing criminal sanctions on those who made illegal expenditures or contributions regardless of intent. As part of its enforcement responsibilities during this time period, the Department also issued "advisory opinion letters" that clarified the reach of the campaign financing statutes in specific factual scenarios.

Congress enacted FECA in 1971, and it became effective on April 7, 1972. The Act originally was limited to establishing enforceable reporting and public disclosure requirements for federal candidates and their campaign committees. The legislation did not alter the pertinent criminal codes in any way and the Department continued its enforcement role.

In 1974, Congress amended the Federal Election Campaign Act, effective January 1, 1975. One of its principal features was the establishment of a bipartisan Federal Election Commission comprised of six Commissioners. This new Commission was given specific power to formulate policy, issue regulations (subject to legislative veto), and render advisory opinions regarding specific transactions or activities. Following the enactment of the 1974 Act, the Department ceased rendering its own advisory opinions and began deferring to the FEC on the scope of the new law. At the same time, the FEC was required to refer to the Department all apparent violations of the campaign financing statutes.

Shortly after its enactment, the legislation was challenged on constitutional grounds, and the Supreme Court, in Buckley v.

Valeo, 424 U.S. 1 (1976), struck down significant features of FECA. Congress was thus required to enact remedial legislation on an expedited basis prior to the 1976 presidential elections. The result was the Federal Election Campaign Act amendments of 1976, which took effect in mid-June of that year.

The amended legislation changed the FECA in several significant ways. Among other things, it incorporated within the Act itself the campaign financing statutes, which then became subject to the FEC's noncriminal enforcement processes and remedies. It also restructured the penalties for violations of the Act. Specifically, it repealed the strict liability criminal penalty that had been applicable to violations of the original FECA, and replaced it with a series of flexible administrative and civil remedies that applied to all violations of the Act enforced exclusively by the FEC. In addition, it added a criminal misdemeanor penalty that applied only to FECA violations involving at least $2000 and committed "knowingly and willfully." 2 U.S.C. § 441j. Moreover, under the amendments, it was no longer mandatory for the FEC to refer violations of the campaign financing statutes to the Department, but instead was within its discretion. 2 U.S.C. § 437g(a)(5)(C).

The amended statute expressly gave to the Federal Election Commission the power and the duty to "formulate policy with respect to" FECA. This power is conferred directly by the Commission's statutory charter. 2 U.S.C. § 437c(b)(1). Even the courts defer to the Commission's interpretation of the FECA. See, e.g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981) (the FEC, a bipartisan body, is "precisely the type of agency to which deference should presumptively be afforded"); Bush-Quayle '96 v. FEC, 104 F.3d 448, 452 (D.C. Cir. 1997)(same). As reflected in the Memorandum of Understanding (MOU) between the Department and the FEC, signed in 1977 and still in force, the Department too has deferred to the Commission's authority to interpret the Act by confining itself to the prosecution of a subset of clearly defined offenses.

The law does not preclude the Department from initiating a criminal action while related agency proceedings are still pending or have never been brought. See United States v. Tonry, 433 F. Supp. 620 (E.D. La. 1977); see also United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979); United States v. Jackson, 433 F. Supp. 239 (W.D.N.Y. 1977). Nevertheless there are important legal and policy reasons why the Department has chosen to defer to the FEC, especially in cases where the underlying law is unclear or in flux. The Department policy in this regard is described below.

B. Department of Justice Policy

The Department consistently has deferred to the FEC in matters involving the interpretation of its own statutes and regulations. This makes sense where, as here, the standard governing the content of speech is ambiguous and awaits further clarification from the FEC. This practice is reflected not only in our historical practice of not prosecuting cases such as those under investigation here, but also in certain of the Department's written policy statements.

To begin, in December 1977 the Department and the FEC entered into an MOU that clarified their respective roles in the enforcement of federal election matters. It recognizes, among other things, that "Congress intended to centralize civil enforcement of the Federal Election Campaign Act in the Federal Election Commission by conferring on the Commission a broad range of powers and dispositional alternatives for handling nonwillful . . . violations" of the FECA and the public funding statutes. See paragraph 1 of the DOJ/FEC MOU.

The Department's policy is more specifically laid out in its written manual, Federal Prosecution of Election Offenses. That manual states on page 107 that "[c]ivil enforcement is clearly appropriate for FECA violations . . . that are committed openly and in obvious ignorance of the law." This policy recognizes that where the governing legal standards are ambiguous and the potential violation is committed openly, such that willfulness is absent or would be difficult to prove, then deference to civil enforcement by the FEC is appropriate.

Finally, although only recently reduced to writing, the Department has long adhered to the following policy, recently included in a written memorandum to Assistant United States Attorneys assigned to serve as "District Election Officers" in the 93 United States Attorney's offices:

> All criminal violations of FECA brought under the Act's criminal misdemeanor provision [2 U.S.C.§ 437g(d)] require proof of a specific intent on the part of the offender to violate a substantive provision of the Act which the offender knew of and purposefully flouted. [citations omitted] This strict scienter element requires that the offender's conduct offend a clearly defined statutory standard. Resolution of ambiguities in the reach of FECA are the exclusive responsibility of the FEC, subject of course to judicial review. E.g., 2 U.S.C. § 437c(b)(1), § 437d(e), § 437f, and § 438(a)(8). Felony prosecutions involving FECA brought under 18 U.S.C.§ 371 or § 1001 require additional proof of scienter beyond that needed to gain a conviction under 2 U.S.C.§ 437g(d) . . . .

As these written policies suggest, the Department of Justice has historically deferred to the FEC where the governing standard is ambiguous and the alleged offense was committed openly. The Department has followed these policies without exception. The DNC issue ads fall squarely within this policy, because the governing electioneering message standard was ambiguous and the offense, if indeed it was one, was committed openly. Under these circumstances, the Department's longstanding policies dictate that this matter should be deferred to the FEC's administrative authority and enforcement.

CONCLUSION

As set forth above, we have concluded that there are no reasonable grounds to believe that further investigation is warranted in the investigation of President Clinton and Vice President Gore concerning their involvement in the DNC-financed issue ads broadcast in the 1996 election cycle. We therefore recommend that the Attorney General be advised not to seek the appointment of an independent counsel.

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, DC 20530-0001

November 20, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Independent Counsel Matter: Albert Gore, Jr.,
Vice President of the United States

PURPOSE: To provide the Attorney General with a recommendation whether to seek the appointment of an Independent Counsel pursuant to 28 U.S.C. §591-599 further to investigate whether Vice President Gore may have violated 18 U.S.C. §1001

TIMETABLE: As soon as possible, but a final decision must be made not later than November 24, 1998.

INTRODUCTION

On August 26, 1998, the Attorney General initiated a preliminary investigation pursuant to the Independent Counsel Act, 28 U.S.C. §591-599, (the ICA), to determine whether further investigation was warranted into whether Vice President Gore may have violated 18 U.S.C. §1001 in the Fall of 1997 when he told investigators during a previous ICA preliminary

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investigation that he did not know, at the time he made fundraising calls from the White House, that the beneficiary of his efforts, the Democratic National Committee's (DNC) Media Fund, was funded in part by federal ("hard") money, and that he believed at the time of his telephone solicitations that federal or hard money contributions to the DNC were limited to $2,000. In fact, as the Vice President acknowledged during the Fall 1997 interview, the Media Fund had both hard and soft money components, and the hard money limit was $20,000 not $2,000, as he claimed to have believed when he made the calls from the White House.

Attached hereto are three memos setting forth contrary recommendations as to whether an independent counsel should be sought pursuant to the ICA as to Vice President Gore. Lee Radek, Chief of the Public Integrity Section, and David Vicinanzo, Supervising Attorney of the Campaign Financing Task Force, write: "Upon a full review of all the facts relating to all three allegations and the applicable law, we have determined that there are no reasonable grounds to believe that further investigation is warranted. It is therefore our recommendation that an independent counsel not be appointed." [redacted], Special Assistant to the Supervising Attorney--Campaign Task Force, with the concurrence of the FBI Task Force management, writes: "It is with the greatest reluctance that I recommend the appointment of an Independent Counsel. I do so because I think the statute compels it, not because I think this is a case which would ever be deemed worthy of prosecution." The FBI has submitted a memo entitled "Recommendation to Seek Appointment of an Independent Counsel to Investigate Allegations Against the Vice President of the United States" which states: "We believe that the evidence [described in the memo and attached as exhibits to the memo] is sufficient to support a finding that the Vice President knew that 'hard' money was a component of the media fund, and that his denial of that awareness was false."[1]

In addition to the Radek/Vicinanzo memo and the Feigin memo, I have also attached a memorandum from Lee Radek, prepared at my request, discussing the question of whether the "clear and convincing evidence" determination, called for under 28 U.S.C. §592 (A)(2)(B)(ii) with respect to state of mind determinations, is a subjective or an objective determination. I asked for the memo in the event a decision as to the Vice President's "state of mind" is deemed necessary in determining whether to seek the appointment of an independent counsel under the ICA. I have also attached the September 9, 1998, Memorandum of Law submitted by counsel for Vice President Gore. During the Criminal Division/Task Force/FBI discussions of this matter Larry Parkinson expressed the view that the "clear and convincing evidence" standard for "state of mind" determinations is an objective standard rather then a subjective standard for the Attorney General under Section 592(a)(2)(ii). I disagree; however, I understand that Larry is working on a memo discussing this matter. If I change my view based on Larry's memo, I will forward a supplemental memo.

Counsel for the Vice President was afforded a meeting with the Deputy Attorney General and the Assistant Attorney General--Criminal Division to present their position on whether an

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[1]Also attached hereto is a memorandum from Messrs. Radek and Vicinanzo responding to the FBI memorandum which concludes "that the evidence cited in the FBI Recommendation does not challenge or refute the factual conclusions set forth in our 90-day memorandum."

independent counsel should be sought. Representatives of the Public Integrity Section and the Campaign Finance Task Force also attended the meeting. I met with the attorneys and investigators involved in the preliminary investigation of the Vice President and fully explored the factual and legal arguments for and against seeking the appointment of an independent counsel in connection with this matter.

RECOMMENDATION

I recommend that the Attorney General not seek the appointment of an independent counsel in connection with this matter because I believe she should determine, based upon a careful review of the facts and the law set forth in the attached memoranda, pursuant to 28 U.S.C. §592 (b), "that there are no reasonable grounds to believe that further investigation is warranted" with respect to the possibility that Vice President Gore made knowing and willful false statements to the investigators in the Fall of 1997 in violation of 18 U.S.C. §1001.

Messrs. Radek and Vicinanzo base their recommendation against the appointment of an independent counsel on the ground "that the evidence that the Vice President's statement was false is so insubstantial that no further investigation is warranted" and that "the other two allegations relating to Charles Uribe and Nicolas Allard are not sufficiently credible and specific to warrant further investigation." [redacted] agrees with respect to the Vice President's belief that $2,000 was the hard money limit, but she argues in favor of the appointment of an independent counsel with respect to the Vice President's statement that he did not know when he made his calls on behalf of the DNC Media Fund that there was a hard money component of the fund. She writes: "The evidence we now have, some of it newly developed during this phase of the investigation, and some of it developed earlier but given new context now that we have a more complete picture, supports an argument the Vice President *had to have known* that hard money was a component of the Media Fund." (Italics in original.)

Under 28 U.S.C. §592 (a)(2)(ii), the Attorney General is not to base a determination that further investigation is not warranted upon a determination that such person lacked the state of mind required for the violation of the criminal law involved "unless there is clear and convincing evidence that the person lacked such state of mind." In my August memorandum recommending, *inter alia*, a preliminary investigation with respect to the Vice President, I expressed the view that: "When the 'falsity' of a statement is addressed to the belief of the declarant about his own knowledge or prior belief, as distinguished from a statement about some objective external fact, in my view, the element of falsity becomes inextricably intertwined with issues of specific intent." Public Integrity, joined by Mr. Vicinanzo, continue to take the view that: "Because the issue here is falsity and not intent, the statutory standard is not whether evidence of lack of intent is clear and convincing." I concede the reasonableness of the position taken by Public Integrity on this matter; however, I continue to believe, as I stated in my August 1998 memo, that the distinction between "the element of falsity" and "the element of the state of mind required to commit the offense" (the words used in Section 592 (a)(2)(ii)) "while intellectually defensible, appears to me to be a very fine one in this context." Congress intended, it seems to me, that state of mind determinations relied upon by the Attorney General to reject the appointment of an independent counsel be made using a "clear and convincing evidence"

standard. Whether under the guise of no "falsity" or no "knowing or willful" "falsity," a decision not to appoint an independent counsel in this case would be a based upon a conclusion that the Vice President "lacked the state of mind required for the criminal law involved" within the letter and spirit of 28 U.S.C. § 592 (b)(1). As such, I believe it must be supported by the "clear and convincing evidence" standard. If the Attorney General does not believe that this standard is met to her satisfaction, she should seek the appointment of an independent counsel under Section 592 (c).

My recommendation against the appointment of an independent counsel for this matter is because I believe that even if the Attorney General is required to determine a lack of falsity or lack of the state of mind required to commit the offence, by a "clear and convincing evidence" standard, that the standard is met in this case. At footnote 20 of the Radek/Vicinanzo memo, it is reported that Mr. Radek also believes that the clear and convincing standard, while unnecessary to his conclusion, is met here. Mr. Vicinanzo "sees the application of this standard to the falsity issue as problematic." As demonstrated in the Radek memorandum on the subject, the standard is a subjective one for the Attorney General. In *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), also quoted with approval in the Feigin memo, the "clear and convincing evidence" standard requires that the entire body of evidence "place in the ultimate factfinder [here the Attorney General] an abiding conviction that the truth of its factual contentions are 'highly probable'." This is not a standard of moral certainty and it is not a "beyond a reasonable doubt" standard. In my view, considering all of the evidence/information concerning this matter and weighing all of the arguments advanced in favor of further investigation, I believe that the Attorney General can, and should, conclude, by a clear and convincing evidence standard, that the Vice President "lacked the state of mind required for the violation of the criminal law involved." I believe the Attorney General can, and should, conclude that it is "highly probable," to the point of supporting an "abiding conviction" in her that the Vice President did not make a knowing and willful false statement about the hard/soft mix of the DNC Media Fund to the investigators in the Fall of 1997.

In my view, the evidence that the Vice President ever even had the Media Fund hard money/soft money knowledge required for his Fall 1997 statement to the investigators to have been false is, at best, very weak. The Radek/Vicinanzo memos persuasively argue that the evidence of knowledge inconsistent with the Vice President's Fall 1997 statements is "so insubstantial that no further investigation is warranted." The evidence that there was some discussion of the hard/soft money component of the DNC Media Fund at the November 1995 meeting (two years before the statements in question here), while certainly meeting the standard test of relevancy under the federal rules of evidence[2] as to the Vice President's knowledge when he made his calls from the White House, fall far short of establishing a likelihood that he "must have known" of that mix when he made the calls and when he stated in the Fall of 1997 that he did not have that understanding.

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[2] Federal Rule of Evidence 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Certainly the Attorney General, in making the determination whether reasonable grounds exist for further investigation, is entitled, indeed obligated, to consider all of the available information/evidence in light of the information/evidence gleaned during the preliminary investigation, common sense and the reasonableness of the inferences available therefrom. The information about the Vice President's Fall 1997 pre-interview attorney-client communications about this matter before making the statements under review, and the lack of any clear motive to lie about his belief concerning the hard/soft component of the Media Fund, provides compelling support for a determination that he made no knowing and willful false statement.

The ultimate question for the Attorney General in deciding whether to seek the appointment of an independent counsel for this matter, pursuant to 28 U.S.C. § 592, is whether she determines that "further investigation is warranted." Under Section 592 (b)(1), the Attorney General may notify the special panel that she is closing this matter without seeking the appointment of an independent counsel if she "determines that there are no *reasonable* grounds to believe that further investigation is warranted." (Italics added.) "Reasonable," as relevantly defined in Webster's II New Riverside University Dictionary, is: "governed by or in accordance with reason or sound thinking"; "within the bounds of common sense." In my view, Congress has empowered the Attorney General with discretion, albeit within the limitations imposed by the ICA, to determine, based upon all of the available information/evidence and arguments, including the likelihood that probative evidence/information could be gained from further investigation, whether there are "reasonable grounds [for her] to believe that further investigation is warranted." Congress also made the Attorney General's determination that further investigation is not warranted unreviewable by providing in Section 592 (b) that upon filing a notification that further investigation is not warranted, "the division of the court shall have no power to appoint an independent counsel with respect to the matters involved."

The FBI memorandum recommending appointment of an independent counsel asserts that the evidence concerning the Vice President "is sufficient to support a finding that the Vice President knew that 'hard' money is a component of the media fund, and that his denial of that awareness was false." I disagree. In my view, the evidence is sufficient to support a determination by the Attorney General, under a "clear and convincing evidence" standard, that the Vice President did not have such knowledge and that his denial in the Fall of 1997 was true. If the Attorney General agrees with this assessment of the evidence, there are "no reasonable grounds to believe that further investigation is warranted" and no independent counsel should be sought. If the determination were mine to make, I would conclude that the Vice President lacked the state of mind required for the violation of criminal law involved by a clear and convincing evidence standard and, accordingly, I would not seek an independent counsel for this matter.

I recommend that the Attorney General determine "that there are no reasonable grounds to believe that further investigation is warranted" of Vice President Gore for possible violation of 18 U.S.C. §1001 and that, accordingly, the Attorney General "promptly so notify the division of the court" as required by 28 U.S.C. §592(b). Deputy Assistant Attorney General Mark Richard joins me in making this recommendation and concurs with my analysis of the basis for the recommendation.

Attachments to Memo Re
Independent Counsel Matter: Albert Gore, Jr.,
Vice President of the United States

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1. Memo to James K. Robinson re Independent Counsel Matter: Albert Gore, Jr., Vice President of the United States from Lee Radek, Chief, Public Integrity Section and David Vicinanzo, Supervising Attorney, Campaign Financing Task Force, dated November 17, 1998.

2. Memo to James K. Robinson re 90-day Vice President Preliminary Investigation from [redacted] Special Assistant to the Supervising Attorney, Campaign Finance Task Force, dated November 13, 1998.

3. Recommendation to Seek Appointment of an Independent Counsel to Investigate Allegations against the Vice President of the United States by the FBI.

4. Memo to James K. Robinson re "Clear and Convincing Evidence" from Lee J. Radek, Chief, Public Integrity Section, dated November 17, 1998.

5. Memorandum of Law on Behalf of Vice President Al Gore from James F. Neal and Christopher H. Schroeder, dated September 9, 1998.

6. Memo to James K. Robinson re FBI's Recent Memo in Independent Counsel Matter involving the Vice President, dated November 20, 1998.



MEMORANDUM

TO: The Attorney General
The Deputy Attorney General

FROM: Robert S. Litt
Principal Associate Deputy Attorney General

RE: Gore and Ickes

DATE: November 22, 1998

After reviewing the various recommendations on Gore and Ickes, I firmly believe that the Attorney General should not seek the appointment of an independent counsel with respect to Harold Ickes, and conclude with somewhat less certainty that she should do so with respect to Vice President Gore. My reasons are set forth below.

I. The Applicable Standard

In each of these cases there is some evidence tending to show that the target of the investigation lied. In each of these cases there is considerably more evidence tending to show that the target of the investigation did not lie. A critical analytical question, and one on which the various recommendations are entirely contradictory, is the extent to which the Attorney General, in determining whether or not to seek an independent counsel, is permitted to weigh conflicting evidence and draw conclusions of fact.

The statute contains two relevant provisions. At the end of a preliminary investigation, the Attorney General must seek an independent counsel if she determines that there are "reasonable grounds to believe that further investigation is warranted." 28 U.S.C. § 592(c)(1)(A). By itself, this language does not give much guidance as to whether the Attorney General can weigh factual evidence. However, 28 U.S.C. § 592(a)(2)(B)(ii) expressly permits the Attorney General to find that there are no reasonable grounds to believe that further investigation is warranted if "there is clear and convincing evidence" that the target lacked "the state of mind required for the violation of the criminal law involved."

Thus, the Attorney General can draw factual conclusions about a target's state of mind, albeit subject to a fairly high standard. This accords with prior practice. For example, in the Freeh matter there was evidence from which one could have inferred that Director Freeh knew his statement was false (a briefing book presented to him contained the true information), yet the Attorney General found this outweighed -- to the point of "clear and

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convincing evidence" by other evidence showing that he did not know.[1]

But does the Attorney General have the power to weigh conflicting evidence on issues other than intent, and if she does, what standard does she use? The FBI Memorandum, and the Public Integrity Section's memorandum with respect to Ickes, both suggest that she has no such power, but that an independent counsel must be sought so long as there is "evidence sufficient to support a finding" that the target committed the offense. For two reasons, I disagree.

First, as Mr. Radek's memorandum and the FBI Memorandum both note, the "clear and convincing evidence" standard was added to the law because Congress that the Department was dismissing cases based on too low a threshold. However, Congress only made the "clear and convincing evidence" standard applicable to factual determinations about the target's state of mind. The necessary implication is that some lower threshold remains applicable to other factual issues, such as identity or (in these cases) falsity. It would actually reverse Congressional intent if the Attorney General could weigh conflicting evidence in making a state of mind determination, but not with respect to other elements of the offense.

This conclusion also accords with common sense. Assume, for example, a case in which a totally credible witness to a bank robbery identifies the Secretary of Treasury as the robber, and so swears under oath. The Secretary claims that he was present at a social function with 25 other people at the time of the robbery. During the course of the preliminary investigation we locate and interview 15 of these people, each of whom credibly confirms the Secretary's alibi.[2] No one would have any hesitancy in closing this matter based upon a factual conclusion that the witness, however certain he was, was in error. Yet the witness' testimony would, I believe, be "sufficient to support a finding" of the Secretary's guilt.

[1] Both the FBI memo and Assistant Attorney General Robinson's memo discuss whether the Attorney General is to make this determination based on an "objective" or a "subjective" standard. I do not find these formulations particularly illuminating. The Attorney General is to act as a fact-finder, subject only to the qualification that she must make any determinations as to state of mind by clear and convincing evidence. That is the practice that the Department has followed in prior preliminary investigations and should not be changed at this time.

[2] The FBI Memorandum suggests that the Department may not conduct a factual inquiry during the preliminary investigation. But the consistent practice of the Department has been to investigate whether the matter can be closed without appointment of an independent counsel. This was done, for example, in the Freeh matter.

I conclude, therefore, that even when there is evidence sufficient to support a finding that the target of an investigation has committed a crime, the Attorney General retains the power to weigh conflicting evidence and draw factual conclusions. I am unsure how to articulate the appropriate standard for such determinations when the issue is not the target's state of mind. The legislative history referred to above shows that it is less than "clear and convincing evidence"; it seems equally clear that it should be greater than a preponderance of the evidence. Ultimately, I am unable to be more precise than to reiterate the words of the statute. If the Attorney General is sufficiently convinced by the facts to conclude that it would not be reasonable to proceed further, then she should not seek an independent counsel.

Of course, the entire discussion above assumes that all reasonable factual investigation has been done. If that is not the case, however, the Attorney General must determine whether it is "reasonable" to conclude that further investigation might lead to a decision to prosecute. In these cases, I do not find that issue to be relevant, because there does not appear to be any more factual investigation to be done with respect to Ickes, and I conclude on other grounds that an independent counsel should be sought with respect to Gore.

II. Ickes

The Ickes matter is straightforward. I am convinced by clear and convincing evidence that Ickes did not knowingly lie. I reach that conclusion based primarily on the following:

1. The questions were imprecise and ambiguous. Whether the Administration "did anything" about the Diamond Walnut strike is not subject to only one interpretation; Ickes' own answers at the deposition make clear that he was not certain of the meaning himself. On the one hand, "doing anything" could include Ickes' conversations with Hamilton, or even just discussions within the Administration. On the other hand, it could refer, as Ickes now claims, to formal public actions.

2. In answer to other questions, Ickes acknowledged several things that the Administration "did" in connection with the strike -- conversations that he had with Hamilton, and conversations with Jennifer O'Connor. These answers both reveal the imprecision of the question, and suggest that Ickes did not intend to deceive.

3. The whole tenor of Ickes' deposition is one of contention but not deception. He is cagey and combative but not untruthful. It is noteworthy that although Ickes' many depositions have presumably been gone over by Congressional staffers with a fine-toothed comb, no other statement is claimed to have been false.

4. The Diamond Walnut matter was not brought to Ickes' attention before the deposition, but was sprung on him without warning.

5. Ickes was deposed some 26 times, as I recall. He had ample opportunity to conceal information that was far more damaging but did not do so. For example, many of the documents that are most heavily relied upon in connection with the Common Cause allegations to show the involvement of the President (and, not incidentally, Ickes) in the media fund campaign came from Ickes, and he acknowledged -- indeed, bragged about -- his own role in his depositions. By comparison, his alleged motive to lie about Kantor's call to Diamond Walnut seems fairly trivial.

In sum, after reviewing all of the evidence, I am left with the firm conviction that, even if Ickes' statement was technically false, it was not knowingly so.[3] Indeed, I am convinced of this beyond a reasonable doubt. Accordingly, I do not believe it is appropriate to seek an independent counsel with respect to Ickes.

III. Vice President Gore

I find the Gore matter much more troubling and very close. There is from which one could infer that Gore knew what he claimed he did not know: that the media campaign was paid for in part with hard money.[4] Gore was unquestionably present at a meeting at which it appears that the hard money component to the media campaign was discussed. In addition, he was sent a large number of memos which made reference to the same topic. (However, what Gore's chief of staff may have known, or Gore's press statement that he was raising money for "the campaign," say nothing about Gore's knowledge of whether there was a hard money component to the media campaign.)

On the other hand, there is clearly substantial contrary evidence. The statements of Gore's staff give rise to an inference that Gore never read the memos that were sent to him. And the lack of recollection displayed by many others who attended the same meeting that Gore did could support an inference that he either never understood or subsequently forget what he was told at the meeting.

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[3] I agree with the Public Integrity Section that falsity and state of mind are separate elements, and that the "clear and convincing evidence" standard applies only to the latter, even when the statement at issue concerns the target's knowledge, belief or recollection.

[4] I do not believe there is anything worth investigating further in the Allard or Uribe matters; indeed, at this point I do not think either rises to the level of a specific allegation from a credible source of possible criminal activity.

While reasonable minds could draw, and have drawn, a different conclusion, I cannot conclude that this evidence meets the "clear and convincing" standard necessary to conclude that Gore did not knowingly lie, nor am I sufficiently convinced that Gore's statement was true that further investigation is unreasonable. I do not think we can disregard evidence that a target was told something based upon an inference that he might not have understood or recollected it. If a defendant claims lack of knowledge or recollection, I think that we would go forward with evidence showing that he was put on notice of the facts, and leave it to him as a defense to show that he did not hear the statements, or read the memos. This is not the sort of factfinding that I believe it is "reasonable" for the Attorney General to engage in: it requires her simply to prefer one set of inferences over another.[3]

I am not persuaded by the suggestion that Gore had no motive to lie. With the light of hindsight, we can conclude that he did not need to lie, because the hard money component of the media campaign was being borrowed. We also have uncontradicted evidence that gore told his lawyers as well as the Government that he believed there was no hard money component and adhered to this story even when the lawyers pointed out to him that he was wrong. However, this evidence does not negate the possibility that Gore could have concluded that evidence of his state of mind about hard and soft money would be relevant to the Department's investigation (as in fact it was) and thus determined to lie about that. Gore's lawyers do not claim that they discussed with him that the hard money component was being borrowed, and so Gore might stall have thought that it would help him to claim that he thought only soft money was being raised (even if that belief would have been erroneous). I do not believe that this is likely; but I cannot rule it out based on the facts before us.

As a finder of fact, I would be unable to conclude that the evidence sustains the government's proof beyond a reasonable doubt. As an exercise of prosecutorial discretion, I would not bring this case. But that is not the test to be applied here. On the factual record developed in this matter, I am unable to conclude that there are "no reasonable grounds for further investigation." Accordingly, I believe that this matter should be referred to an independent counsel.

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[3] This conclusion might be claimed to be inconsistent with the approach taken in the Freeh matter, where we likewise had evidence that Director Freeh was presented with the true facts; but in the Freeh matter, we had affirmative evidence that he was also told things which supported his (incorrect) view of the facts, and other corroborating evidence affirmatively demonstrating his state of mind. We have no such evidence here.

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I do not, however, believe that there is any basis to refer any matter other than the false statement. In particular, I do not see any basis for revisiting the underlying § 607 determination. Whether or not Gore lied about the state of his knowledge concerning the hard money component to the media campaign, the evidence firmly establishes that the calls were made only for the purpose of raising soft money for that campaign, regardless of what the DNC did with the funds once received. There is still no evidence that Gore in fact asked for hard money in any of the calls, nor that Gore knew about the subsequent splitting of the contributions by the DNC. Equally, I do not think that this possible false statement rises to the level of the sort of aggravating circumstance that would overcome the Department policy that served as alternate basis for decision. Accordingly, I do not believe that there is any reasonable grounds to investigate the § 607 matter further, and would refer only the false statement matter.

cc: AAG Robinson
Mark Richard
Lee Radek
David Vicinanzo
Larry Parkinson

11/23/98 MON 09:04 FAX

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, DC 20530-0001*

November 23, 1998

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

PURPOSE; To provide the Attorney General with a recommendation whether to seek the appointment of an Independent Counsel pursuant to 28 U.S.C. § 591-599 further to investigate whether Harold M. Ickes, former Deputy White House Chief of Staff, may have violated 18 U.S.C. § 1621.

TIMETABLE: As soon as possible, but not later than November 30, 1998.

RECOMMENDATION: See attached memorandum

Attachments

Approval _____
Disapproval _____
Date _____

DOJ-HI-00387

EXHIBIT
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U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, DC 20530-0001*

November 23, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

PURPOSE; To provide the Attorney General with a recommendation whether to seek the appointment of an Independent Counsel pursuant to 28 U.S.C. § 591-599 further to investigate whether Harold M. Ickes, former Deputy White House Chief of Staff, may have violated 18 U.S.C. § 1621.

TIMETABLE: As soon as possible, but not later than November 30, 1998.

INTRODUCTION

On September 1, 1998, the Attorney General initiated a preliminary investigation pursuant to the Independent Counsel Act, 28 U.S.C. § 591-599 (the ICA) to determine if further investigation was warranted into whether Harold M. Ickes, former White House Deputy Chief of Staff, may have violated 18 U.S.C. § 1621 during a deposition on September 22, 1997, conducted by the staff of the Senate Committee on Governmental Affairs. The answers in question concerned Mr. Ickes' claimed lack of knowledge regarding what, if anything, the Administration did in 1995 in connection with a strike by the Teamsters union at Diamond Walnut Growers, Inc. A preliminary investigation has been conducted to determine if further investigation by an independent counsel is warranted as to whether Mr. Ickes' claimed lack of knowledge was false in light of the fact that in March and April of 1995 Ickes was personally

involved in causing U.S. Trade Representative Mickey Kantor to call Diamond Walnut in an effort to assist in settling the long-running strike with the Teamsters.

Attached hereto are two memos to me setting forth contrary recommendations as to whether an independent counsel should be sought pursuant to the ICA as to Mr. Ickes.[1] Lee Radek, Chief of the Public Integrity Section, and David Vicinanzo, Supervising Attorney of the Campaign Financing Task Force, recommend "that an independent counsel be appointed to investigate whether Ickes falsely testified about the extent of his recollection during the Senate Committee deposition." Messrs. Radek and Vicinanzo state: "Although the evidence that Ickes must have remembered is weak, we do not believe, as a matter of law, that prosecution would be precluded." [redacted] Deputy Chief of the Public Integrity Section, and [redacted] Trial Attorney, Public Integrity Section, "recommend that the Criminal Division ask the Attorney General not to seek an independent counsel in this matter." [redacted] and [redacted] base their recommendation against seeking an independent counsel on their belief "that the potential perjury is unprosecuteable as a matter of law at this point, based on a fair consideration of the totality of the evidence obtained during the preliminary investigation."

In addition, attached hereto is a November 20, 1998, memorandum from FBI General Counsel Larry Parkinson recommending, on behalf of the FBI, that the Attorney General seek the appointment of an independent counsel as to both Vice President Gore and Harold Ickes. While viewing the ICA appointment matter concerning Mr. Ickes as "a close issue," indeed closer than as to Vice President Gore, "particularly in light of the ambiguity of the question at issue, [the FBI] believe[s] there is legally sufficient evidence to satisfy the elements of perjury." The FBI also does "not think it would be reasonable to find by clear and convincing evidence that Ickes did not knowingly and wilfully lie during the deposition."

Counsel for Mr. Ickes was afforded a meeting with the Deputy Attorney General to present views on whether an independent counsel should be sought. Although I was unable to attend that meeting, I did carefully review the attached memo from his counsel and I met with Mr. Ickes' counsel in connection with the decision whether to trigger the preliminary investigation. I recommended that a preliminary investigation be conducted as to Mr. Ickes, in part because I believed it was necessary to assess Mr. Ickes' state of mind, an inquiry possible during a preliminary investigation but not appropriate during an initial inquiry under the ICA. I met with the attorneys and investigators involved in the preliminary investigation of Mr. Ickes and fully explored the factual and legal arguments for and against seeking appointment of an independent counsel in connection with this matter.

RECOMMENDATION

I recommend that the Attorney General not seek the appointment of an independent counsel in connection with this matter because I believe she should determine, based upon a

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[1]The Attorney General has received a third memo from Principal Associate Attorney General Robert S. Litt recommending that independent counsel be sought as to Vice President Gore, but not as to Mr. Ickes.

careful review of the facts and the law set forth in the attached memoranda, pursuant to 28 U.S.C. § 592 (b), "that there are no reasonable grounds to believe that further investigation is warranted" with respect to the possibility that Mr. Ickes committed knowing and willful perjury during his September 22, 1997, deposition.

As with the determination with respect to whether to seek an independent counsel as to Vice President Gore, I believe that in evaluating Mr. Ickes asserted lack of knowledge of what, if anything, the Administration did concerning the Diamond Walnut strike under 18 U.S.C. §1621, a powerful argument exists that the Attorney General is necessarily addressing "the state of mind required for the criminal law involved." In my view, Congress intended that state of mind determinations by the Attorney General under the ICA be made employing a "clear and convincing evidence" standard. I agree with the statement in the [redacted] memo that: "In the context of a 'failure to recall' perjury, the evidence of falsity will be largely indistinguishable from the evidence of intent."

I share the FBI's view that appointing an independent counsel as to Mr. Ickes is less warranted than it is as to Vice President Gore. While the FBI would seek the appointment of independent counsel as to both matters, I recommend that the Attorney General seek independent counsel as to neither.

My reasons for recommending against seeking an independent counsel as to Mr. Ickes are somewhat different from my reasons with respect to Vice President Gore. Viewing the totality of the available and potentially obtainable information/evidence, I believe that the Attorney General may, and should, conclude, employing a clear and convincing evidence standard, that the Vice President lacked the state of mind required for the violation of the criminal law involved. I believe this standard is also met with respect to Mr. Ickes' state of mind. The analysis of the facts in the [redacted] memorandum in the context of the vague and ambiguous questioning of Mr. Ickes strongly support this determination. Their arguments in support of their assertion that there is no evidence of falsity are also compelling as to Ickes absence of the state of mind required for perjury. I disagree that in this case their arguments concerning "falsity" are somehow not addressed to the "state of mind required for violation of the criminal law involved." I believe the "clear and convincing evidence" standard is implicated here. I believe, contrary to the view of some of the others involved in this process, that the Attorney General may and should find by the clear and convincing evidence standard that Mr. Ickes "lacked the state of mind required" to constitute perjury.

A key additional element for me in reaching this conclusion is the vagueness and ambiguity of the questioning. While the question, in the abstract, may not be facially incapable of producing a perjurious answer, given the available and potentially obtainable information/evidence, its vagueness and ambiguity are highly relevant to Mr. Ickes' state of mind in answering the question.

There is a consensus among Public Integrity, the Campaign Financing Task Force and the FBI that the perjury case against Mr. Ickes is, at best, highly problematic. Bob Litt shares this view. The Radek/Vicinanzo memo says: "the evidence that Ickes must have remembered is

weak." The Parkinson/FBI memorandum notes as to Vice President Gore that: "there seems to be a consensus that the facts as known would not warrant prosecution" and further states: "We believe the Ickes case presents the Attorney General with a much more difficult determination than that presented in the Vice President's case." I agree with Bob Litt's November 22, 1998, memorandum which, in speaking of both the Gore and Ickes statements says: "In each of these cases there is some evidence tending to show that the target of the investigation lied. In each of these cases there is considerably more evidence tending to show that the target of the investigation did not lie." (Emphasis in original.)

Ultimately, the issue of whether to seek the appointment of an independent counsel as to Mr. Ickes turns on the test to be applied by the Attorney General in making the decision. Several alternative tests have been suggested:

The Radek/Vicinanzo test:

> "Taking the evidence in the light most favorable to the government, we conclude that the circumstantial evidence gathered to date is sufficient for a rational fact finder to find beyond a reasonable doubt that Ickes testified falsely when he professed a lack of certainty and knowledge about what the Administration did regarding Diamond Walnut. For the same reason, we do not believe that there is clear and convincing evidence that Ickes did not knowingly and wilfully lie during the deposition."

The Parkinson/FBI test:

> "We concur in the analysis and conclusion set forth in the memorandum from Lee Radek and Dave Vicinanzo. While we view this matter as a close issue, particulary in light of the ambiguity of the question at issue, we believe there is legally sufficient evidence to satisfy the elements of perjury. Moreover, we do not think it would be reasonable to find by clear and convincing evidence that Ickes did not knowingly and willfully lie during the deposition."

AHY NAMES

The [redacted] test:

> "[T]he Attorney General is the decision maker and her determination is to be informed by her sound exercise of discretion, and whether she subjectively believes that further investigation of this case is reasonably likely to lead to evidence that could ever be sufficient to make a conviction for perjury 'probable.'" They conclude the answer is no because : "there is no likelihood of ever obtaining a conviction in this case because there is no prospect of even being able to prove the falsity of Ickes' lack of certainty and knowledge during the deposition."

The Litt test:

> "[E]ven when there is evidence sufficient to support a finding that a target of an investigation has committed a crime, the Attorney General retains the power to weigh conflicting evidence and draw factual conclusions. . . . Ultimately, I am unable to be more precise than to reiterate the words of the statute. If the Attorney General is sufficiently convinced by the facts to conclude that it would not be reasonable to proceed further, then she should not seek an independent counsel."

I have some problem with each of these "tests." In my view, at the core of the decision in this case is the Attorney General's subjective assessment of "the state of mind [of Mr. Ickes] required for the violation of the criminal law involved." Unless the Attorney General is personally satisfied, employing a clear and convincing evidence standard, that Mr. Ickes "lacked the state of mind required for the violation of the criminal law involved," she should seek the appointment of an independent counsel. The "clear and convincing evidence" standard, while high, is not a standard of moral certainty or beyond a reasonable doubt. As noted in *Colorado v New Mexico*, 467 U.S. 310, 316 (1984), it is a standard requiring that the entire body of evidence "place in the ultimate fact finder [here the Attorney General] an abiding conviction that the truth of its factual contentions are 'highly probable.'" As noted by Professor Saltzburg: "The standard represents a confidence level, not an abstract of the quantity or quality of the evidence presented in any case." 1 Saltzburg, Federal Rules of Evidence Manual, p. 389 (7th ed 1998).

Although a very close question, I disagree with the [redacted] memo that the case -- as weak as it is -- "is unprosecuteable as a matter of law." However, I believe the Attorney General may, and on this record should, determine, using a clear and convincing evidence standard, that Mr. Ickes lacked the state of mind required to commit knowing and willful perjury during the September 22, 1997, deposition. I share the view expressed by Bob Litt that "after reviewing all of the evidence I am left with the firm conviction that even if Ickes' statement was technically false, it was not knowingly so." My "firm conviction" is even higher than Bob's. I have an "abiding conviction" that this is "highly probably," that Ickes' "state of mind required for the criminal law involved" is absent. Accordingly, if the determination were mine to make, I would not seek an independent counsel for this matter.

The Parkinson/FBI memorandum, at footnote 6, takes issue with the proposition that a determination under 28 U.S.C. §592 (a)(2)(ii) whether a covered [or discretionary] person under the ICA "lacked the state of mind required for the violation of the criminal law involved" is a determination personal to the Attorney General. Instead, the memo asserts that "it seems clear that the Attorney General must apply a more objective standard tha[n] one involving a level of personal certainty." While the view expressed in the Parkinson/FBI memo is not an unreasonable one, I agree with the analysis presented in the Radek "Clear and Convincing Evidence" memo attached to the ICA recommendation concerning Vice President Gore.

I recommend that the Attorney General determine "that there are no reasonable grounds to believe that further investigation is warranted" of Harold M. Ickes for possible violation of 18 U.S.C. §1621, and that therefore the Attorney General should not seek the appointment of an independent counsel, and should "promptly so notify the division of the court" as required by 28 U.S.C. § 592 (b). Deputy Assistant Attorney General Mark Richard joins me in making this recommendation and concurs with my analysis of the basis for the recommendation.

Attachments to Memo Re
Preliminary Investigation of Harold M. Ickes

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1. Memo to Lee J. Radek re Recommendation to Close the Preliminary Investigation of Harold M. Ickes without Seeking Appointment of an Independent Counsel from Jo Ann Farrington and Stevan E. Bunnell, dated November 17, 1998.

2. Memo to James K. Robinson re Recommendation to seek Appointment of an Independent Counsel to Investigate Perjury and False Statement Allegations against Harold M. Ickes, former White House Deputy Chief of Staff from Lee Radek, Chief, Public Integrity Section and David Vicinanzo, Supervising Attorney, Campaign Financing Task Force, dated November 17, 1998.

3. Memo to James K. Robinson re Recommendation to Seek Appointment of an Independent Counsel to Investigate Allegations Against Vice President Gore and Harold Ickes from Larry R. Parkinson, General Counsel, FBI, dated November 20, 1998.

4. Memo to the Attorney General re Gore and Ickes from Robert S. Litt, dated November 22, 1998.

December 4, 1998

MEMORANDUM

To: Director Freeh

From: Larry Parkinson

Subject: Independent Counsel Matter: Potential Election Law Violations Involving President Clinton and Vice President Gore

For purposes of your consultation with the Attorney General on the pending independent counsel matter, this memorandum is intended to summarize our discussions on the key issues. For the reasons stated below, it is appropriate to recommend that she seek the appointment of an independent counsel to investigate potential election law violations involving President Clinton and Vice President Gore. Because similar allegations have been made against the Dole presidential election campaign, the independent counsel should be authorized to investigate those allegations as well.

This memorandum is divided into two parts. The first section focuses primarily on the narrow question presented at the end of this 90-day preliminary inquiry: is the advice of counsel defense sufficient for the Attorney General to conclude by "clear and convincing evidence" that the President and Vice President lacked the requisite criminal intent? The second section discusses broader issues that justify the appointment of an independent counsel (regardless of the outcome on the narrow legal issue).

I. The 90-Day Preliminary Inquiry

A. Threshold Issues

The Radek/Vicinanzo memorandum dated November 20, 1998 ("DOJ memo") streamlines the discussion by resolving correctly several important threshold issues. First, the memo defers appropriately to the FEC auditors' conclusion that the DNC-financed "issue ads" can be attributed to the Clinton/Gore campaign committee, thereby violating the spending limits. That conclusion obviously has been strengthened by this week's public release of the Audit Division's final report. The audit report, along with the very strong concurring opinion by the FEC Office of General Counsel, makes a compelling statement that the Clinton/Gore campaign



illegally benefited from the media campaign.[1] Therefore, the basic facts that led to the initiation of the 90-day preliminary inquiry -- the audit findings -- have become stronger.[2]

The DOJ memo also resolves the issue of control, after setting forth a good factual summary of the genesis and development of the issue ad campaign. The memo correctly concludes that the ad campaign was controlled in all major respects by the White House:

> [T]here was little dispute that the DNC issue ad campaign was not only coordinated with the White House but controlled by it. Fowler described the White House control as "near absolute."

DOJ Memo at 29. Among many other things, the memo relies on the April 17, 1996 from Ickes to Fowler establishing that all DNC expenditures were subject to prior White House approval.[3]

With respect to the purpose of the media campaign, the DOJ memo appears to give credence to the witness statements that the primary purpose of the issue ads was to aid the Democratic party and not to reelect the President. Such statements appear to be disingenuous at best; the documentary evidence clearly indicates that the primary purpose of the ads was the reelection of the President. In fact, the FEC Audit Report takes the matter a step further: not only does it flatly reject the argument that the ads

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[1] As you know, the career FEC auditors and lawyers reached similar conclusions about the Dole campaign.

[2] The FEC Commissioners met in public session on December 3, 1998. Campcon had agents in attendance and has reported that several of the Commissioners appeared hostile to the Audit Report. As expected, the final resolution by the Commission is uncertain. One thing that does appear certain, however, is that there will be no resolution for at least several months. Thus, there appears to be little reason for the Attorney General to seek a 60-day extension of the preliminary investigation.

[3] This total White House control of DNC expenditures raises a significant legal issue. As you will recall, in our January 30, 1998 memorandum to DAG Holder, we argued strongly that this was a case about "control" and not mere "coordination." Based on their discussions with the FEC auditors and attorneys, our agents believe that the FEC has acquired only a fraction of the evidence that Campcon has obtained regarding "control." When asked how they would treat a situation in which there was total control of committee expenditures by a campaign, the FEC staff responded that it was an intriguing scenario with which they had never been faced.

were not intended primarily to reelect the President, it essentially alleges an outright fraud:

> The Audit Division does not dispute that the advertisements in fact address pending political issues. However, the facts ascertained during the audit indicates that the primary purpose for addressing these issues was to assist President Clinton's reelection. It further appears that those facts which might otherwise demonstrate that the purpose and "targeting" of the advertisements were related to an overall party agenda (rather than the President's reelection) are true because of a deliberate effort to conceal the actual purpose of the advertisements.

FEC Audit Division Report on Clinton/Gore '96, at 42 (emphasis added).

Although its own analysis of "purpose" leaves something to be desired, the DOJ memo does reach a very significant conclusion: "it is clear that [President Clinton and Vice President Gore] both were sufficiently involved to be deemed coconspirators or aiders and abettors of any potential criminal violations of the FECA or PPMPAA." DOJ Memo at 31. This is an enormously significant conclusion in light of the FEC audit findings that there were violations of the relevant statutes. We are left, then, with the sole issue of whether the President and Vice President committed such violations "knowingly and willfully."

B. Advice of Counsel Defense

I view the advice of counsel defense as fairly strong in this case, but not strong enough to satisfy the "clear and convincing" standard under the Independent Counsel Act. I strongly disagree with the statement in the DOJ memo that "it is hard to imagine a more compelling set of facts establishing an advice-of-counsel defense." DOJ Memo at 40. While there appears to be no dispute that two of the lawyers representing the DNC and Clinton/Gore -- Sandler and Utrecht -- were involved significantly in the ad campaign process, the DOJ memo itself notes certain factors that cut against a viable advice of counsel defense.

1. No Direct Contact Between Lawyers and Principals.

The memo points out that where the attorneys never advise the principal clients directly, this undercuts to some degree the advise of counsel defense. It appears to be undisputed that the two experts, Sandler and Utrecht, never had direct contact with the President or Vice President. Instead, their advice was filtered through intermediaries. The principal intermediary was

Harold Ickes, who is, after all, the subject of a separate investigation for perjury. (While the perjury allegations are unrelated to media fund issue, does it make sense to shut down an investigation based on an advice of counsel defense where the person actually relaying the advice is about to have his own independent counsel?)

There appears to be relatively little evidence that actual legal advice was transmitted to the President or Vice President. Instead, this seems to be a situation in which the President and Vice President were told that "lawyers were involved" and that seemed to satisfy them. (See, e.g., DOJ memo at 40: "The Vice President felt confident that Quinn, who had some expertise in this area and was a good lawyer, had ensured that the ads were legal.") While certainly relevant to state of mind, this kind of evidence is not particularly persuasive in establishing a solid advice of counsel defense.

It also appears that the President and Vice President were relying primarily on Ickes and Quinn, even though they were not acting in a legal capacity. At the time, Ickes was Deputy Chief of Staff to the President and Quinn was Chief of Staff to the Vice President. The fact that they also happened to be lawyers does not necessarily mean they were dispensing "legal advice" for purposes of analyzing an advice of counsel defense.

Finally, there is one clear indication that the legal advice of Sandler and Utrecht may not have been getting through. As noted in footnote 11 of the DOJ memo (p. 22), "Sandler and Utrecht stated that they consistently applied the 'electioneering message' legal standard, not the express advocacy standard, when they reviewed the content of the DNC ads. Yet virtually every other witness recalls Sandler and Utrecht's advice in terms of express advocacy." While the memo concludes that this inconsistency is not significant, certainly it raises some question about whether the attorneys' advice was being heard and heeded.

2. The Attorneys Were Not Disinterested

The DOJ memo points out accurately that Sandler, as general counsel for the DNC, and Utrecht, as general counsel for the Clinton/Gore campaign committee, "worked for organizations with an unmistakable interest in ensuring the reelection of President Clinton." DOJ Memo at 38. The memo also states that "courts have declined to instruct juries on advice of counsel where the evidence indicated that the attorney was not disinterested in the outcome." Without impugning their integrity or professionalism,[4]

[4] Apparently both Utrecht and Sandler are recognized experts in the election law arena, which has very few

Sandler and Utrecht certainly were not disinterested in the outcome.

3. No One Sought Advice From the FEC

If the DNC or Clinton/Gore truly wanted disinterested -- and dispositive -- advice on whether the spending for "issue ads" was properly allocated, they obviously could have gone to the FEC. They chose not to, presumably because they were afraid they might receive an answer they did not like. (When I met with the FEC's Chief Auditor in September 1998, he reacted viscerally when I asked him if the DNC or Clinton/Gore had ever sought advice on these matters.)

4. The Sandler Memo

There is one clear indication that Sandler -- one of the two lawyers critical to a viable advice of counsel defense -- had doubts about whether the media campaign was violating the law. In a February 2, 1996 memo to Don Fowler, Sandler stated:

> Under [the FEC's legal] test, the DNC is bumping up right against (and maybe a little bit over) the line in running our media campaign about the federal budget debate, praising the President's plan and criticizing Dole by name.

(Emphasis added). When the same memo was sent to Ickes at the White House, it had been rewritten to state that the FEC's "electioneering message" test "is the standard we are applying (albeit aggressively) in the current DNC media campaign." When interviewed about these memos, Sandler gave a contorted explanation which led our agents to believe he was lying.

5. The Investigation Was By Definition Limited

As is true in any preliminary investigation conducted pursuant to the Independent Counsel Act, we conducted this 90-day inquiry[5] without the use of standard investigative tools. Therefore, we had to rely on voluntary production of documents, voluntary statements by witnesses, and agreed-upon attorney-client privilege waivers. While our agents felt that they received full document production from the DNC, they were not

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practitioners. Utrecht in particular is a very impressive witness, according to the agents who interviewed her.

[5] In fact, because of the deadlines required for preparation and review of the DOJ memo and subsequent deliberations, the actual investigation was approximately 60 days.

confident that all relevant White House documents had been produced. While I am unaware of any specific documents we believe to be missing, Campcon has had significant difficulties with White House document production since the Task Force began its work.

C. The "Clear and Convincing Evidence" Standard

Under all the circumstances, is it reasonable to conclude by "clear and convincing evidence" that the President and Vice President lacked the requisite state of mind? As we pointed out during deliberations on the recent Gore and Ickes matters, Congress clearly intended to set a very high threshold before an Attorney General could close a case, either before or after a preliminary investigation, on the ground that the subject lacked the state of mind necessary to commit the alleged crime. In 1987, Congress amended the Independent Counsel Act in an effort to curb what it viewed as a "disturbing" practice by the Department:

> A third problem with the Department of Justice's implementation of the statute is its practice in several cases to decline further proceedings, despite specific information from a credible source of possible wrongdoing, due to a lack of evidence of the subject's criminal intent. The decision not to proceed has sometimes been made even in the face of conflicting or inconclusive evidence on the subject's state of mind.
>
> . . .
>
> The Justice Department's demand for proof of criminal intent to justify continuing independent counsel cases is disturbing, because criminal intent is extremely difficult to assess, especially in the early stages of an investigation. Further, it often requires subjective judgments, which should ideally be left to an independent decisionmaker. It is not the type of factual question that the Attorney General should be resolving in light of the Attorney General's limited role in the independent counsel process and lack of access to important investigative tools such as grand juries and subpoenas.

1987 U.S.C.C.A.N. at 2159-60.

The 1987 conference agreement emphasized, "The conferees believe it will be a rare case in which the Attorney General will be able to meet the clear and convincing standard and in which such evidence would be clear on its face. It would be unusual for the Attorney General to compile sufficient evidence at that point in the process." Id. At 2190 (emphasis added).

The question is whether this is one of those "rare cases." We should bear in mind the accurate conclusion that the President and Vice President "both were sufficiently involved to be deemed coconspirators or aiders and abettors of any potential criminal violations of the FEC or PPMPAA," DOJ memo at 31. There was a conscious, well-orchestrated effort by the White House to evade the spending limits through the media campaign. Moreover, this kind of campaign was unprecedented, as the President readily acknowledged when he bragged to his supporters about how he had found a new way to spend enormous amounts of money for the campaign. Under all the circumstances, notwithstanding the potentially viable advice of counsel defense, this matter should not be closed on a "clear and convincing" finding.

II. Broader Issues: Conflict of Interest

Even if the Attorney General determines that there is "clear and convincing" evidence of a lack of intent in this 90-day matter, she should step back and consider the impact of closing this investigation. It would be fair to summarize the decision in the following way:

-- For two years, the investigators advocated a need to conduct a broad investigation of the entire campaign financing scheme conducted by the White House and the DNC, including both the raising of campaign money and the spending of that money. The media campaign was critical to the reelection and many of the apparent criminal abuses resulted from the need to keep the money flowing into the media fund.

-- For nearly two years, investigation of the media fund was largely off-limits while the Department debated internally about the scope of the campaign finance laws and whether we should defer to the FEC. In the meantime, the Task Force pursued a variety of individual cases largely independent of one another.

-- While we were debating internally on the broader issues, the FEC was actually working on a comprehensive audit of the two presidential campaigns (much to our surprise). Contrary to the prevailing view within DOJ, the FEC auditors found massive violations of the law by both presidential campaigns.

-- Faced with evidence of legal violations, the Department was forced to initiate a preliminary investigation under the Independent Counsel Act.

-- The preliminary investigation consisted primarily (but not exclusively) of an examination of an advice of counsel defense. We went to the subjects and their lawyers and asked them what happened. They informed us that the subjects had no criminal intent, notwithstanding the apparent violations. After investigating that issue, we agreed with the subjects and closed the entire matter, with one exception:

-- The exception is the related investigation of the Dole campaign. Since we have no evidence relating to an advice of counsel defense for that campaign, we will keep that investigation alive, particularly in light of the FEC's recent Audit Report.

The media fund/Common Cause allegations have always been the biggest piece of the campaign finance scandal. In large part, those allegations led to the creation of the Campcon Task Force in the first instance. Nevertheless, those allegations have never been investigated in any comprehensive or organized way.

Nearly a year ago (January 1998), we sent a detailed memorandum to the Department seeking a comprehensive investigation of the Common Cause allegations. In that memo, we stated:

> "[T]he Common Cause allegations are the most serious of those issues raised in connection with the investigation of campaign finance." In a series of well-researched submissions, Common Cause has described a scheme to circumvent the FECA and presidential funding laws on a breathtaking scale. For knowing and willful violations of these laws, Congress provided for criminal penalties.
>
> It has been nearly 16 months since Common Cause first brought these allegations to the attention of DOJ. The Department has on more than one occasion written to Common Cause stating that the Task Force is "reviewing a variety of campaign financing issues arising out the last national election" and is "examining" the soft money issues raised by Common Cause. In fact, the Task Force has undertaken no actual investigation of these allegations. Consequently, some of the most fundamental questions relating to the 1995-96 presidential campaign remain outstanding:
>
> -- How were the campaign funds raised?
>
> -- How were they spent?
>
> -- How were they allocated and reported for FECA purposes?

-- Who made the fundaising and spending decisions?

> While the Task Force has uncovered partial answers to these questions, in particular the last one, it is not because we have addressed them in any systematic investigative fashion. Instead, our information has come primarily from Common Cause, the newspapers, and tangentially from our investigation of other matters.

Very little has changed in the last year. After several months of memos and discussions last winter, in February the Attorney General took under advisement the matter of whether the Common Cause allegations could be investigated. We never received a response until July of 1998, when we read (with great surprise) the Attorney General's congressional testimony in which she stated that the Department was deferring to the FEC.[6]

Our January 1998 memorandum also recommended the immediate appointment of an independent counsel:

> Because the Common Cause allegations clearly involve the President, they must be investigated by an Independent Counsel. Moreover, the Attorney General should seek the appointment of an Independent Counsel immediately. Since the Department has had the allegations for nearly 16 months, a preliminary inquiry does not appear to be an option. Finally, we once again would incorporate by reference the FBI's prior written submissions recommending that, independent of the mandatory provision of the Independent Counsel statute, the Attorney General should exercise her discretionary authority pursuant to the political conflict of interest provision.

Notwithstanding the passage of time, our arguments remain the same. If anything, the need for investigation has increased.

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[6] In April 1998, the Task Force investigators developed a investigative plan and dubbed it the "Media Fund" plan. Because it was never clear how the Task Force could investigative the "media fund" while steering clear of the Common Cause allegations, the investigative plan was necessarily truncated. In any event, beginning in May, the investigators began to conduct the "media fund" investigation and obtained a significant amount of information that became very useful during the current 90-day preliminary investigation. That investigation consisted primarily of interviews of state party officials in a dozen key battleground states (focusing on the use of the state parties as conduits for the DNC), document production by the media consultants, and interviews of three DNC employees (Brad Marshall and two lower-level employees).

Intentionally or not, the Department has deferred to the FEC, which has spoken publicly in a resounding way.

For nearly two years, the Department has been investigating the potential criminal conduct of the President and Vice President. That is an inherent conflict of interest that the Independent Counsel Act was designed to address. Even if the Attorney General concludes by "clear and convincing evidence" that there is a lack of intent, she should exercise her discretionary authority and seek the appointment of an independent counsel.

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

December 8, 1998

MEMORANDUM

TO: LARRY PARKINSON

FROM: DIRECTOR, FBI

SUBJECT: INDEPENDENT COUNSEL MATTER: POTENTIAL ELECTION LAW VIOLATIONS INVOLVING PRESIDENT CLINTON AND VICE PRESIDENT GORE

I concur in your analysis and recommendations regarding the above-captioned matter as summarized in the attached 12/4/98 memorandum.

I spoke with the Attorney General on 12/3/98 and advised that my recommendation in favor of the appointment of an Independent Counsel in this matter should be further discussed. We agreed to meet at 7:00 a.m. on 12/4/98 at DOJ.

We met as agreed for approximately thirty (30) minutes. I fully presented my recommendation and reasons for the Attorney General to use her discretionary authority to appoint an Independent Counsel. Using the attached notes and my annotated copy of the 11/20/98 Radek-Vicinanzo memo, I strongly urged the Attorney General to appoint an Independent Counsel.

I argued that her decision was probably one of the most important to be made as Attorney General and certainly the most significant of all the Independent Counsel matters previously considered. I explained that a decision not to appoint would be made in the worst set of circumstances. The "Common Cause" allegations have been at DOJ in an unresolved state for almost two (2) years. Until the August, 1998, FEC audit report, PIS and others at DOJ have been advising that no violation of FECA or the matching campaign funding statutes was viable.

After the audit report, those same advisors now argue that DOJ policy and the advice of counsel defense preclude further investigation. I used the analogy of a USA preempting a grand jury investigation--using subpoenas and sworn testimony--because the subjects' lawyers present an advice of counsel defense and voluntarily supply and certify that all of the records the Government has requested are produced. I specifically pointed out that in this case the subjects on whose testimony and personal certifications DOJ was relying upon were, in some cases,

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people who have ostensibly lied under oath or who were actively being considered for possible perjury charges. I stated that DOJ and the TF have frequently been "surprised" by these subjects when previously subpoenaed or requested records mysteriously turn up long after requested.

I also argued once again that the Attorney General has and had had for some time an irrevocable political conflict of interest which makes it inappropriate and--in my judgement--impossible for her to have conducted the preliminary inquiry and, now, to make legal and policy decisions which close this inquiry without further investigation.

I recommended that rather than analyzing these three (3) very technical statutes--which contain ambiguous provisions--the Attorney General should follow the analysis set forth in the memoranda prepared for her by Chuck LaBella and me. That is, a broad referral based on a Title 18, Section 371, Conspiracy involving the "core group"--including covered individuals--and specific and credible information that a pattern of potential criminal activities should be investigated further by an Independent Counsel without a political conflict. I also pointed out that the Radek-Vicinanzo memo did not even discuss the issue of political conflict or discretionary referral. That pattern would include, but not be limited to, FECA violations, foreign campaign contributions, telephone solicitations, and a conspiracy by the PRC to bribe high-ranking U.S. political figures.

I stated that such a referral could recite that the Attorney General believed that actual prosecution should not result because of DOJ Guidelines, advice of counsel defenses, or for any other reason.

I also pointed out that a decision not to refer this matter still leaves the TF with the RNC issues.

More particularly, I made all the arguments contained in your memo emphasizing that I did not agree that the clear and convincing standard had been reached. I argued that the advice of counsel defense was insufficient here for a number of reasons:

(a) Ickes and Quinn--neither of whom are "disinterested" attorneys--are the principal conduits of "legal advice" to the President/Vice President. Moreover, Ickes, the primary conduit, has serious credibility issues;

(b) The DNC Clinton/Gore attorneys never directly advise the President/Vice President;

(c) Sandler and Utrech are not "outside attorneys" but employees of the campaign or party apparatus who are interested in the outcome;

MEMORANDUM TO PARKINSON FROM DIRECTOR

(d) No advice was ever sought from the FEC or from bona fide "outside counsel";

(e) A serious conflict exists between the "issue ad" legal standard advice supplied according to Sandler and Utrech and what everyone else claimed they furnished as a standard;

(f) Sandler's 2/5/96 "memo" which indicates issue ads may be "over the line";

(g) The inappropriateness of closing down a matter of this significance on the subjective statements, volunteered records, personal certifications and quasi-regulatory review of records and unsworn testimony.

CONCLUSION

The Radek-Vicinanzo memo's statement that this is the most "compelling" case for an advice of counsel defense is a self-serving exaggeration. Conversely, given the gravity of the Attorney General's political conflict of interest--as well as the DOJ's and her principal advisors--I cannot imagine a more compelling matter for the appointment of an Independent Counsel. We now need to review both the purpose and the need for a continuing TF.

1 - Mr. Bryant
1 - Mr. Pickard
1 - Mr. Gallagher
1 - Mr. R. Bucknam

LJF:wss (6)

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

December 14, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General

FROM: [redacted]
Deputy Chief
Public Integrity Section

attorney name

[redacted]
Trial Attorney
Public Integrity Section

SUBJECT: Review of Harold Ickes's Congressional Testimony about White House Constituent Courting Activities

During internal discussions about the pending Independent Counsel Act preliminary investigation involving Harold Ickes and the Diamond Walnut matter, questions were raised about whether Ickes's lack of recollection about the Kantor call was possibly part of broader effort to conceal White House constituent and contributor courting activity, particular when it involved the Teamsters or other labor unions. At the suggestion of Robert S. Litt, Principal Associate Deputy Attorney General, we have conducted a comprehensive review of Ickes's 30 hours of deposition and hearing testimony before the Senate Governmental Affairs Committee. As detailed below, our review revealed no evidence of any pattern by Ickes to conceal White House constituent courting. To the contrary, Ickes's testimony about such activity was frequently expansive and taken as a whole suggests that his failure to recall the Kantor call was not part of a general pattern to conceal labor and constituent courting efforts by Ickes or others.

White House Perks Generally. In the course of four days of testimony, Ickes repeatedly provided -- and in some cases volunteered -- testimony about constituent and union courting activity by the White House, which included facilitating access to high-level officials and checking on the status of pending

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matters, as well as providing special perks, like invitations to White House coffees with the President.[1] The specific constituent perks discussed by Ickes included:

- White House coffees with the President;
- Travel on Air Force One and Two;
- Attendance at the President's weekly radio address;
- Jogging with the President;
- Overnight stays at the White House; and
- Use of White House tennis courts.

Ickes testified that he was not aware of any specific perk being offered in exchange for a specific contribution, but he acknowledged, on several occasions during his testimony, that these perks were intended in a general way to reward important supporters. For instance, when asked if the Democratic National Committee urged the White House to use perks to assist in raising funds, he responded, "There is always -- there was on occasion discussion about using or having contributors invited to the White House, as well as having non-contributors invited to the White House. I mean, the Presidency is obviously a political institution, as well as a constitutional institution, and it is not unknown for Presidents and their staffs to be concerned about the care and feeding, if you will, of political supporters, both financial and otherwise . . . ." Senate Committee Deposition, 6/27/97, at 59.

Labor Union Perks/Special Treatment Generally. With respect to organized labor, Ickes testified at length not only about perks, but also about the special access and treatment labor officials received from the White House with respect to their substantive concerns. Indeed, Ickes often answered questions by volunteering considerably more information than the question called for. For example, during his September 22, 1997, deposition, shortly before the questioning about Diamond Walnut, the following colloquies occurred:

Q: Do you recall having any meetings or discussions with Jennifer O'Connor about what the White House or in particular you and she should be doing for the labor community?

A: Yes. There were, I think I may have testified before, there were a lot of constituency groups that dealt with the White House on a whole range of issues from welfare to labor to the economy, et cetera.

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[1] Ickes provided deposition testimony on June 26-27, 1997, and September 22, 1997. On October 7 and 8, 1997, he appeared in a public hearing before the full Committee, although he only answered questions on October 8th.

Labor was one of those many, many constituencies.

I, because of my prior background and because of the fact that I knew a number of the members of the leading -- some of the leading labor people, it was an area that I had, one, particular interest in but, two, that I dealt with within the White House. And as such, Jennifer was the person on my staff, limited staff, who basically did a lot of the so-called "leg work" with respect to labor, and primarily labor issues, substantive issues, but other matters as well.

Senate Dep. 9/22/97, at 110-111.

Ickes also volunteered information about specific labor issues that he handled:

Q: Could you give me an example when you describe like a sticky situation, one concerning the labor community that would have come to your attention?

[Objection by White House counsel that the questioning seeks general information about the Administration's relationship with organized labor and is irrelevant to campaign financing issues]

Q: Would you consider the Davis-Bacon to be one of the sticky issues?

A: Well, again, I don't want to over-emphasize the word "sticky." Davis-Bacon was an issue that certain labor leaders were very concerned about. The strike replacement, which ended up being an executive order promulgated by the President, was another one that they were very concerned about. The budget in general was an issue that the labor community, to use an over-used work, was very concerned about, and how the President was dealing on that. And, as I say, they were only one of many, many groups that had interest in a lot of these issues.

But, certainly, to come back to the short answer to your question, Davis-Bacon, I wouldn't say it was a sticky issue. It was an issue that they were particularly concerned about, and it did wander its way into the Chief of Staff's office, and I had several discussions with various labor leaders about the President's position on Davis-Bacon.

Senate Dep. 9/22/97, at 112-114.

Diamond Walnut General Questioning. Ickes continued to answer questions expansively when the questioning turned to the Teamsters and Diamond Walnut. For example, in response to an open ended question about his relationship with Ron Carey, Ickes volunteered that he had several White House meetings with Carey and described some of the specific substantive labor issues discussed:

Q: And did you, after you met him in passing, did you develop any type of relationship with Mr. Carey?

A: Not until I came to the White House. When I came to the White House in 1994, I had several meetings with him, not many but several. And basically they were -- as I recall, virtually all if not all of the meetings were at the White House. And they were focused, to the best of my recollection, on a series of so-called substantive issues that the Teamsters and the other members of the Transportation Department of the AFL-CIO were interested in, ranging from, much to my surprise, the AMTRAK to Section 13(c) to the reorganization of the Interstate Commerce Commission.

Q: Do you recall if in any --

A: Striker replacement. I mean, he had a whole, you know -- but those were some of the issues that he was fussing about.

Senate Dep. 9/22/97, at 127-128.

Q: Do you recall if in any of your meetings with Mr. Carey the Diamond Walnut strike was discussed?

A: I'm not sure in a meeting with Carey. Maybe, but [the Diamond Walnut strike and the Pony Express matter] were two-well known, notorious issues that the Teamsters were fussing about, and I think that I may have discussed it. I'm just trying to think. I know I discussed the Diamond Walnut strike with Hamilton. I don't know whether I discussed it with Carey or not.

Senate Dep. 9/22/97, at 128.

Q: Did you discuss the Sun Diamond Growers with Jennifer O'Connor?

A: I -- is -- well, I don't know -- is Sun Diamond the

same as Diamond Walnut? That's the question I have in my mind. I know that I discussed Diamond Walnut with Jennifer. Sun Diamond -- if Sun Diamond is the same as Diamond Walnut, then the answer is clear, yes, given what I've just said; if it's different, I don't know. And the answer is I don't know whether they are one and the same or whether they aren't.

Senate Dep. 9/22/97, at 133. Ickes also testified that he "probably" was involved in setting up a meeting or meetings between Carey and the President, but that he had "no idea" when the meetings would have occurred. Senate Dep. 9/22/97, at 130.

Other Teamster Issues. In connection with another issue of concern to the Teamsters -- the union's opposition to a legislative provision requiring FedEx workers to organize nationally rather than locally -- Ickes made no secret of his practice of making status inquiries on behalf of the Teamsters:

Q: Do you recall if the Federal Aviation Reauthorization Act and the FedEx provision is a labor issue that your office was handling?

A: Well, when you say "handling," I don't know if we were "handling" it --

Q: Were you involved?

A: It was obviously -- assuming that this letter [from Ron Carey to Clinton] was sent and it was received, it was -- I do recall there being a fuss by some of the unions about FedEx, and maybe it was the Teamsters that was one of the unions, but I couldn't tell you the details of this.

Q: Do you recall if you took any action because of the "fuss" by the unions?

A: Typically, Ms. Hickey, when somebody raised something, brought something to my attention, in the White House, as Deputy Chief of Staff, I had an obligation to follow up on it, at least to make an inquiry as to what the status was, so I may well have done that -- or Jennifer -- Jennifer may have done this -- this may have gone directly to Jennifer, and I never saw it.[2]

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[2] Despite the Teamsters' strong opposition to the FedEx provision, President Clinton declined -- shortly before the 1996 election -- to veto the Federal Aviation Reauthorization Act of 1996, which was the legislation that contained the provision.

Senate Dep. 9/22/97, at 161.

Similarly, during his public testimony before the full Committee, when Ickes was asked if he intervened on behalf of the Teamsters with the Department of Labor in connection with an issue involving the Pony Express company, he responded, "Well, again, I don't know what you mean by intervene. I don't recall having any discussions with the Department of Labor. I may well have, to find out the status. I don't think I did." Senate Hearing 10/8/1997, at 135-136.

The United Brotherhood of Carpenters. Ickes also testified in considerable detail about other labor unions who were actively courted by the Administration. When asked if Sig Lucassen, the head of the Carpenters' Union, was ever invited to travel with the President, Ickes answered that he was and then went on to volunteer information about the circumstances under which guests would often be invited:

Q: Do you recall if Mr. Lucassen was ever invited [to travel with the President]?

A: As I recall, he was. I don't know whether he accepted.

Q: Do you recall what trip he was invited to go on?

A: No, I have no idea. We would invited people from time to time to fly with the President, often to events that the guests were either participating in or speaking at or something like that, or coming back from such events.

Senate Dep. 9/22/97, at 198.

He also acknowledged talking to the Carpenters union about substantive issues:

Q: Did you -- did Sig Lucassen or Robin Gerber [the union's political director] ever talk to you about the Administration opposing the repeal of Davis-Bacon?

A: I think many labor leaders did. I don't know whether Lucassen himself did. Robin Gerber undoubtedly did, but this was something that organized labor felt very strongly about, Davis-Bacon.

Senate Dep. 9/22/97, at 199.

The American Federation of State County and Municipal Workers. With respect to the American Federation of State County and Municipal Workers, Ickes acknowledged personal involvement in getting the union involved in DNC activities. He was asked:

Q: Did you encourage Mr. Cowan [an AFSCME official] to get involved in early stages of the campaign?

A: I encouraged Mr. Cowan to get involved in matters dealing with the DNC as well as coordinated campaign, and they had always been a major supported of both the DNC and the coordinated campaigns.

Senate Dep. 9/22/97, at 200-201.

The Communication Workers of America. With respect to the Communication Workers of America, Ickes again acknowledged that White House perks were used to "schmooze" a union and volunteered details that went beyond what was strictly called for by the question:

Q: Do you recall if Morty Bahr [head of the CWA] was invited to travel on Air Force One?

A: I think he was and I think he did.

Q: And do you have any recollection if he was invited to any dinners at the White house or special events?

A: I don't have any -- I don't have specific recollections of any particular events, but I would be surprised if he had not been.

Senate Dep. 9/22/97, at 202.

Q: And do you know if the meeting with the President and Morty Bahr actually took place?

A: I think the meeting did. In fact, Mr. Bahr had more than one meeting with the President over the course of my three years -- or three and-a-half or four, however many it was, at the White House. He was a very strong supporter, financial and political, and also he had a number of issues that were of concern to him.

Senate Dep. 9/22/97, at 204.

The Steelworkers. Ickes was questioned about a memo to him from a labor consultant requesting that Ickes arrange a meeting for Steelworkers president George Becker with President Clinton, and again he responded by volunteering more than the question called for:

Q: And to your knowledge, was a meeting arranged between the President and George Becker?

A: I don't know whether it was the result of this memo. I do know that the President met with Becker. I don't know whether he met with him one-on-one or whether he met with him with a small group of labor leaders.

I just -- I just don't recall, but again Becker is in that tier of international union presidents that would meet with the President from time to time.

Senate Dep. 9/22/97, at 207.

The American Federation of Government Employees. Ickes was shown a memorandum requesting that he set up meetings for AFGE president John Sturdivant about a matter involving the Immigration and Naturalization Service. Although unsure about the specifics, Ickes acknowledged his likely personal involvement in arranging meetings for Sturdivant on a substantive labor issue:

Q: Do you recall if you took any action regarding Mr. Sturdivant having an opportunity to talk with Leon Panetta?

A: Mr. Sturdivant was a very effective and very persistent labor leader of the American Federal of Government Employees and he was not bashful. I think I met with him myself on several occasions. He may have met with Leon from time to time, but I think very infrequently and I don't know what the result of this particular request was.

Senate Dep. 9/22/97, at 212.

Q: Do you recall if you contacted Ms. [Meissner, Commissioner of the INS] regarding a meeting with Mr. Sturdivant?

. . . I don't know whether I contacted the Commissioner directly or her chief of staff or whether somebody in my office

did, but as I recall, contact was made and I think that Mr. Sturdivant had his meeting. But that's my best recollection of it.

Q: Why did you set up this meeting with Mr. Sturdivant and Ms. Meissmer [sic]?

A: He asked for it and Leon agreed it would be a good idea and he represented -- my understanding was that Mr. Sturdivant represented, or may he wanted to represent, but I think he represented employees that were involved in her agency, and he had some concerns that he wanted to talk to her about.

Senate Dep. 9/22/97, at 214.

Hudson Casino Matter. When questioned about whether he discussed the Hudson casino matter with DNC Chairman Don Fowler, Ickes acknowledged remembering a one-on-one conversation: "I recall having one discussion. I think it was a telephone discussion with Don Fowler. . . in which he raised the issue. I told him I would check on it, and I think I had Ms. O'Connor check on it, on the status of it." Senate Hearing 10/8/97, at 46-47.

No Pattern of Concealment. It has been suggested that although there was nothing improper about the Kantor call per se, Ickes may have nevertheless had a motive to conceal it to cover up a general pattern special White House treatment of important contributors and constituents, such as labor unions. We found no support for such a theory in our review of Ickes's congressional deposition and hearing testimony. Rather, we found numerous examples of Ickes acknowledging and often volunteering information about special access, treatment and perks, which were routinely made available to politically important constituents, including labor unions, and specifically the Teamsters. There was no indication that Ickes was, as a general matter, trying to evade questioning about his involvement in constituent-courting activity.

To be sure, there were also multiple instances during his lengthy testimony where Ickes did not recall specific discussions, meetings or issues. But these lapses in memory were not, in our experience, inconsistent with the nature and extent of recollection commonly seen in testimony about events that occurred one, two or more years earlier, especially when the testimony is as extensive and broad-ranging as it was here.

Overall, Ickes was clear and straightforward in describing the political nature of certain aspects of the White House. With respect to his activities to keep labor unions happy, Ickes did not mince words. He was, more often than not, direct

and expansive about what was done and why. In sum, the overall pattern of Ickes's testimony -- especially in light of his volunteered statements about Diamond Walnut, the Teamsters, and his efforts to "schmooze" other labor unions -- strongly confirms, in our view, that Ickes had no motive or intent to hide the Kantor call from congressional investigators.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

December 14, 1998

MEMORANDUM TO THE ATTORNEY GENERAL

Through: THE DEPUTY ATTORNEY GENERAL

From: James K. Robinson
Assistant Attorney General - Criminal Division

Re: Preliminary Investigation of Harold Ickes

Attached hereto is a memo to me from Principal Deputy Chief Joseph E. Gangloff of the Public Integrity Section which contains additional information concerning the preliminary independent counsel investigation of Harold Ickes. This additional information was requested by the Attorney General. Mr. Gangloff, based upon his review of the supplemental factual and legal analysis summarized in his memo, recommends that "the preliminary investigation of Mr. Ickes' alleged perjury should be closed without the appointment of Independent Counsel." This recommendation provides additional factual and legal support for my November 23, 1998, recommendation to the Attorney General not to seek an Independent Counsel. In my view, the Attorney General should determine, based upon a careful review of the facts and the law, pursuant to 29 U.S.C. § 592(b), "that there are no reasonable grounds to believe that further investigation is warranted" with respect to the possibility that Mr. Ickes committed knowing and willful perjury during his September 22, 1997, deposition.

Enclosures

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

December 14, 1998

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General

FROM: Joseph E. Gangloff
Principal Deputy
Public Integrity Section

SUBJECT: Additional Information Concerning Preliminary Investigation of Harold M. Ickes

This memorandum and its attachments provide supplemental information in connection with the pending Independent Counsel Act preliminary investigation of a perjury allegation against Harold M. Ickes.[1]

On November 30, 1998, the Attorney General obtained a 60-day extension of the preliminary investigation of Ickes in order to consider the potential significance of new information provided by Independent Counsel Carol Elder Bruce, which Bruce had uncovered in the course of investigating a perjury allegation against Interior Secretary Bruce Babbitt. In addition, during discussions with the Attorney General on November 30, 1998, questions were raised about: (1) whether Ickes's congressional testimony suggested a pattern of attempting to conceal instances in which Ickes and the White House sought to assist important constituents or contributors, including labor unions; (2) whether other matters that have been investigated by the Campaign Financing Task Force indicate a pattern of conduct by Ickes that might provide a motive to

[1] Lee J. Radek, Chief, Public Integrity Section, has been recused from this matter.

conceal the Kantor call; (3) the status and significance of former Teamsters official Bill Hamilton's unwillingness to provide an interview or proffer; and (4) whether the questioning of Ickes was so fundamentally ambiguous that criminal prosecution would be precluded as a matter of law. Each of these issues is addressed below and in the attached materials.

In addition, after the November 30th extension, we offered Ickes's principal counsel, Robert S. Bennett and Amy Sabrin, of Skadden, Arps, an opportunity to make a supplemental submission and specifically suggested that they address the issue of whether Ickes's other congressional testimony evidenced an intent or motive to conceal Administration efforts to court important contributors and constituents. Their submission, dated December 10, 1998, argues: (1) that Ickes's other testimony shows that he had no motive to lie about White House contacts with organized labor or other constituents; (2) that "all witnesses confirm that the underlying events were not especially memorable;" (3) that "there is no reasonable prospect that the facts could support a successful prosecution;" and (4) that "there is no conflict justifying the exercise of the Attorney General's Discretionary Authority." The Skadden, Arps supplemental submission is Attachment A hereto.

Information from Carol Bruce. Attachment B hereto is a Memorandum dated December 8, 1998, from [redacted] Trial Attorney, Public Integrity Section, and [redacted] Trial Attorney, Campaign Financing Task Force, to me and David A. Vicinanzo, Supervising Attorney, Campaign Financing Task Force, summarizing [redacted] December 2, 1998, meeting with prosecutors from Bruce's office about information they had uncovered about Ickes. The memorandum concludes that none of the evidence gathered by Bruce about the Hudson casino matter or any of the other three matters discussed in her November 24, 1998, draft letter provides any support for the theory that Ickes had a motive to lie about Diamond Walnut. Nor did Bruce's office have any information suggesting that Ickes had attempted to conceal his role in attempting to assist important contributors or constituents by arranging meetings or checking on the status of matters pending within executive branch departments or agencies. To the contrary, with respect to the Hudson casino matter, Ickes acknowledged in congressional testimony that he had talked to Fowler about the casino application and recalled that he asked Jennifer O'Connor to follow-up with the Interior Department to determine the status of the matter.

attorney names

Testimony by Ickes about Constituent and Labor Courting Matters. The Skadden, Arps submission highlights a number of instances in which Ickes provided congressional testimony about special favors that he and others within the White House

provided for important constituents and contributors. We have verified the accuracy of the excerpts they quoted. Moreover, as detailed in the attached memorandum dated December 14, 1998, from [redacted] Deputy Chief, Public Integrity Section and [redacted] to you (see Attachment C hereto), our independent review of Ickes's 30 hours of congressional testimony confirms the basic claim made by Skadden, Arps, that Ickes repeatedly provided -- and in some cases volunteered -- testimony about constituent and union courting activity by the White House, which included not only special perks, but also facilitating access to high-level officials and checking on the status of pending matters. Accordingly, in my view, the totality of Ickes's testimony strongly suggests that he had no motive and no intent to conceal information about the Kantor call from the Senate Committee.

Information about Ickes Uncovered by the Campaign Financing Task Force. Attachment D is a memorandum from David A. Vicinanzo, Supervising Attorney, Campaign Financing Task Force, to Assistant Attorney General James Robinson, which concludes that although Ickes was a central figure in many aspects of the 1996 DNC and Clinton/Gore campaigns, the Task Force is unaware of any information indicating a general pattern of illegal or improper conduct by Ickes that might reasonably suggest a motive for Ickes to feign a diminished recollection about the Diamond Walnut matter generally, or the Kantor call specifically.

Status of Bill Hamilton. Teamsters political director Bill Hamilton was the only witness of any potential significance who did not provided us an interview or a proffer. Hamilton is currently under indictment in the Southern District of New York for perjury and other charges in connection with the Teamsters contribution swap investigation. Hamilton's attorney, Robert Gage -- who does not seem to be familiar with the unique dynamics of a preliminary investigation under the Independent Counsel Act -- has refused to provide us a proffer and has expressed concern that if Hamilton's proffer did not "say what the Justice Department wants it to say" we might seek to charge him with false statements or obstruction of justice.

According to Assistant U.S. Attorney Michael Horowitz from the Southern District of New York, Gage has recently proposed that Hamilton would be willing to provide a proffer that would include exculpatory information about Ickes's involvement in the Diamond Walnut issue in exchange for a downward sentencing departure under § 5K1.1 of the U.S. Sentencing Guidelines (departure for providing substantial assistance to law enforcement). We have told Horowitz that he should not promise Hamilton any sentencing concessions in exchange for information relating to Ickes and Diamond Walnut, but if the USAO and Hamilton were to reach a cooperation agreement based on his

substantial assistance relating to other matters, we would be interested in hearing what Hamilton has to say about Diamond Walnut and Ickes. The latest word from Horowitz is that negotiations with Hamilton have stalled.

For the reasons set forth in the original Radek/Vicinanzo Memorandum, I believe there is no need to wait for a possible Hamilton proffer before resolving the preliminary investigation. It seems unlikely, even if Hamilton were inclined to provide a statement, that he would be able to provide any credible evidence that would add to what we already know about the potential falsity of Ickes's professed inability to recall. The Southern District of New York has allowed us to review the contents of Hamilton's personal computer, which was searched during their investigation. We have also received by subpoena from the Teamsters and Podesta Associates all documents in their files relating to Diamond Walnut, including any documents evidencing contact with the White House or Ickes on the issue. The information in these contemporaneous documents makes clear what other Teamster officials and the Teamsters lobbyists have corroborated, i.e., that Diamond Walnut was an important issue to the Teamsters and one that they discussed on several occasions with Ickes and his staff. There is no reason to believe that Hamilton -- who presumably would be a bit gun-shy about possibly being charged with additional lies -- would say anything inconsistent with his own contemporaneous documentation or with the consensus recollection of his colleagues.

I do not believe that Hamilton's current unwillingness to give his reportedly "exculpatory" proffer about Ickes warrants delaying a decision to close the preliminary investigation without appointment of an independent counsel. If, however, the Attorney General were inclined to seek appointment of an independent counsel -- either because we have not heard from Hamilton or for other reasons -- it would make sense to wait to see if Hamilton's potentially exculpatory information might make a difference.

Appellate Analysis of Legal Ambiguity Issue. Attachment E hereto is a Memorandum dated December 2, 1998, from Patty M. Stemler, Chief, Appellate Section, Criminal Division and [redacted] Attorney, Appellate Section, Criminal Division, to Robert S. Litt, Principal Associate Deputy Attorney General. The memorandum analyzes whether the questions posed to Ickes were so "fundamentally ambiguous" as to preclude prosecution as a matter of law. The Stemler/[redacted] memorandum concludes that there is "a good chance" that a court would dismiss a perjury indictment (or grant a Rule 29 motion) in this case as a matter of law based solely on the ambiguity of the question.

CONCLUSION

In my view, the supplemental factual and legal analyses summarized above further confirm that the preliminary investigation of Ickes's alleged perjury should be closed without the appointment of an independent counsel. Ickes's congressional testimony is replete with instances in which he provided -- and on multiple occasions volunteered -- information about situations in which he and the White House courted the Teamsters, other labor unions, and other important donors and constituents with perks, special access, and status calls. To the extent that Ickes's other testimony sheds light on Ickes's motive and intent to lie about Diamond Walnut it strongly suggests that he had no motive or intent to conceal. Nor is there anything in the information uncovered by the Campaign Financing Task Force or the Office of Independent Counsel Bruce that suggests that the Kantor call to Diamond Walnut was anything more than an innocuous and inconsequential attempt to mollify the Teamsters, i.e., there is no reason to believe that the Kantor call was part of larger pattern of illegal or improper conduct by Ickes or the Administration.

Finally, the Appellate Section memorandum convincingly explains why the questions posed to Ickes were so vague and ambiguous that it is likely that a court would dismiss a potential perjury charge as a matter of law. It should be noted that the Appellate Section's analysis does not even reach the factual issue of whether Ickes's characterization of his lack of recollection was actually true. The futility of attempting to prosecute Ickes's alleged perjury is even clearer when the legally defective questioning is combined with the following facts: (1) the underlying conduct -- the Kantor call -- was not illegal, improper, or even politically embarrassing (as evidenced by the fact that the Administration had previously intervened in the strike in a very public way); (2) Ickes repeatedly volunteered information about the Diamond Walnut issue, the Teamsters, labor unions, and important constituents generally; (3) all the other witnesses involved in the Kantor call describe it as an inconsequential, routine matter, i.e., not a matter Ickes would likely have remembered two and a half years later; (4) Ickes had no reason in advance of the deposition to anticipate questioning about Diamond Walnut; and (5) the Administration steadfastly refused to do what the Teamsters really wanted, which was to alter substantive trade, agricultural, and environmental policy for the purpose of pressuring Diamond Walnut.

Applying the Independent Counsel Act standard as articulated in the recent filing relating to Vice President Gore, I recommend that the Attorney General conclude here "that there is no reasonable prospect that these facts could support a successful prosecution" (see In re Albert Gore, Jr.,

Notification of Results of Preliminary Investigation, 11/24/98, at 18).

Attachments

TABA

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

EXHIBIT 61

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Allegations Relating to Harold Ickes

PURPOSE: To recommend against invoking the discretionary clause of the Independent Counsel Act and conducting a preliminary investigation.

TIMETABLE: None

SYNOPSIS: The Criminal Division recommends that the Attorney General not invoke the discretionary clause of the Independent Counsel Act and conduct a preliminary investigation. As discussed in the attached memorandum at Tab A, we do not believe that an appropriate legal theory exists on which to premise a prosecution. Moreover, we do not believe that under these factual circumstances the invocation of the discretionary clause is warranted.

DISCUSSION: At Tab A is a memorandum to me from the Public Integrity Section and the Campaign Financing Task Force recommending that no preliminary investigation under the Independent Counsel Act be conducted of allegations from John Huang that Harold Ickes requested that he raise funds on behalf of congressional candidate Jesse Jackson, Jr., in potential violation of the Hatch Act.

The memorandum concludes that even taking the facts in their worst possible light, there is not a legal theory on which a potential

Attorney names

JKR:MMR:LJR [redacted] DAV [redacted] tdc
Typed: 03/29/99 Retyped: 04/01/99
Records Section Chron.
[redacted]

prosecution could appropriately be based. I concur in the reasoning of that memorandum, and add my strong views that in any event this matter would not warrant invocation of the discretionary clause of the Independent Counsel Act.

RECOMMENDATION: I recommend that you determine that these allegations do not warrant the invocation of the discretionary clause of the Independent Counsel Act.

Attachments (2)

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Allegations Relating to Harold Ickes

PURPOSE: To recommend against invoking the discretionary clause of the Independent Counsel Act and conducting a preliminary investigation.

TIMETABLE: None

SYNOPSIS: The Criminal Division recommends that the Attorney General not invoke the discretionary clause of the Independent Counsel Act and conduct a preliminary investigation. As discussed in the attached memorandum at Tab A, we do not believe that an appropriate legal theory exists on which to premise a prosecution. Moreover, we do not believe that under these factual circumstances the invocation of the discretionary clause is warranted.

DISCUSSION: At Tab A is a memorandum to me from the Public Integrity Section and the Campaign Financing Task Force recommending that no preliminary investigation under the Independent Counsel Act be conducted of allegations from John Huang that Harold Ickes requested that he raise funds on behalf of congressional candidate Jesse Jackson, Jr., in potential violation of the Hatch Act.

The memorandum concludes that even taking the facts in their worst possible light, there is not a legal theory on which a potential prosecution could appropriately be based. I concur in the reasoning of that memorandum, and add my strong views that in any event this

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matter would not warrant invocation of the discretionary clause of the Independent Counsel Act.

I am aware that the Attorney General decided to invoke the provisions of the Act recently with respect to Mr. Ickes in the context of allegations from the Senate Committee on Governmental Affairs that Ickes had been misleading in his testimony about Administration action with respect to a labor strike at Diamond Walnut Growers, Inc. We are not aware of the factors that led the Attorney General to decide that the Department would have a conflict of interest were it to investigate and, if appropriate, prosecute that matter. However, it is my understanding that factors unique to those allegations led the Attorney General to that conclusion, rather than a conclusion that it was Harold Ickes himself that created the conflict. Indeed, the Criminal Division had previously handled the investigation and declination of a matter involving allegations that Ickes, while a White House official, was receiving payoffs from a corrupt union to be "its man in the White House." Therefore, the Attorney General is free to assess the question of a potential conflict in light of the current allegations.

It is not the ordinary practice of the Criminal Division to make a recommendation with respect to whether the Attorney General should invoke the discretionary clause; we have always regarded that decision to be a personal judgment call to be made by the Attorney General alone. However, this matter arises in a slightly different context, in that the Department has taken the official public position that the Act should not be reauthorized, and that it is invoked in far too many cases. This is precisely the sort of matter where we believe the Act should not be invoked, even were Mr. Ickes a covered person.

I do not believe the Department has an inherent conflict of interest with respect to Mr. Ickes. Mr. Ickes was a high-level staffer in the White

House several years ago, but was never a covered person. He left the Administration after being passed over for a job, and according to press reports, after having a serious falling-out with the President over how he was treated. Again according to press reports, the relationship between Mr. Ickes and the President has been somewhat patched together, but he could by no means be described as a Clinton intimate or even a close friend at this point. As a result, we do not believe that Mr. Ickes' relationship with the President, in and of itself, creates a conflict of interest. Certainly, neither the Task Force nor the Public Integrity Section feels that it would have any difficulty making a credible call on matters generally involving Mr. Ickes.

Nor are these particular allegations of the sort that call into question the political future of the Administration, as were the allegations in Watergate and Iran/Contra, for example. In both those cases, the allegations were of a broad conspiracy within the Executive Branch to violate the law, and they brought into question the very legitimacy of the Administration. Even putting the worst possible light on this matter, the improper use of a single Executive branch employee to engage in political fundraising clearly does not create implications of broad corruption throughout the Administration.

Finally, the timing of this matter is a factor that can legitimately be considered. If the Congress accepts the Department's recommendation, the Independent Counsel Act will lapse in less than 90 days, the amount of time normally allotted to us to conduct a preliminary investigation and to advise the Attorney General as to whether appointment of an Independent Counsel is needed. If the Act expires, the Attorney General will have substantially more flexibility and discretion to determine whether an Independent Counsel should be appointed in a given case. It is inconceivable to me, even were Ickes now a covered person, that these factually ambiguous and legally weak allegations

would lead the Attorney General to seek appointment of an outside Special Counsel after the Act expires. Because he is not covered, she now has the discretion to decline to invoke the inflexible provisions of the Act. Any remaining inquiry that is appropriate can and will be properly handled by the Task Force, and we will report to you promptly should that inquiry lead to any additional concerns with respect to Mr. Ickes.

RECOMMENDATION: The Criminal Division recommends that the Attorney General determine that these allegations do not warrant the invocation of the discretionary clause of the Independent Counsel Act

APPROVED: _____ Concurring Components:
None

DISAPPROVE: _____ Nonconcurring Components:
None

OTHER: _____

Attachment

TAB A

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

JUN 02 1999

MEMORANDUM

TO: James K. Robinson
Assistant Attorney General
Criminal Division

FROM: Lee J. Radek
Chief
Public Integrity Section

David A. Vicinanzo
Supervising Attorney
Campaign Financing Task Force

SUBJECT: Allegation Relating to Harold Ickes

John Huang has provided information indicating that, in the Fall of 1995, then-White House Deputy Chief of Staff Harold Ickes asked Huang to "round up" contributions for the campaign of Jesse Jackson, Jr., who was running for the U.S. House of Representatives in a special election. At the time, Huang was still a political appointee in the U.S. Department of Commerce, although he was in the process of resigning and moving to a new position at the Democratic National Committee ("DNC") as a fundraiser. Notwithstanding the Hatch Act's ban on the solicitation of political contributions by federal employees, Huang admits to having solicited several people for contributions to the Jackson campaign in response to Ickes' request. At the time of his request to Huang, it is reasonable to infer that Ickes may have known that Huang was still a Commerce employee.[1]

[1] However, we have been unable to pinpoint precisely the time of Ickes' alleged request to Huang. Thus, while it is certainly possible that Ickes knew Huang was still a Commerce employee at the time of their conversation, it is equally possible that Ickes believed Huang already was at the DNC, or, at the very least, would be at the DNC in time to raise this money. According to Huang, nothing was said in the conversation with Ickes that would affirmatively indicate awareness that Huang was still a Commerce employee, as opposed to a DNC employee who could

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Accordingly, it could arguably be inferred that Ickes may have intended for Huang to violate the Hatch Act. The question thus presented is whether Ickes may have violated: (1) the federal conspiracy statute, 18 U.S.C. § 371, by requesting that Huang solicit contributions in violation of the Hatch Act; or (2) 18 U.S.C. § 607 by asking Huang, presumably while Ickes or Huang (or both) were in federal office space, to solicit others for contributions to the Jackson campaign.

Although Ickes is not a covered person under the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599, the Attorney General previously concluded that she would have a conflict of interest with respect to a criminal investigation of Ickes involving at least certain types of subject matters. Accordingly, we recognized that she may wish to treat Huang's allegation relating to Ickes as a potential Independent Counsel Act matter.[2] In this case, however, we recommend that she not do so. Furthermore, as explained below, we believe that further criminal investigation of this allegation is not warranted even under the minimal standards of the Act. The FBI has reviewed this memorandum and concurs in our recommendation.

We reach this conclusion because, as discussed in more detail below, even if Ickes intended for Huang to violate the Hatch Act's prohibition against contribution solicitations, Ickes' conduct is not prosecutable under the "defraud clause" of 18 U.S.C. § 371, and a prosecution of Ickes under the "offense clause" of section 371 would be an unwise extension of case law that itself is of dubious continuing validity. In addition, our review of the practice of the Department with respect to using the criminal conspiracy laws to address concerted civil violations leads us to conclude that proceeding criminally under the circumstances of this case would not be consistent with Departmental practices. In addition, because Ickes did not allegedly solicit any specific contributions himself, but at most asked Huang to solicit others for contributions to the Jackson campaign, Ickes cannot be prosecuted for a violation of 18 U.S.C. § 607, the Pendleton Act provision that prohibits solicitation or receipt of hard money contributions in federal office space. We therefore recommend that the Attorney General not initiate a preliminary investigation of Ickes under the Independent Counsel Act.

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legitimately engage in fundraising.

[2] Because Ickes is not a covered person under the Independent Counsel Act, the Attorney General is under no statutorily imposed timetable to decide whether or not to initiate a preliminary investigation under the Act.

Should the Attorney General decide that no further investigation is warranted, no paperwork is required. Should she conclude that some further inquiry is warranted, but that the allegation against Ickes does not create such a potential conflict of interest that the discretionary clause of the Independent Counsel Act should be utilized, the Task Force will complete the inquiry. However, should she conclude that the procedures of the Act should apply pursuant to the discretionary provisions of the Act, and that further investigation is warranted, a Notification to the Special Division is required. We will prepare the necessary paperwork should this occur.[3]

I. IS THERE SPECIFIC INFORMATION FROM A CREDIBLE SOURCE THAT HAROLD ICKES MAY HAVE VIOLATED FEDERAL CRIMINAL LAW?

A. The Information

During proffer sessions in Los Angeles and Washington, D.C., John Huang informed Task Force agents that, in the Fall of 1995, while he was employed at Commerce, Harold Ickes asked him to round up $10,000 to $15,000 in contributions for Jesse Jackson, Jr.'s campaign for the House of Representatives.[4] Huang admits that, while he was still at Commerce, he solicited contributions from several individuals in response to Ickes' request. These people included: Maeley and Ronald Tom, Arief and Soraya Wiriadinata, and Joseph Ambrose and Michael Feddersen. Huang also admits that he knew at the time that it was improper for a government employee to solicit political contributions. However, Huang does not know whether Ickes was aware of this prohibition, and nothing was said in the conversation with Ickes to indicate that he was requesting action that might be improper or contrary to the law.

As explained below, we have been able to corroborate much of Huang's specific information. In addition, the agents and

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[3] The Act does not require that this Notification be filed on the thirtieth day. Rather, the decision must be made on or before the thirtieth day, and the Notification filed promptly thereafter.

[4] Jesse Jackson, Jr. was a candidate in the special election held to fill the Illinois congressional seat vacated by Rep. Mel Reynolds. The primary election for this seat was held on November 28, 1995. The general special election occurred on December 12, 1995. Jackson won both the Democratic primary and the general election and was reelected to the House of Representatives in 1996 and 1998.

attorneys who have questioned Huang on this matter have found him to be credible.

B. Facts Developed During the Initial Inquiry[5]

From mid-1994 until early December 1995, John Huang was a political appointee in the International Trade Administration within the Commerce Department.[6] In September, 1995, Huang attended a meeting at the White House with the President and others, in which his desire to move to the DNC where he could do fundraising was discussed. Ickes was not at that meeting, but soon after, on October 2, 1995, Huang had a meeting with Ickes at the White House to discuss the move. At that time, Ickes was White House Deputy Chief of Staff. Ickes' notes from that meeting indicate that the two men discussed Huang's interest in leaving the government for a fundraising position at the DNC.[7] Ickes' notes do not reflect any discussion of Jackson, Jr.'s congressional campaign or any plans to have Huang solicit contributions for that or any other campaign. Huang confirms that the topic of fundraising for the Jackson campaign did not come up at this October 2nd meeting with Ickes.

At some point in November 1995, Huang met with DNC finance chief Marvin Rosen to discuss his potential employment at the DNC. Rosen subsequently offered him a fundraising job at the

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[5] To date, we have been unable to interview Ickes, Jesse Jackson, Jr., or Jesse Jackson, Sr. However, there are plans to interview these individuals on another matter. We do recommend that when they are interviewed on that matter, the Jacksons and Ickes be asked about this matter, so that we have a complete understanding of its context. This completion of the record would assist us in our appraisal of Huang's potential overall culpability, and would enable us to develop the fullest possible understanding of the facts.

[6] As an executive branch employee, Huang was prohibited under the Hatch Act, 5 U.S.C. § 7323(a)(2), from "knowingly solicit[ing], accept[ing], or receiv[ing] a political contribution from any person" for a congressional campaign. This is a civil provision, a violation of which can result in the firing of the government employee.

[7] According to Huang, he had attended a meeting in the White House on September 13, 1995, along with President Clinton, Bruce Lindsey, C. Joseph Giroir, and James Riady, at which the subject of Huang moving to the DNC was discussed. At some point between that September 13th meeting and Huang's October 2nd meeting with Ickes, Huang had a separate meeting on this topic with Lindsey.

DNC, which Huang accepted. Huang delayed leaving Commerce so that he could say an appropriate farewell to Secretary Brown, who was traveling at the time. His last day at Commerce was December 3, 1995.[8]

According to Huang, at some point in the Fall of 1995, while he was still at Commerce, Ickes called him and said words to the effect of — "Can you help out from the Asian-American community and round up $10,000 to $15,000 for Jesse Jackson, Jr.?"[9] Huang understood Ickes to be asking Huang to raise money in connection with the primary election, as opposed to the special general

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[8] It is possible that Ickes believed Huang would be leaving Commerce for the DNC well before December 3rd. Indeed, given the amount of control we know that Ickes exercised over the DNC, if Ickes decided after interviewing Huang on October 2nd that Huang should go to the DNC, then in his own mind, Ickes could have viewed Huang's move as a fait accompli. Thus, if Ickes asked Huang to round up contributions for the Jackson campaign after the October 2nd interview, Ickes may have done so believing that Huang was already at the DNC — we have no evidence that Ickes himself placed the relevant telephone call to Huang at Commerce. At the very least, Ickes may well have believed that Huang would be at the DNC in time to solicit the contributions for the primary election. Huang is quite clear that he and Ickes never discussed when Huang was to perform Ickes' request. Of course, at this point, not having interviewed Ickes, any discussion of Ickes' subjective beliefs requires us to engage in speculation. However, it also would require speculation for us to conclude that Ickes necessarily expected Huang to violate the Hatch Act if he were to comply with Ickes' alleged request.

[9] This raises another serious factual question. Although Huang believes that Ickes was requesting that Huang personally solicit others for contributions, Huang has in hindsight acknowledged that Ickes' request could have been construed otherwise. If Ickes only intended for Huang to provide to the Jackson campaign the names of fundraising prospects whom Huang believed would be willing to contribute, such conduct, unlike the direct solicitation of contributions, is legal under the Hatch Act, which now permits federal employees to participate in most forms of "political activity." See 5 U.S.C. § 7323; see also 5 C.F.R. § 734.208 ex. 9 (noting that a federal employee "may help organize a fundraiser including supplying names for the invitation list as long as he or she does not personally solicit, accept, or receive contributions"). The fact that Ickes' language, as recalled by Huang, can reasonably be construed as requesting that Huang engage in permissible activity is another reason why further investigation of Huang's allegation is unwarranted.

to the Jackson campaign himself, but only asked him to "round up" $10,000 to $15,000. Huang states that neither he nor Ickes mentioned any legal concerns with regard to Ickes' request and that at no time was there an explicit or implicit agreement that Huang should conceal his activity because of Hatch Act concerns. According to Huang, he responded to Ickes that he would help the Jackson campaign. So far, Huang has been unable to identify with any precision the date of this telephone conversation with Ickes.[10]

Huang has told us that, in keeping with his response to Ickes' request, Huang asked several people to make contributions to the Jackson campaign, including Maeley and Ronald Tom of the Sacramento area; Arief and Soraya Wiriadinata, both of whom were legal permanent residents of the United States living in Springfield, Virginia; and Joseph Ambrose and Michael Feddersen, the principals of an architecture firm in Southern California. According to Huang, he and his wife also each made contributions to the Jackson campaign around the same time that Huang was soliciting others for contributions to Jackson. According to Huang, he received contribution checks from the Toms, the Wiriadinatas, and from Ambrose and Feddersen, bundled them together with the contributions from him and his wife, and hand delivered all the checks to Jackson's campaign headquarters in Northwest Washington, D.C. Huang recalls that he delivered the checks to the Jackson campaign in late November 1995, after he returned to Washington from a few days in Las Vegas.[11]

FEC records confirm that the six individuals identified by Huang, as well as Huang and his wife, were credited with making contributions to the Jackson campaign as of November 29 or November 30, 1995. Bank records as well as records provided by the Jackson campaign reflect that Huang and his wife each made $500 contributions to the Jackson campaign on checks dated November 20, 1995. These records also reflect that: Arief and Soraya Wiriadinata each provided $1,000 contributions to the Jackson campaign on checks dated November 20, 1995; Maeley and Ronald Tom each provided $1,000 contribution checks to the

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[10] However, it seems clear that Huang's conversation with Ickes occurred before November 15, 1995, which is the earliest date of any contribution checks to the Jackson campaign from individuals whom Huang solicited. Huang's Commerce telephone message pad reflects that Ickes attempted to reach him on October 23, 1995, and left a White House number where he could be reached. Huang does not know whether this phone message was related to Ickes' request concerning the Jackson campaign.

[11] As noted below, Huang's charge card records reflect that he stayed at a Las Vegas resort from November 21, 1995, through November 23, 1995.

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Jackson campaign on checks dated November 15, 1995; and Joseph Ambrose and Michael Feddersen each provided $1,000 checks to the Jackson campaign on checks dated November 16, 1995.

Telephone records reflect fourteen calls in October and November of 1995 from telephones to which Huang had access to telephone numbers associated with Maeley Tom. We also know that Arief Wiriadinata and Huang also were in relatively frequent contact.[12] According to Huang, he had several telephone conversations with both Tom and Wiriadinata in the Fall of 1995, most of which would have had nothing to do with contributions to the Jackson campaign.

Telephone records reflect one call made from a telephone to which Huang had access[13] to Ambrose, which occurred on November 16, 1995.[14] An architect who has built several homes for James Riady, Ambrose recalls meeting Huang through Riady, and remembers that Huang subsequently called him once or twice. According to Ambrose, during one of these telephone conversations, Huang asked him whether he was supporting certain candidates. Ambrose recalls discussing his support of Jesse Jackson, Jr. with Huang. Ambrose also recalls making a contribution to Jackson, Jr.'s campaign. However, Ambrose does not feel that Huang solicited him to make this contribution to the Jackson campaign. According to Ambrose, nobody reimbursed his contribution to the Jackson campaign.

It is likely that Huang's contact with Ambrose was the impetus for Ambrose's partner, Michael Feddersen, making his $1,000 contribution to the Jackson campaign. When interviewed, Feddersen could not recall whether Huang asked him to make that

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[12] Huang solicited the Wiriadinatas for more than $400,000 in contributions to the DNC between late 1995 and the 1996 elections.

[13] This call was placed from the Washington office of Stephens, Inc. Stephens is an Arkansas-based corporation that has been affiliated with the Lippo Group, the Indonesian conglomerate owned by the Riady family and for which Huang used to work. According to Huang, he often walked across the street from Commerce to the Stephens office to make telephone calls that were not related to U.S. government business.

[14] Telephone records also reflect a call from Huang from the Stephens office to Maeley Tom one-half hour prior to the call to Ambrose. Huang believes that this call to Tom may be related to his solicitation for the Jackson campaign.

contribution.[15] According to Feddersen, Ambrose usually would take the initiative to make political contributions, and Feddersen would also make the same contribution. According to Feddersen, he and Ambrose have the kind of relationship that if Ambrose "puts something in front of" Feddersen, Feddersen "signs it." According to Feddersen, nobody reimbursed his contribution to the Jackson campaign.

We have no knowledge of anyone other than Huang (such as his wife) being credited in Jackson campaign records as having solicited the contributions that resulted from Ickes' request.[16] Indeed, according to Huang, Jesse Jackson, Sr. indicated to Huang in the Fall of 1996 that he was aware of Huang's assistance to his son's campaign.

Huang remembers leaving a follow-up voice mail message for Ickes from Las Vegas regarding the Jackson contributions. Huang's charge card records reflect that Huang was in Las Vegas between November 21, 1995, and November 23, 1995. According to Huang, he told Ickes in that voice mail message that the "task" is "seventy to eighty percent accomplished." Huang meant that he had collected $7,000 toward his goal of at least $10,000 in contributions for the Jackson campaign.

Before turning to the legal analysis, it is worth recapitulating the factual weakness of the matter as it relates to a theory that Ickes may have violated the law by requesting that Huang raise money for the Jackson campaign. First of all, it is not clear that Ickes was requesting that Huang raise money himself, as opposed to providing names within the Asian-American community from whom funds might be raised, which would be permitted under the Hatch Act. Second, it is not clear that when the call was placed, Ickes even knew that Huang was still at Commerce, and even if Ickes had such knowledge, it remains uncertain whether Ickes intended that Huang fulfill his request in the very near future when Huang would be working at DNC. We also have no information, and nothing was said in the conversation that Huang related to us, that would establish that Ickes knew that Huang could not engage in fundraising for congressional campaigns, and proof of specific intent would be a prerequisite for a conspiracy charge. Furthermore, it is not

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[15] Huang believes that he spoke only with Ambrose about the Jackson campaign, but expected that both Ambrose and Feddersen would make contributions.

[16] In contrast, we believe that some DNC contributions that Huang raised during his tenure at Commerce may have been credited to Huang's wife to avoid consequences to Huang under the Hatch Act.

clear to us how any of these facts might be proven beyond a reasonable doubt, absent a confession from Ickes.

In addition to the weakness of the facts necessary even to establish the potential offense, it is also worth pointing out the very minor and technical nature of this alleged violation. It occurred only once — Huang is clear that Ickes made no other similar request to him while he was at Commerce. Perhaps most telling is the fact that Huang was on his way out from a political position at Commerce within, at most, a few weeks of the time he made the solicitations, and was headed to a new job as a political fundraiser. There was nothing inherently wrong about his conduct in soliciting these funds, beyond the personnel regulation prohibiting the solicitation. There is no suggestion that Huang extorted anyone, or used the prestige of his government position to try to persuade a potential donor. While clear lines of appropriate conduct certainly should have been observed, the general goal of the Hatch Act to separate partisan politics and the federal employee was not seriously undermined by Huang's conduct under the circumstances of this case, and there is nothing about the allegation that would suggest it demands criminal redress.

ANALYSIS

As noted above, notwithstanding Huang's impression, it is not clear from Ickes' words that Ickes expected Huang personally to solicit contributions to the Jackson campaign. Moreover, even if Ickes expected Huang to do so, it is quite possible that Ickes believed Huang would do so as a DNC employee, rather than as a Commerce employee. However, even if all the factual inferences are construed against Ickes, and we assume that Ickes meant for Huang to violate the Hatch Act, the question remains whether such conduct could potentially be prosecuted criminally. The two statutes that appear potentially to be implicated by Ickes' conduct are 18 U.S.C. §§ 371 and 607. However, upon analysis, we believe that neither statute can appropriately be applied to the conduct alleged.

A. 18 U.S.C. § 371

Section 371 proscribes two types of conspiracy: one to commit "any offense against the United States," and the other "to defraud the United States, or any agency thereof in any manner or for any purpose ..."

1. The "Offense" Clause

With regard to the first prong of 18 U.S.C. § 371, the question is whether Huang's civil violation of the Hatch Act, by soliciting campaign contributions in violation of 5 U.S.C.

§ 7323(a)(2), is an "offense against the United States." While there is some legal support for the viability of such a theory, for the reasons discussed below, prosecution in this instance would be contrary to established Departmental practice. Our view, consistent with that of the other litigating Divisions which deal with overlapping civil and criminal remedies, is that while there is some support for the viability of the theory that the criminal conspiracy statute can be used to prosecute concerted efforts to violate civil law, there are very strong legal and policy arguments against such a prosecution. The tenuous nature of the theory may be inferred from the fact that even though there is a Supreme Court decision directly supporting it, there have been no reported cases in which prosecution was based on the theory for more than 40 years. Therefore, any use of the theory should be reserved for seriously aggravated facts. Otherwise, the judicial hostility that has been demonstrated with respect to efforts to extend the mail fraud statute to cover similar misconduct is likely to lead to loss of the theory altogether.

The Judicial Support. A few cases have held that violations of statutes that only provide for civil penalties are "offenses" that may serve as the object of a section 371 conspiracy. The seminal case in this area is United States v. Hutto, 256 U.S. 524, 526 (1921), in which the Supreme Court addressed the question of whether a civil statute, prohibiting trading with Indians while employed in Indian affairs and providing for civil penalties for its violation, was an "offense against the United States" for purposes of the conspiracy statute. The Court held that "a conspiracy to commit any offense which by act of Congress is prohibited in the interest of the public policy of the United States, although not of itself made punishable by criminal prosecution, but only by suit for penalty, is a conspiracy to commit an `offense against the United States . . . .'" Id. at 529.

Several circuit courts followed Hutto, upholding conspiracy convictions for failure to comply with the licensing requirements of the Gold Reserve Act as well as infringement of another's patent. See Hunsaker v. United States, 279 F.2d 111, 112-13 (9th Cir.), cert. denied, 364 U.S. 819 (1960) (conspiracy to violate the licensing requirements of the Gold Reserve Act, 31 U.S.C. §§ 440-443); United States v. Wiesner, 216 F.2d 739, 741-42 (2d Cir. 1954)(conspiracy to violate licensing requirements of the Gold Reserve Act, 31 U.S.C. §§ 440-444); United States v. Winner, 33 F.2d 507, 508 (7th Cir. 1929) (per curiam) (patent infringement).

The Legal Arguments to the Contrary. We note that the most recent of these cases, Hunsaker, is almost four decades old. There are a few comments in more recent decisions suggesting that

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courts would still uphold the theory.[17] However, despite recent dicta, there is substantial reason to doubt Hutto's continued viability.

First, 18 U.S.C. § 1, like 18 U.S.C. § 371, was part of the 1948 recodification of the Criminal Code.[18] Section 1 redefined "offenses" solely in terms of misdemeanors and felonies.[19] Thus, reading the 1948 revision of the conspiracy statute in light of 18 U.S.C. § 1, it can persuasively be argued to indicate congressional intent that the word "offense" in Title 18 means "criminal offense."

Second, such an interpretation is further supported by Congress' revision of the penalty provisions of the conspiracy statute. The 1948 revision to the conspiracy statute provides lesser penalties for conspiracies to commit misdemeanor offenses. Because the statute does not include conspiracies to commit civil offenses within the misdemeanor penalty provision, the conspiracy statute, if read to include conspiracies to violate civil laws, produces the anomalous result that conspiracies to commit civil offenses are punished as felony conspiracies. Indeed, the two circuits that have addressed this issue have concluded just

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[17] See United States v. Tham, 960 F.2d 1391, 1400 (9th Cir. 1991) ("The conspiracy may have an object offense that is a violation of either criminal or civil law."); United States v. Tuohey, 867 F.2d 534, 536 (9th Cir. 1989) ("[A] civil violation of law may be an `offense' for purposes of this statute."); United States v. Cattle King Packaging Co., 793 F.2d 232, 242 (10th Cir. 1986) (citing Hunsaker approvingly).

[18] Hutto, decided in 1921, interpreted the precursor to section 371.

[19] 18 U.S.C. § 1 was repealed by the Comprehensive Crime Control Act of 1984. Section 1 was replaced by 18 U.S.C. § 3559, which lists the sentencing classification of offenses. Section 3559 delineates felonies and misdemeanors into classes as well as providing that an offense with a maximum term of imprisonment of five days or less is an infraction. The legislative history indicates that this section was enacted to aid in the imposition of sentencing. See S. Rep. No. 225, 98th Cong., 1st Sess. (1983), reprinted in 1984 U.S.C.C.A.N. 3182. There is no mention within the legislative history of using section 3559 to broaden section 1's definition of "offenses" to include statutes providing only for civil penalties. Rather, the classifications are based on terms of imprisonment. Thus, neither the statute defining offenses in 1948 nor the statute currently in force makes any mention of civil statutes in their definitions of "offenses."

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that.[20] However, other circuit courts may find persuasive the argument that Hutto did not survive the 1948 revision to the conspiracy statute in light of the definition of offenses contained in 18 U.S.C. § 1 and the conspiracy statute's revised penalty provision. Thus, were the Supreme Court to consider today the issue raised in Hutto, it is not at all clear that it would reach the same result.[21]

Moreover, applying Hutto to the civil provisions of the Hatch Act would arguably be an extension of the current law. Notably, there appear to be no reported cases upholding a conspiracy conviction to violate a statute that has no penalty provisions at all, even civil penalties. Hutto is addressed specifically to a conspiracy to violate a statute that is enforceable by a "suit for penalty," as are those cases that follow it. In contrast, two district courts have dismissed indictments where they found that a civil penalty did not attach

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[20] Confronted with the obvious anomaly that a civil offense does not fall within the misdemeanor exception and would therefore be punished the same as a conspiracy to commit a felony, the Second and Ninth Circuits continued to apply Hutto. See Wiesner, 216 F.2d at 742 ("[W]e would not be justified in giving the 1948 amendment an unnatural construction. The cure for this anomaly may well be something which the Congress will wish to consider, but the courts must take the statute as they find it."); Hunsaker 279 F.2d at 113 ("Whatever incongruity there may be in imposing a greater penalty for a conspiracy to commit an offense against the United States which is neither a felony nor a misdemeanor than would be the penalty had the offense against the United States been a misdemeanor only, is a matter for the Congress to consider. The language it used admits of no debate."); see also United States v. Barrios, 124 F. Supp. 807, 808 (S.D.N.Y. 1952) (also applying section 371 to the Gold Reserve Act despite the newly enacted misdemeanor penalty provision).

[21] The Public Integrity Section expressed this same opinion — that Hutto is of dubious continuing validity in light of section 1 and the misdemeanor penalty provision — in a 1987 memorandum from Gerald E. McDowell, Chief, Public Integrity Section, to William F. Weld, Assistant Attorney General, Criminal Division. This memorandum, entitled "Scope of 18 U.S.C. § 371 — Conspiracy to violate a non-criminal statute," responds to Assistant Attorney General Weld's request for the "black letter law" in this area. Most likely, the Criminal Division was interested in this issue because of possible Boland Amendment violations by the Reagan Administration.

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to the defendants' actions.[22] The Hatch Act does not provide for a "suit for penalty." Rather, its remedy is administrative — dismissal.[23] Thus, to apply Hutto to the civil provisions of the Hatch Act would be an additional extension of the state of the law from covering conspiracies to violate civil statutes remedied by suits for penalty to including conspiracies to violate what is in essence a codified personnel regulation.[24]

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[22] See United States v. Brown, 6 F. Supp. 331, 333 (W.D. Ky. 1933) (defendants charged with conspiracy to violate a banking law; the court found that the law was merely a codification of common-law liability, not an additional penalty; the court held that "OFFENSE as used in the conspiracy statute must have for support, in order to legally carry out its purpose, the violation or contemplated violation of a law of the United States, carrying for its violation some type of penalty"); United States v. Brown, 4 F.2d 270, 272 (W.D. Okla. 1925) (defendants were charged with conspiring to violate the Packers and Stockyards Act; the statute required that when the defendants were charged with a violation, the Secretary of Agriculture was to hold a hearing, and, when appropriate, issue a cease and desist order; a civil penalty was available only if the defendants failed to comply with that order; here, the government brought the charges before these intermediate proceedings took place; court dismissed the indictment because no penalty or liability attached to the defendants' actions; rather, only after these intermediate proceedings had occurred could the defendants' conduct potentially ripen into an offense).

[23] Removal is required unless the Merit Systems Protection Board unanimously recommends a lesser penalty in which case a minimum of thirty days' suspension must be imposed. 5 U.S.C. § 7326. There is no penalty available for violations by employees who have left government service. See Special Counsel v. Malone, 77 M.S.P.R. 477 (1998) (dismissing the Office of Special Counsel's complaint as moot because the employees had resigned and the maximum remedy available to the government was removal); see also Special Counsel v. DeMeo, 77 M.S.P.R. 158 (1997) (holding that the Hatch Act does not authorize debarment from federal government employment).

[24] For clarification, we should note that there frequently are section 371 prosecutions involving the violation of regulations; however, these prosecutions are premised on the "defraud" prong discussed below. In those cases, the defendants are not being charged with simply violating a regulation, but rather, they are being charged with defrauding the United States by attempting to circumvent the regulations. See, e.g., United States v. Bucey, 876 F.2d 1297, 1313 (7th Cir. 1989) ("Although [the defendant's] failure to file CTRs and failure to disclose

(continued...)

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Such an extension of the current law would face almost certain hostility by the courts. In a similar context, the First Circuit recently reversed a conviction for violation of 18 U.S.C. § 1346, honest services fraud. United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997). The court rejected the government's argument that the defendant's violation of IRS Rules of Conduct, forbidding unauthorized computer browsing of tax returns, was sufficient to deprive the government of the defendant's honest services. Id. at 1077. In so holding, the court noted the failure of the personnel regulation to provide any notice that its violation was punishable by more than dismissal. Id. ("[The defendant] received no indication from his employer that this workplace violation — the performance of unauthorized searches — would be punishable by anything more than dismissal."). The court averred that there was no evidence that Congress intended to employ section 1346 as a "draconian personnel regulation."[25] Id. Applying the teachings of Czubinski to the this matter,[26] courts are likely to be inclined to

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[24](...continued)
the source of currency on Form 4789 are not unlawful acts, these acts `lost their lawful character when considered as part of a scheme to intentionally deprive the government of material information it would otherwise receive. . . .' Quite apart from the underlying substantive offenses, [the defendant] is liable for agreeing with [his coconspirator] to obstruct by deceit, craft or trickery the lawful function of the Treasury in collecting accurate CTRs.") (quoting United States v. Richter, 610 F. Supp. 480, 487 (N.D. Ill. 1985)).

[25] The First Circuit goes on to say that these considerations are not conclusive — they may be outweighed by sufficient evidence of a scheme to defraud. Here, however, as discussed infra, there is absolutely no evidence of such a scheme.

[26] Notably, the Hatch Act is not the only congressional enactment that regulates the conduct of government employees. For example, under 31 U.S.C. § 1349, the penalty for willful unauthorized use of a motor vehicle is suspension or removal. Given that such unauthorized use is prohibited by an act of Congress, if a section 371 prosecution can be predicated upon a Hatch Act violation, such a prosecution presumably also could be premised upon a violation of this personnel regulation. Thus, two employees who agree to a short unauthorized jaunt would be guilty of felony conspiracy, despite the holding in United States v. Collins, 56 F.3d 1416, 1420 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 737 (1996), which would require that the employees' conduct amount to substantial interference with their duties for such conduct to constitute even a misdemeanor violation of
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scrutinize carefully the broadening of the conspiracy statute to cover not only crimes and offenses punishable by suits for penalty but also offenses punishable by, at most, dismissal.[27] We note that in the circumstances of this matter, where both Ickes and Huang have already left federal government, the remedy that Congress imposed for a violation has already been achieved. Escalating the matter to a criminal violation under these circumstances is not likely to meet with approval by the courts.

Departmental Policy. Furthermore, while this theory may be viable in the abstract, its application under these factual circumstances, in light of the complete absence of any aggravating factors,[28] is contrary to the informal policies of other Sections within the Department. We consulted two Sections within the Environment and Natural Resources Division[29] that routinely deal with both civil and criminal statutes, and both Sections expressed the view that such a theory should and would

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[26](...continued)
18 U.S.C. § 641.

[27] Indeed, courts have recently sought to reign in the broad reach of section 371. See, e.g., United States v. Licciardi, 30 F.3d 1127, 1133 (9th Cir. 1994) (refusing to endorse the government's theory, under the defraud prong of section 371, where "[i]n the instant case . . . a regulatory scheme, which does not have criminal penalties attached to it, has been converted by the government's theory into a system whose violation by commercial cheating is subject to the severe felony penalties of the conspiracy law").

[28] Here, there is no indication of any deceitful or dishonest conduct by Huang or Ickes. We have no evidence whatsoever that Ickes requested that Huang covertly violate the Hatch Act, nor is there any indication that Huang in any way attempted to hide his involvement in the solicitation of these contributions. In fact, it apparently became known to Jesse Jackson, Sr. that Huang had assisted in his son's campaign. Thus, all the facts reveal is that Ickes requested that Huang engage in an activity for which Huang could have been fired. In addition, it should not be overlooked that Huang's solicitations occurred shortly before he left his government job.

[29] We also consulted the Consumer Litigation Section of the Civil Division. While they could not think of a case where they charged a civil offense as the object of a criminal conspiracy, they noted that it was unlikely that such a circumstance would arise because under most of the laws with which they deal, a civil offense also constitutes a misdemeanor.

be applied in only the most egregious cases.[30] The Environmental Crimes Section related that any determination of whether to bring such a charge is made on a case by case basis, and such a case would only be brought where the facts were fairly compelling. They noted that given the massive civil enforcement scheme in place, they would reserve criminal charges for the most egregious factual circumstances. Likewise, the Wildlife and Marine Resources Section stated that they had determined that such a charge should only be brought under compelling circumstances. Thus, other Sections within the Department of Justice would reserve these charges for the most egregious factual circumstances -- the mere violation of a civil regulation by two people is not sufficient for them to bring a conspiracy charge.[31] Moreover, they are careful not to disrupt statutory enforcement schemes that are presently in place.[32]

The Office of Legal Counsel has also considered this issue in the context of charging civil violations of the Shipping Act of 1916 and its amendments as the objects of section 371 conspiracies. 2 U.S. Op. Off. Legal Counsel 5 (1978). OLC noted that "often" a violation of the Act would involve concerted action, and therefore, to avoid a potential violation of Wharton's Rule, they recommended that "a distinction be drawn between what might be called `ordinary' violations of § 16 . . .

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[30] Recently both Sections had considered the bringing of such a charge, determined that such a charge is cognizable, but decided to reserve the charge for egregious factual circumstances. Neither Section could recollect having ever brought such a charge.

[31] Indeed, it should be noted that even in those cases that followed Hutto -- Hunsaker, Wiesner, and Winner -- the government charged not only the conspiracy to commit the civil offense but also a conspiracy to defraud. Thus, in each of those cases, the defendants had not committed a skeletal civil offense but also had engaged in deception or dishonesty.

[32] Notably, the civil provisions in the Hatch Act are part of an entire statutory scheme that does distinguish between civil and criminal offenses. Thus, one may reasonably assume that Congress determined that some conduct warrants criminal punishment and other conduct could be sufficiently redressed by dismissal. Although the concerted action involved in a conspiracy may present an additional danger to society, these particular facts evince no aggravating factors, besides the involvement of two people, that would warrant uprooting this statutory scheme. There are no allegations, for example, of fraud, deception, dishonesty, the abuse of federal authority or property, or the coercion of other federal employees for partisan political ends.

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and aggravated cases": "special care should be used in selecting cases to be prosecuted under 18 U.S.C. § 371." Id. at 11.

Thus, in keeping with the informal policies of other Sections within the Department and the advice of OLC, any criminal prosecution of a conspiracy to violate a civil regulatory scheme should be reserved for egregious cases, if pursued criminally at all. Other Sections do not prosecute civil offenses committed by two people as conspiracies unless there are compelling circumstances. Also, the Hatch Act, like those statutes handled by the Environment and Natural Resources Division, is part of a broad statutory scheme that should not be disrupted without reason. Finally, political activity, like the activity discussed by OLC, rarely occurs in a vacuum; thus, it is fair to assume that civil Hatch Act violations will "often" involve two or more people. Thus, in keeping with OLC's recommendation, a prosecution would and should not be pursued here, as a matter of policy, particularly since no aggravating factors are present.

We recognize that were Ickes a covered person, consideration of the enforcement policies of the Department would only be available as a grounds to close this matter after triggering a preliminary investigation. Given that Ickes is not covered, however, and that the restrictions and limitations of the Act do not therefore apply to our decisionmaking in this case, it is our recommendation that there is no need to jump through the procedural hoop of triggering a preliminary investigation in order to consider Departmental policies. This is a case that would not be prosecuted criminally under the established practice of the Department even if it could be proven, and it is therefore our recommendation that no further investigation is warranted.

2. The "Defraud" Clause

Section 371's "defraud" clause requires an agreement to commit a "fraud" against the United States. United States v. Tuohey, 867 F.2d 534, 536 (9th Cir. 1989). The statute does not define the term "fraud," and courts have held that, unlike common law fraud, fraud under section 371 need not involve money or property. Instead, the defraud clause "reaches `any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.'" Dennis v. United States, 384 U.S. 855, 861 (1966)(quoting Haas v. Henkel, 216 U.S. 462, 479 (1910)); see United States v. Barker Steel Co., 985 F.2d 1123, 1134 (1st Cir. 1993) (defining "defrauding the United States" as including "`any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers ...'") (quoting Curley v. United States, 130 F. 1, 11-12 (1st Cir.), cert. denied, 195 U.S. 628 (1904)); United States v. Goldsmith, 68 F.2d 5, 7 (1933) (defining "defrauding

the United States" as including impairment of "the exercise of ... governmental powers"), cert. denied, 291 U.S. 681 (1934).

However, not every agreement to impair lawful governmental functions, standing alone, violates the statute. See United States v. Haga, 821 F.2d 1036, 1045 & n.17 (5th Cir. 1987); United States v. Caldwell, 989 F.2d 1056, 1059-60 (9th Cir. 1993) (discussing example of a husband who asks his wife to buy him a radar detector). Instead, the defendant must agree "to interfere with or obstruct [a] lawful governmental function[] by deceit, craft or trickery, or at least by means that are dishonest." Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). In reversing the convictions in Hammerschmidt, the Court concluded that "deceit or trickery" was essential to satisfying the "defrauding" requirement of the statute. Id. at 187; cf. United States v. Kanchanalak, 1999 WL 55169, at *8 (D.D.C. Feb. 3, 1999) ("In order to obtain a conviction against defendants, of course, the government will have to prove each of the essential elements of a conspiracy [to defraud] beyond a reasonable doubt, including proving that the defendants used deceitful or dishonest means to obstruct the lawful reporting function of the FEC").

Huang has admitted that he violated the Hatch Act when, while still employed by Commerce, he solicited several people for contributions to the Jackson campaign in response to Ickes' request. However, even assuming that Ickes meant for Huang to violate the Hatch Act, there is no indication that Huang and/or Ickes engaged in any "deceit or trickery" with respect to these solicitations. For example, there is no evidence that Huang and Ickes decided to make it appear that Huang's wife was the solicitor of these contributions in order to thwart potential action against Huang by the Office of Special Counsel ("OSC"), the agency which enforces the civil provisions of the Hatch Act. Apparently, Huang openly raised funds for the Jackson campaign. In these circumstances, there does not seem to be any agreement between Ickes and Huang to defraud the OSC or any other government agency.[33] Accordingly, neither Huang's information nor the additional information gathered in the course of our investigation provide reasonable grounds for further investigation of Ickes for a violation of the defraud clause of

[33] Even if the OSC was impeded in some fashion by Huang's and Ickes' conduct, it does not necessarily follow that the OSC was defrauded by such conduct. The OSC probably would have been more impaired in carrying out its lawful functions if Huang and Ickes had vandalized the OSC's offices. While such conduct probably would constitute another offense, it seemingly would not be prosecutable under section 371 as a conspiracy to defraud the United States.

section 371 in connection with Huang's solicitations on behalf of the Jackson campaign.[34]

B. 18 U.S.C. § 607

First enacted in 1883, 18 U.S.C. § 607 today provides:

> (a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.
>
> (b) The prohibition in subsection (a) shall not apply to the receipt of contributions by persons on the staff of a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, provided, that such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any room, building, or other facility referred to in subsection (a), and provided that such contributions are transferred within seven days of receipt to a political committee within the meaning of section 302(a) of the Federal Election Campaign Act of 1971.

Thus, in order to prove a violation of section 607, the government must demonstrate that: (1) "any person" (2) solicited or received (3) any "contribution" within the meaning of the Federal Election Campaign Act of 1971 ("FECA") (4) in any room or building occupied in the discharge of official duties (5) by any person mentioned in 18 U.S.C. § 603.

Assuming for the sake of argument that Ickes and Huang were in their government offices when Ickes asked Huang to raise funds for the Jackson campaign, the plain language of section 607 seems not to reach Ickes' alleged request that Huang raise money for

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[34] Likewise, there are no reasonable grounds for pursuing Ickes under an honest services fraud theory, 18 U.S.C. §§ 1341, 1343, and 1346, as honest services fraud also requires a scheme to defraud. See United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997); United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997).

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the Jackson campaign.[35] The statute does not refer to solicitations of further solicitations. Rather, the provision covers the solicitation or receipt of specific hard money contributions.[36]

This interpretation of section 607 is supported by both the Hatch Act and regulations promulgated by the Office of Personnel Management ("OPM") implementing the Hatch Act.

The Hatch Act provides that certain high-level White House employees (such as Ickes when he was Deputy Chief of Staff) are exempt from the Act's prohibition on "political activity" while the employee is on duty or "in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof." 5 U.S.C. § 7324. Although Ickes presumably was subject to the Hatch Act's specific prohibition against soliciting political contributions, 5 U.S.C. § 7323(a)(2), in the absence of a clear congressional intent in section 607 to cover requests to raise campaign funds, it arguably would be unwise to interpret that section broadly to cover "political activity" that is legal under the Hatch Act.

Further guidance as to the meaning of the term "solicit" in section 607 is found in OPM's regulations concerning the political activities of federal employees.[37] OPM defines

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[35] Huang claims that he did not use Commerce telephone lines to solicit such contributions, and at least with respect to the Ambrose solicitation, the records appear to support his assertion. Had Huang made his solicitations from his Commerce office, his conduct would present the very complicated question we examined (but did not resolve) during the 1997 investigation under the Independent Counsel Act of Vice President Gore's fundraising telephone calls: whether a telephone solicitation from a federal office to a person outside the government is covered under section 607. See United States v. Thayer, 209 U.S. 39 (1908) (opining in dicta that a solicitation for purposes of section 607's predecessor statute occurred only where it was received).

[36] Thus, if Ickes had telephoned Huang at Commerce and asked him to write a check out himself to the Jackson campaign, Ickes might have a problem under section 607. According to Huang, Ickes never asked him to make such a contribution.

[37] OPM has stated that it "does not view [18 U.S.C. §§ 600-607] as a source of authority for regulating the partisan political activities of Federal employees." 49 Fed. Reg. 17431, (continued...)

"solicit" as "to request expressly of another person that he or she contribute something to a candidate, a campaign, a political party, or partisan political group." 5 C.F.R. § 734.101.[38] Thus, the term "solicit" apparently is not understood by OPM to encompass a request merely for fundraising assistance.

If section 607 were phrased in terms of soliciting "political activity" or purported to reach requests of others to solicit contributions, the result here would be different. Because section 607 is not worded in such broad terms, but rather refers only to solicitation or receipt of "any [hard money] contribution," we believe that section 607 should not be read to cover Ickes' alleged request that Huang raise funds for the Jackson campaign.

CONCLUSION

Huang's allegation that Ickes asked him to "round up" contributions for the Jackson campaign while Huang was still employed at Commerce arguably suggests a lack of respect on Ickes' part for the Hatch Act. However, without more, it does not provide reasonable grounds for further investigation of Ickes for potential violations of 18 U.S.C. §§ 371 and 607.

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[37](...continued)
17432 (1984). However, OPM has classified section 607 as a statute which is "related" to its regulations with respect to partisan political activity. See 5 C.F.R. § 734.702. As such, OPM's views on the meaning of the term "solicit" are instructive.

[38] As is the case with respect to section 607, the terms "solicit" and "solicitation" are not defined in FECA or in FECA's implementing regulations. However, one court has found that the phrase "soliciting contributions," as used in FECA, 2 U.S.C. § 441b(b)(4)(D), "is not unconstitutionally vague since people 'of common intelligence' need not 'necessarily guess at its meaning and differ as to its application ....'" Bread Political Action Comm. v. FEC, 635 F.2d 621, 631 (7th Cir. 1980) (quoting Baggett v. Bullitt, 377 U.S. 360, 367 (1964)), rev'd on other grounds, 455 U.S. 577 (1982).